

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8
416.362.2111 MAIN
416.862.6666 FACSIMILE

OSLER

Toronto

November 7, 2013

Montréal

Richard King
Direct Dial: 416.862.6626
rking@osler.com
Our Matter Number: 1144223

Ottawa

SENT BY COURIER, RESS and ELECTRONIC MAIL

Calgary

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

New York

Dear Ms. Walli:

Natural Resource Gas Limited
Written Submissions on Issues 2 through 5 per Procedural Order No. 5 (October 11, 2013)
OEB File Nos. EB-2012-0406/EB-2013-0081

Further to the Board's decision in Procedural Order No. 5 (October 11, 2013), please find enclosed Natural Resource Gas Limited ("NRG")'s written submissions on Issues 2, 3, 4 and 5.

Yours very truly,

per Richard King

Richard J. King
RK:pgw

Enclosures (1)

c: All Parties to EB-2012-0406/EB-2013-0081
T. Graat and L. O'Meara (NRG)
L. Thacker (Co-counsel to NRG)
P. Welsh (Osler)

ONTARIO ENERGY BOARD

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, for an order
requiring Natural Resource Gas Limited to provide gas
distribution service;

AND IN THE MATTER OF an Order to review capital
contribution costs paid by Integrated Grain Processors Cooperative
Inc., to Natural Resource Gas Limited pursuant to
Sections 19 and 36 of the *Ontario Energy Board Act*, 1998.

**WRITTEN SUBMISSIONS OF
NATURAL RESOURCE GAS LIMITED**

November 7, 2013

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Richard King
Tel: 416.862.6626
Fax: 416.862.6666

Co-Counsel for Natural Resource Gas Limited

LENCZNER SLAGHT ROYCE GRIFFIN LLP
130 Adelaide St W #2600,
Toronto, ON M5H 3P5

Lawrence Thacker
Tel: 416.865.3097

Co-Counsel for Natural Resource Gas Limited

PART I. PROCEDURAL BACKGROUND AND ISSUES

1. In Procedural Order No. 2 dated May 17, 2013, the Board determined the scope of the combined proceedings (EB-2012-0406 and EB-2013-0081) regarding (a) Integrated Grain Producers Cooperative Inc. ("IGPC")'s request for an order compelling Natural Resource Gas Limited ("NRG") to provide gas and distribution services and gas sales for IGPC's alleged facility expansion and upgrading plans (EB-2012-0406), and (b) the Board's review of the capital contribution costs paid by IGPC to NRG (EB-2013-0081). As a result, there are five issues for the Board to determine in connection with the proceeding:

- Issue 1: 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?
- Issue 2: With respect to the cost items listed below, what is the appropriate amount to be included in determining the capital cost of the IGPC pipeline facilities?
 - 2.1 Legal costs
 - 2.2 Contingency costs
 - 2.3 NRG staff costs (Mr. Bristoll)
 - 2.4 Interest during construction
 - 2.5 Insurance costs and other service costs (e.g. auditing)
 - 2.6 Administrative penalty; and
 - 2.7 Costs arising from this proceeding
- Issue 3: Are the capital contribution amounts and the financial assurance provided to NRG by IGPC for the existing NRG facilities serving IGPC reasonable?
- Issue 4: What, if any, is the appropriate amount of payment including any interest owed by NRG to IGPC?
- Issue 5: If any amounts are owing from NRG to IGPC, by what means and in accordance with what terms should IGPC be reimbursed?

2. In Procedural Order No. 5 dated October 11, 2013, the Board ordered IGPC, Board Staff and NRG to file written arguments on Issues 2, 3, 4, and 5 on or before November 7, 2013.

3. NRG submits that Issues 3, 4, and 5 are merely calculation questions dependent on the Board's findings on Issue 2.

PART II. ARGUMENT

Issue 2: With respect to the cost items listed below, what is the appropriate amount to be included in determining the capital cost of the IGPC pipeline facilities?

- 2.1 Legal costs
- 2.2 Contingency costs
- 2.3 NRG staff costs (Mr. Bristoll)
- 2.4 Interest during construction
- 2.5 Insurance costs and other service costs (e.g. auditing)
- 2.6 Administrative penalty; and
- 2.7 Costs arising from this proceeding

A. Context

4. This is a contractual dispute over which the Board has taken jurisdiction. The Board has no specific expertise in interpreting contracts. This is not a rate-making exercise, but rather is a bilateral contractual dispute. The Board should approach this issue based only on the contract at issue. Consequently, the amount of capital cost payable by IGPC will be determined in accordance with the terms of the construction contract (i.e., the Pipeline Cost Recovery Agreement ("PCRA")). The PCRA requires IGPC to pay the actual capital costs of the IGPC Pipeline, subject to IGPC's right to dispute the reasonableness of costs incurred by NRG.

5. The Board has already undertaken a detailed “prudence” review of the capital costs of the IGPC Pipeline for the purposes of determining the capital amount of the IGPC Pipeline to be included in rates.

6. That is not the Board’s task here. The Board’s role here is not to conduct a prudence review to protect ratepayers.

7. In this proceeding no further “prudence review” is required. First, that issue has been decided and the findings are binding on IGPC. Second, this proceeding is strictly a matter of contract and not regulatory policy or compliance. The role of the Board in this proceeding is to be arbiter of a construction contract dispute between two commercial parties, based on the wording in the contract (noted above).

8. On that basis, the Board should consider the broader context for the capital cost dispute. There are three key factors to keep in mind:

- (i) Presumption of Reasonableness: The initial estimate of the capital cost of the IGPC Pipeline was \$9.1 million. This was a legitimate estimate based on quotes received and information gathered. IGPC agreed to this amount. Had it not been legitimate, IGPC would not have agreed to include the estimated amount in the PCRA. NRG built the IGPC Pipeline on time and almost half a million dollars under budget (\$8.65 million). On its face, then, the capital cost should be presumed to be reasonable. Notwithstanding this, IGPC wants the price reduced by a further \$880,000.

- (ii) Project Management Done by NRG: From the end of 2006 to mid-2008, NRG's then-President (Mr. Mark Bristoll) spent virtually all of his time working on the IGPC Pipeline. Notwithstanding this, IGPC wants 90% of Mr. Bristoll's time for free. NRG's other ratepayers should not be subsidizing IGPC's project management costs. IGPC seeks to shift its construction costs to other ratepayers. In addition, Mr. Graat (current President of NRG) spent nearly as much time working on the IGPC Pipeline as Mr. Bristoll, while Mr. Graat was not on NRG payroll. Mr. Graat has over 40 years of experience in the construction industry and was instrumental in negotiations with contractors that led to the project being completed on time and under budget. But for Mr. Graat's and Mr. Bristoll's involvement, the IGPC Pipeline would likely have exceeded the \$9.1 million. NRG has not sought to recoup any of Mr. Graat's time or costs for his work, which would have exceeded the \$394,405 for Mr. Bristoll.
- (iii) IGPC Caused Significant Legal and Consulting Costs: Because the IGPC Pipeline was a dedicated line for one customer, completing the IGPC Pipeline was not a matter of NRG dealing with a single contractor in bilateral negotiations. IGPC and its legal counsel participated in virtually every task involved to bring the IGPC Pipeline into commercial operation. This greatly added to the administrative burden (i.e., legal costs, and time of Mr. Bristoll and Mr. Graat) involved in completing the development and construction of the IGPC Pipeline. Notwithstanding this, the majority

of the capital costs disputed by IGPC are precisely the administrative costs caused solely by IGPC's participation in the development of the IGPC Pipeline. NRG does not quarrel with IGPC's desire to play a role in that process (to keep costs in check), but it cannot then seek to contest the very administrative costs that IGPC created.

9. Leaving aside item 2.7 (costs arising from this proceeding), NRG believes that the capital costs in dispute related to the initial IGPC pipeline are as follows:

Cost Category	NRG Cost	IGPC Disputed Amount of Cost
Regulatory Costs	\$843,633	\$458,407
NRG Staff Costs (Mr. Bristoll)	\$394,405	\$271,905
Interest During Construction	\$113,272	\$88,272
Insurance Costs	\$62,000	\$62,000
Miscellaneous Agreements	\$0	NIL (\$2646)
TOTAL AMOUNT IN DISPUTE		\$877,938

10. These figures are mostly based on evidence provided as part of IGPC's motion made during NRG's rate proceeding (EB-2010-0018) and as attachments in NRG's Interrogatory Responses filed on June 28, 2013 and July 8, 2013 as part of these proceedings. IGPC sought to have the contractual dispute (i.e., the subject of this proceeding) dealt with in NRG's rate case, but the Board declined. However, the Board utilized the capital cost evidence provided in

IGPC's motion for the purposes of determining the cost of the IGPC Pipeline to be included in NRG's rate base.

11. NRG constructed the IGPC Pipeline solely to serve IGPC, and construction was completed according to IGPC's schedule and under IGPC's budget. Notwithstanding NRG's success, IGPC now asks the Board in its motion (which the Board has now determined it has jurisdiction to hear) to review every item on every invoice, and every entry on every time docket included by NRG in the capital cost of the IGPC Pipeline.

12. This level of cost scrutiny is unprecedented and arguably is a misuse and perhaps an abuse of the Board's process. Moreover, it is fraught with potential for error and misinterpretation. For example, It is impossible to go back and look at a brief time entry for professional advice and disallow portions of time for one reason or another. The reality is that items on invoices and entries on time dockets would never be so detailed to withstand such scrutiny.

13. NRG has a long history before the Board and it cannot recall when a capital project (particularly one that has come in well under budget and on time) by Union Gas, Enbridge or NRG has undergone a line by line review of hundreds of cost items and time entries to ensure every penny was accounted for and explained *ad nauseum*. NRG cannot operate that way – no business can. If it did, NRG would have spent more time record-keeping than working on the IGPC Pipeline project. In the current situation NRG has already spent a disproportionate amount of time on the record-keeping of this project. These costs should be borne by IGPC and not other ratepayers.

14. The fact of the matter is the costs were properly incurred and there is sufficient documentary evidence to back it up. Indeed, the Board has been reviewing and considering the cost of the IGPC Pipeline for years now. As noted, NRG is not aware of any capital project scrutinized by the Board to such a degree. Moreover, this is not a case of a project that is drastically over-budget, which might warrant greater cost scrutiny by the Board.

15. NRG would urge the Board and IGPC to remember that the \$9.1 million estimate was based on sound quotes, and placed before both IGPC and this Board (as part of the PCRA).

16. To be clear, NRG stands behind all of its capital costs being claimed, and believes firmly that it did an excellent job of negotiating the best pricing for the equipment and services to build the IGPC Pipeline.

17. During the course of the rates proceeding, NRG agreed that certain costs should be adjusted due to error, but these were minor. NRG's argument and its evidence in this proceeding, filed on June 3, 2013 (the "Evidence"), incorporates those agreed-to adjustments for the purposes of this contractual dispute.

B. Legal Costs (2.1), Contingency Costs (2.2) and NRG Staff Costs (2.3)

General

18. The bulk of the costs in dispute relate to these three items, which as noted above was driven by the increased "administrative burden" placed on the project by IGPC wanting to be involved at every step of the process.

19. IGPC and its counsel, Aird & Berlis, were extensively involved in the IGPC Pipeline project. Thus, whereas the typical pipeline construction project would involve a

bilateral negotiation between two parties (see Figure 1), the IGPC Pipeline project was more complicated (see Figure 2).

Figure 1: Typical Pipeline Construction Project -- Bilateral Negotiation

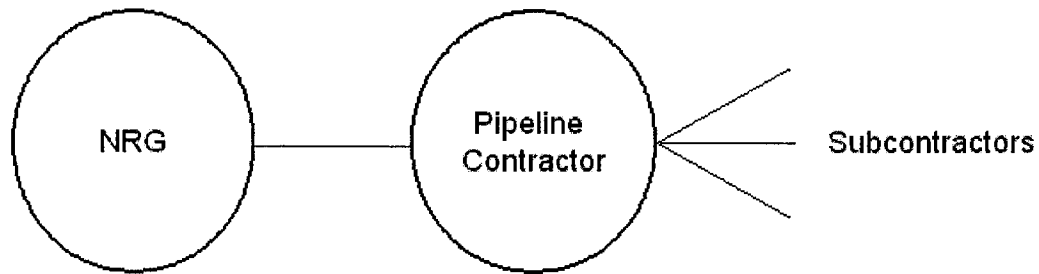
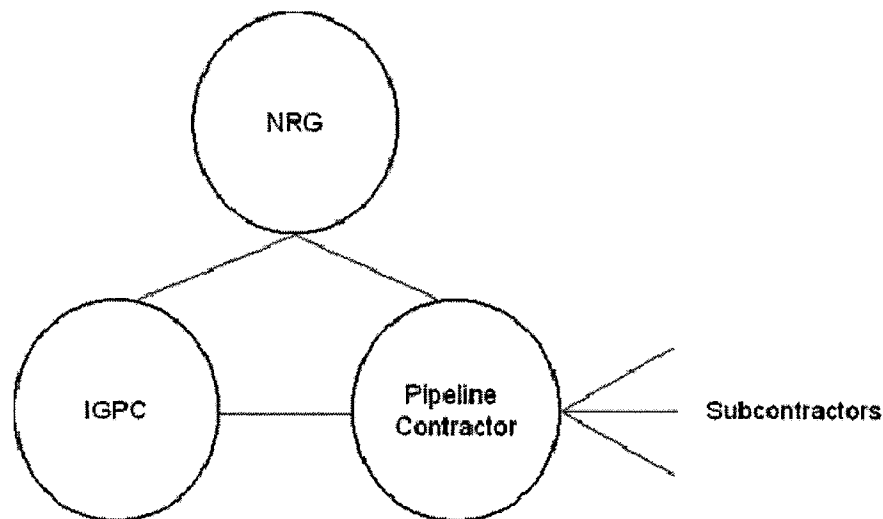


Figure 2: IGPC Pipeline Project Negotiation – Multiple Parties



20. This dynamic meant that more meetings, discussions, emails, etc. were involved in the entire process. This, of course, increased legal costs, as well as Mr. Bristoll's and Mr. Graat's involvement.

21. As noted above, NRG does not quarrel with IGPC's desire to play such a role in the process -- the IGPC Pipeline was a dedicated line, and NRG understands IGPC wanted to be involved in cost decisions. However, NRG believes it is unreasonable for IGPC to dispute the legal and consulting costs that IGPC alone created.

22. As an example of how the involvement of IGPC and its counsel added to the administrative burden of the project, please see Exhibit B to the Evidence, which is the documentation related to the process of quotes received for pipe.

23. As you will note, the most desirable quote according to NRG was submitted to IGPC's counsel who, by way of a letter, advises of a number of issues with the quote, including:

- (a) the potential need to seek an extension for placing the purchase order;
- (b) the need to supply IGPC's lenders and Board with a variety of documentation about the other quotes;
- (c) the need to coordinate pipeline delivery to suit IGPC's needs (not NRG's construction schedule); and
- (d) a request for special payment arrangements for the pipe to "help expedite IGPC's access to the required funding and comfort IGPC's lenders". The OEB must appreciate that NRG is not a bank.

24. These are extraordinary requests, and this is but one example. Consequently, it is difficult for NRG to consider reasonable any attempt by IGPC to dispute NRG's legal or

consulting costs related to “project management” when IGPC uses its counsel this way in the procurement process.

25. When NRG builds new facilities to service new customers it does not normally have to deal with these issues. The norm is the customer calling for new or expanded service, a work order being written up, service and meter installed and gas turned on – and that is the end of the dialogue around connection. With IGPC, however, NRG seems to have been required to have daily contact, discussions or dealings in one form or another.

26. In order to demonstrate the reasonableness of the legal costs and costs for Mr. Bristoll’s time, NRG did the following:

- (a) In Undertaking JT 1.16 in the Technical Conference convened for NRG’s last main rates case (EB-2010-0018), NRG demonstrated the reasonableness of Mr. Bristoll’s rate by benchmarking it to the rate charged by a Chartered Accountant of Mr. Bristoll’s seniority (NRG Response to Undertaking JT 1.16, filed June 17, 2010);
- (b) NRG retained the services of Neal Pallett (NRG’s accounting firm) to carry out an audit of Mr. Bristoll’s emails sent in relation to the IGPC Pipeline. The audit period covered December 2007 to October 2008. The audit results show that Mr. Bristoll sent/received a total of 1,959 emails related to the IGPC Pipeline during that 11 month period. This is extraordinary by any measure; and,
- (c) NRG asked MIG Engineering to comment on the typical level of consulting, legal and administrative time for analogous pipeline projects.

Reasonableness of Mr. Bristoll's Rate

27. Attached as Exhibit C to the Evidence is NRG's response to Undertaking JT1.16 in NRG's last rate case. It sets out the rationale for Mr. Bristoll's hourly rate.

28. IGPC asserts that because Mr. Bristoll was NRG's President, NRG should only be able to re-coup a portion of Mr. Bristoll's salary, or an administrative fee based on a percentage of the costs of the IGPC Pipeline. It is NRG's position that that would not have been appropriate. Mr. Bristoll was, for significant stretches of time, dedicated nearly 100% to the IGPC Pipeline.

29. Further, Mr. Bristoll was a Chartered Accountant with a number of years of experience in the construction industry. He was able to draw on the expertise of the officers of NRG's related companies, who are some of the most experienced construction executives in southwestern Ontario. None of these other advisers billed for their time (including Mr. Graat), which would have been in the hundreds of hours. NRG believes that Mr. Bristoll's accounting and construction expertise is a key reason why the IGPC Pipeline was built on time and significantly under budget.

30. Moreover, as noted above, Mr. Graat worked nearly as many hours as Mr. Bristoll on the IGPC Pipeline matter, without any compensation. Mr. Graat has over 40 years of construction experience, and was not an employee of NRG at the time.

31. IGPC benefitted substantially from the involvement of Mr. Bristoll and Mr. Graat.

Neal Pallett Email Analysis (Reasonability of Mark Bristoll's time)

32. Attached as Exhibit D to the Evidence is the email analysis conducted by Neal Pallett.

33. The analysis shows that even during the period of time between December 2, 2007 and October 24, 2008, Mr. Bristoll sent and received a total of 1,959 emails in relation to the IGPC Pipeline project, broken down as follows:

IGPC Contract Negotiations	323 emails
Construction Contract	372 emails
Financing for IGPC Pipeline	182 emails
Engineering Matters	289 emails
Commissioning/Testing	73 emails
Material Acquisition	31 emails
Letter of Credit	161 emails
Transfer Station Testing	365 emails
June 2008 Motion	15 emails
Miscellaneous (Assignments/Consents)	148 emails

34. Neal Pallett's analysis was that although it may take only ten minutes to compose and send an email, in most instances an email involves additional time (to review a document, make a phone call or investigation). Consequently, Neal Pallett considered one hour to be a reasonable estimate of time per email. On that basis, Mr. Bristoll would have spent 1,959 hours on the IGPC Pipeline during the email audit period. At a rate of \$295 per hour that could be a cost of \$577,905. Instead, Mr. Bristoll's actual cost billed to IGPC for that period of time was

only \$258,460. That means that Mr. Bristoll would have spent less than 30 minutes per email.

This is demonstrative of the reasonableness of the quantum of Mr. Bristoll's time, considering most communication with IGPC involved consultation with both internal and external consultants.

35. The time spent by Mark Bristoll prior to this period (June 12, 2006 to November 2007) was outlined in a very detailed schedule already provided to IGPC.

36. Our detailed review of Mark Bristoll's time confirmed an error had been made – there was a duplication of time on December 18, 2006 where 12 hours was included twice. In 2010, we agreed to a reduction of \$3,540 to Mark Bristoll's time.

MIG Engineering Letter

37. Attached as Exhibit E to the Evidence is a letter prepared by MIG Engineering, who constructed the IGPC Pipeline and has extensive experience with major natural gas pipeline construction in southwestern Ontario.

38. Based on MIG's letter, the "soft costs" of a major pipeline project (comprised of engineering design, procurement, contract administration, inspection and as built/documentation) is typically 17.5% of the total construction costs of a project. Note that this does not include defining project scope, regulatory application, and customer negotiations/resolutions, which would be provided on a "Time and Material" basis and could attract an administration charge of 10% for any third party assistance.

39. Based on MIG figures, NRG's costs are in-line with those noted as typical by MIG. Given the extensive involvement of IGPC and its counsel in every minute aspect of the

IGPC Pipeline process, which compounded the “soft costs” of the project, one would have expected them to be higher.

Specific Legal Costs Contested by IGPC

40. As best as NRG can understand, the legal fees disputed by IGPC is comprised primarily of:

Cost of 2007 Emergency Motion	\$68,725 ¹
2008 Motion	\$91,554 ²
Shareholder Advice	\$26,426
Project Management	\$15,000

41. As noted above, the last two items (shareholder advice and project management) were costs directly attributable to the unusual, extensive involvement by IGPC and its counsel in the construction process.

42. The other three legal cost items were all driven by two unnecessary OEB proceedings commenced by IGPC, the 2007 Emergency Motion and the 2008 Motion.

43. In general, with respect to legal costs related to any disputes between IGPC and NRG, IGPC seems to be suggesting that legal and regulatory costs of a utility related to business or commercial disputes are always unreasonable or inappropriate business expenses to be included in rates. That cannot be the case. To suggest that utilities must conduct their day-to-

¹ Please see NRG's Responses to Oral Hearing Undertakings (EB-2010-0018) filed September 8, 2010, specifically J 1.7 and J 1.9

² Please see NRG's Responses to Oral Hearing Undertakings (EB-2010-0018) filed September 8, 2010, specifically J 1.7 and J 1.9

day business free of any and all disputes, and any regulatory or commercial glitches is unrealistic. There will be business expenses that arise as a result of disputes (with customers, suppliers, government, etc.). As in any dispute, there will be two (or more) views as to who was right and who was wrong. NRG submits that the reasonable approach for a regulator is to look at these disputes and ask whether the costs that the utility incurred were reasonable at the time they were incurred. In the case of both motions, NRG felt that it took prudent steps to protect itself and its ratepayers.

44. Moreover, in assessing whether incurring legal and consulting costs were necessary, one has to understand that all the Board proceedings in this case were commenced by IGPC (the emergency motion, the February 2008 motion, even the Notice of Motion in NRG's rate case and the denial of service application that is the subject of this proceeding). One has to ask – would it be reasonable for NRG to not respond to these proceedings? NRG had no choice but to respond. And IGPC cannot argue that they were “caused” by NRG because in every case so far, and in particular the 2007 and 2008 motions, ultimately IGPC failed to get what they wanted from the Board.

45. Throughout these proceedings, IGPC has taken aggressive, adversarial and overly-litigious positions. IGPC has repeatedly commenced frivolous and unnecessary litigation proceedings and actively interfered in NRG relationships with other towns and municipalities. It has encouraged the Town of Aylmer and other towns to intervene in various unnecessary proceedings. IGPC has falsely alleged urgency and even gave false evidence to support unnecessary litigation.

The 2007 Emergency Motion and Subsequent Appeal

46. On June 29, 2007, IGPC brought an emergency motion before the OEB. Since that emergency motion, it has become clear that there was no basis for any urgency. IGPC was demanding that NRG execute certain documents that NRG had requested time to review. IGPC was unwilling to allow NRG the time it required to review and consider the documents. Instead, IGPC commenced an emergency motion that resulted in NRG incurring unnecessary legal costs and other expenses that could have been avoided if IGPC had been willing to deal with NRG in good faith.

47. The starting point is that NRG had no obligation to sign these documents. IGPC was always fully responsible for arranging financing and satisfying its lenders. NRG had no obligation to satisfy IGPC's lenders.

48. Contrary to representations made on behalf of IGPC to the Board, 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. The alleged urgency that IGPC relied upon in bringing the emergency motion to the OEB, without proper notice to NRG, did not exist.

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

50. 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.

51. 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 without compliance with the OEB's notice requirements.

52. 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 because NRG:

- (a) had not had any time to retain and properly instruct counsel;
- (b) had not had time to consider its position and instruct counsel as to its position;
- (c) had not had adequate time to review the evidence or assemble and present responding evidence; and,
- (d) had no opportunity, prior to the issuance of the Emergency Notice of Hearing, to address the OEB as to whether the hearing should or should not proceed on an expedited basis.

53. Counsel for IGPC stated that the motion was urgent because if NRG did not sign the two agreements, the Assignment Agreement and the Bundled T-Service Agreement, by the end of the day on June 29, the equity funds raised for the financing were required to be returned by the escrow agent, Canada Trust, to the equity investors.

54. IGPC introduced evidence 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.

55. The June 2007 motion is one example of how IGPC's aggressive and litigious conduct caused NRG to incur significant legal and other costs and expenses in dealing with IGPC.

56. NRG was forced to appeal this decision (which improperly levied a penalty on NRG) and incurred significant legal expenses. Ultimately, the Board, when facing the Divisional Court appeal, elected to set aside its Decision entirely, both on liability and the penalty it had improperly levied on NRG as part of the June 2007 motion. In doing so, it acknowledged those findings were wrong and completely without foundation.

57. NRG had no choice but to respond to emergency motion and file the appeal.

58. Attached as Exhibit F to the Evidence is NRG's factum relating to the June 2007 motion.

The February 2008 Motion

59. In February 2008, at the request of IGPC, the Board convened another hearing by issuance of Notice of review dated February 22, 2008.

60. The hearing involved disputes between NRG and IGPC relating to certain provisions of the PCRA.

61. Set out below is a brief description of the issues in dispute that were addressed on the motion:

- (a) *IGPC's Refusal to Deliver Letters of Credit:* The PCRA required IGPC to provide NRG with a Customer Letter of Credit and a Delivery Letter of Credit. In breach of its obligations under the PCRA, IGPC refused to provide the Customer Letter of Credit. As a result, NRG was delayed in ordering pipe and delayed in ordering components and materials required to construct the pipeline. IGPC also refused to provide the Delivery Letter of Credit as required by the PCRA.
- (b) *Union Gas and Lakeside Process Controls Ltd. Advance Payments:* Due to IGPC's refusal to provide the Customer Letter of Credit, NRG was forced to seek ad hoc financing or security from IGPC for each advance payment or liability that it incurred to suppliers or subcontractors in order to keep the construction on the required timeline. Eventually, NRG was forced to require IGPC to deal directly with certain suppliers, because IGPC was in continuing default of its obligations to deliver to NRG the Customer Letter of Credit. If IGPC had provided the Customer Letter of Credit, which was required to guarantee that NRG's rate payers would not be exposed to risk, NRG would have been able to make payments directly to those suppliers immediately.
- (c) *The Tender Package:* NRG had no obligation to provide IGPC with draft copies of the Tender Package. However, NRG did do so in a good faith effort to move the project forward and ensure that IGPC understood all aspects of the project.

NRG completed the construction of the pipeline ahead of schedule and well under budget. By contrast, IGPC failed to complete its facility by the agreed deadline.

- (d) *IGPC's Refusal to Pay NRG Invoices:* Under the PCRA, IGPC was required to pay NRG for all "reasonable internal, consulting and third party expenses incurred", which explicitly includes "consultant, legal, . . . construction and commission" costs.

62. On January 2, 2008, NRG forwarded its invoice to IGPC for payment in accordance with the PCRA. The fees covered by the invoice included reasonable legal fees paid by NRG to its counsel (Lenczner Slaght and Ogilvy Renault), as well as consulting fees necessary to protect its NRG stakeholders and to enter into appropriate subcontracts. IGPC refused to pay the invoice.

63. NRG responded by letter dated February 22, 2008. Attached as Exhibit G to the Evidence is a copy of that letter dated February 22, 2008 from NRG's Counsel to IGPC's counsel.

64. *Allegations of Delay:* IGPC was in breach of the PCRA due to its failure to deliver the Customer Letter of Credit to NRG. Despite this continuing failure, NRG continued with the project, and ensured that the IGPC Pipeline was completed on time and well under budget. By letter dated February 22, 2008, NRG set out its position with respect to the continuing and deliberate breaches of the PCRA by IGPC:

I have the five letters you sent to me last night at 7:20 pm.

The obligations and rights of IGPC and NRG are set out in the Pipeline Cost Recovery Agreement dated as of January 31, 2007 ("PCRA").

Article 7.1 of the PCRA provides that IGPC will, prior to NRG ordering the pipe and stations, provide NRG with “an irrevocable letter or letters of credit...in an amount equal to the quoted cost of the pipe and the stations...”

IGPC has absolutely failed to comply with its obligations under Article 7.1 and, as a result, IGPC is in breach of the PCRA. Moreover, IGPC’s failure to comply with Article 7.1 has caused delays with construction, and may cause additional delays in the future. For example, despite repeated warnings, IGPC has not provided the letter of credit to NRG, so that NRG can order components and materials from Lakeside Process Controls Ltd. (“Lakeside”) for the stations, and has failed to pay Lakeside directly the amounts required by Lakeside to deliver components and materials in time to allow construction to proceed in a timely manner.

As you know, under Section 3.7 of the PCRA, given IGPC’s failure to make payments required and failure to provide the letter of credit required under Section 7.1, NRG has the right to elect not to proceed further with any of its obligations under the PCRA. Moreover, if NRG elects to exercise this right, the PCRA expressly provides that NRG “shall not be liable for any liabilities, damages, losses, payments, costs or expense that may be incurred by [IGPC] as a result”.

To date, NRG has been proceeding with its obligations under the PCRA and moving forward with construction, despite IGPC’s failure to comply with its obligations under the PCRA. NRG is doing so in order to cooperate with IGPC and move the project forward as fast as possible. However, NRG has obligations to all of its stakeholders and ratepayers and cannot continue with this process indefinitely, given IGPC’s continuing and deliberate failures to comply with its obligations under the PCRA.

65. Attached as Exhibit H to the Evidence is a copy of that letter dated February 22, 2008 from NRG’s counsel to IGPC’s counsel.

66. It was always NRG’s goal to complete construction in accordance with the terms of the PCRA, and NRG was always willing to work with IGPC in a cooperative fashion to move forward and complete the construction of the IGPC Pipeline.

67. Despite this, IGPC maintained its refusal to pay amounts required by Union Gas and Lakeside Process Controls and failed to provide the required Letter of Credit to NRG, or alternatively pay the amount the amounts directly to each of Union Gas and Lakeside Process Controls.

68. Despite IGPC's failure to provide NRG with letters of credit required under the PCRA, apparently because IGPC was either unable to obtain the required funding or unwilling to give NRG the required security, NRG nevertheless ensured at its own risk that the pipeline construction continued. In doing so, NRG:

- (a) financed the construction of IGPC's pipeline;
- (b) made advance payments to suppliers;
- (c) undertook and bore all risks of construction without any security;
- (d) did not request any fee from IGPC for granting financing and undertaking risk in circumstances where it had no obligation whatsoever to NRG to do so (see the letter above at para. 64).

69. In short, IGPC's pipeline would never have been built due to IGPC's failure to obtain its own financing, unless NRG voluntarily undertook the risk of construction and essentially lent IGPC the required construction costs by using NRG's own balance sheet. This is undisputed and uncontradicted in the evidence that NRG has acted entirely in good faith and cooperatively towards IGPC.

70. The February 2008 motion is another example of IGPC's aggressive and litigious conduct, which required NRG to retain counsel and incur significant legal and other costs and expenses in order to respond.

71. As with the June 2007 motion, the February 2008 motion was caused by IGPC's failure to comply with its obligations owed to NRG. NRG had no choice but to respond to the

motion, prepare evidence and attend to make written and/or oral submissions at the hearing.

These costs were incurred by NRG as a direct result of IGPC's conduct.

72. With respect to the legal costs associated with this motion, IGPC has incorrectly taken the position that the precipitating event was NRG's demand for \$32 million in financial assurance. The real reason for the motion was that IGPC would not provide NRG with any Customer Letter of Credit in accordance with the PCRA, holding to the position that the \$5.3 million letter of credit established in the PCRA could not be increased by the Board.

73. The issue was that IGPC did not provide any Letter of Credit to NRG for any amount, and this caused NRG to be delayed in ordering the pipe, components and materials for the IGPC Pipeline. This resulted in the Board (on its own motion) issuing a Notice of Review of the original leave-to-construct decision, and the Board deciding that: (a) it could increase the amount of financial assurance that NRG needed; and (b) ordering IGPC to provide such financial assurance (in this case, directly to Union Gas Limited).

Contingency Costs

74. Contingency costs on any capital project are meant to deal with exactly that – “contingencies” (i.e., costs that might occur but are not intended).

75. NRG has incurred five years of legal, consulting and staff costs related to the IGPC Pipeline.

76. The IGPC Pipeline came into service nearly five years ago and NRG is still incurring significant costs, both internal and external, related to the IGPC Pipeline.

77. The argument that the IGPC Pipeline has been completed and therefore that there should be no contingency costs is simply wrong. All of those costs are directly related to the construction of the IGPC pipeline. The issue of the cost of the IGPC Pipeline has not been resolved and these costs are indeed related to the capital cost of the IGPC Pipeline. Simply put, without the IGPC Pipeline, none of these post-construction costs would have been incurred. The utility must remain whole, and to that end, needs to recover these costs, otherwise NRG's other ratepayers will be subsidizing IGPC's capital project.

78. It is clear at this point that the costs have in fact exceeded that contingency, and the question is how these excess costs can be recovered by NRG.

C. Interest Costs During Construction (2.4)

79. IGPC is taking the position that the proper amount of interest to be included in the capital cost of the pipeline is approximately \$25,000 and that the key to this is that NRG should cease charging interest after July 15, 2008 (when IGPC first took gas), and that to allow a utility to accrue interest thereafter (while collecting distribution rates) would permit the utility to "double recover".

80. NRG's position is that the proper amount of interest to be included in the capital cost of the pipeline is \$106,172. This includes two amounts (as set out in detail in Undertaking J1.5 in EB-2010-0018, attached as Exhibit I to the Evidence): (a) interest calculated from the due date of the Aid-to-Construct invoice to the date the amount was received from IGPC; and (b) interest calculated from the date the last Aid-to-Construct payment was due to the date the final invoice from the primary contractor was received. With respect to (b), this refers to the period during which NRG was financing the construction costs.

81. Further, the proper amount of interest, originally calculated to be \$113,271, has been reduced to \$106,172 to account for an amount mistakenly included in the interest calculations. The interest expense was therefore reduced by \$7,099 (see NRG's Responses to Interrogatories from IGPC, pp. 7-8, filed October 28, 2013).

82. Moreover, the PCRA clearly requires interest at a fixed and agreed rate. The interest is not conditional on NRG proving that it incurred any corresponding interest costs. The agreed interest rate was negotiated and agreed to as part of the capital cost. It also is typical in the industry. In any event, until the amounts are paid by IGPC, IGPC had the use of the funds and is required to pay interest because it had the use of the funds.

83. From a financing point of view, the definition for "during construction" is not when the physical construction was completed but when the final invoices from the contract were received. There is no double recovery here.

D. Insurance Costs and Other Service Costs (e.g., Auditing) (2.5)

84. There is \$62,000 in insurance costs during construction in dispute between NRG and IGPC. The \$62,000 insurance figure represents an allocation of NRG's insurance during the development and construction of the IGPC Pipeline.

85. IGPC objects to this and suggests that insurance should start only after it began receiving gas.

86. NRG believes that position to be unreasonable. Prior to coming into service, NRG had millions of dollars of pipe, components and equipment delivered and was carrying out activities in connection with the development and construction of the IGPC Pipeline.

87. Had any incident occurred to the pipe, components and equipment, IGPC would have had the benefit of NRG's insurance coverage. Moreover, it is virtually certain that IGPC's lenders would require insurance and IGPC has not alleged that it obtained any other insurance for the construction phase.

88. IGPC also object to including this amount in capital costs because IGPC believes this would allow NRG to double recover the insurance costs.

89. NRG disagrees. NRG had certain insurance costs incorporated into NRG's revenue requirement pursuant to which NRG was operating at the time of construction of the IGPC Pipeline. However, the Board does not dictate how to manage those costs within the utility's revenue requirement envelope.

90. On that basis, it is appropriate to have IGPC pay for a portion of NRG's insurance coverage that IGPC benefitted from.

E. Costs Arising from This Proceeding (2.7)

91. NRG believes that the costs arising from this proceeding should be dealt with by way of submissions at the conclusion of the hearing, as is customary Board practice.

92. NRG is seeking all of its costs. As noted in NRG's reply affidavit to the original motion dealing with the capital cost of the pipeline, NRG made significant efforts to resolve the matter with IGPC. Attached as Exhibit K to the Evidence is a memorandum prepared by Weston Suchard (consultant of NRG) setting out the timeline and summary of discussions between IGPC and NRG in this regard.

November 7, 2013

EB-2012-0406

EB-2013-0081

Written Submissions of NRG on Issues 2-5

Page 27 of 26

Issue 3: Are the capital contribution amounts and the financial assurance provided to NRG by IGPC for the existing NRG facilities serving IGPC reasonable?

Issue 4: What, if any, is the appropriate amount of payment including any interest owed by NRG to IGPC?

Issue 5: If any amounts are owing from NRG to IGPC, by what means and in accordance with what terms should IGPC be reimbursed?

93. NRG believes these to be calculation issues dependent upon resolution of Issue #2.

PART III. RELIEF SOUGHT

94. NRG respectfully requests an Order by the Board finding that NRG's capital costs related to the IGPC pipeline facilities were reasonably incurred, and that IGPC's application should be dismissed in its entirety, with costs to NRG.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 7, 2013

per Richard King

Richard King – Osler Hoskin & Harcourt LLP

per Lawrence Thacker

Lawrence Thacker – Lenczner Slaght Royce Griffin LLP