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November 14 2013

BY COURIER, EMAIL AND RESS

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

Dear Ms. Walli:

Re: Integrated Grain Processors Co-operative Inc.
Board Files No. EB-2012-0406 and EB-2013-0081

Pursuant to Procedural Order No. 5 dated October 11, 2013, we attach two copies of the Reply Submissions of Integrated Grain Processors Co-operative Inc. in respect of Issues No. 2 through 5.

Yours truly,

AIRD & BERLIS LLP

Heather MacLennan

For Dennis M. O'Leary / Scott Stoll

cc Natural Resource Gas Limited
cc Intervenors (Per Procedural Order No. 1, April 22, 2013)

15780343.1

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 Co-operative Inc., to Natural Resource Gas Limited pursuant to Sections 19 and 36 of the *Ontario Energy Board Act*, 1998.

REPLY SUBMISSIONS OF INTEGRATED GRAIN PROCESSORS CO-OPERATIVE INC. ON ISSUES NO. 2 TO 5

Introduction

1. These are the Reply Submissions of Integrated Grain Processors Co-operative Inc. ("**IGPC**") addressing the submissions of Board Staff dated November 6, 2013 and Natural Resource Gas Limited ("**NRG**") dated November 7, 2013.

2. IGPC disagrees with NRG's position in its entirety for the reasons specified in IGPC's Argument in Chief dated November 7, 2013, as NRG's position is inconsistent with the law, the Pipeline Cost Recovery Agreement ("**PCRA**"), prior Ontario Energy Board ("**OEB**"or "**Board**") Orders and regulatory policy. In this submission, IGPC corrects the record in respect of certain NRG assertions that are unsupported mischaracterizations of the evidentiary record.

Review of Capital Costs Contribution

3. Contrary to NRG's efforts to mischaracterize this proceeding, it is clear from the Board's Procedural Orders and the Issues List that this proceeding involves a review of the reasonable actual costs and resulting capital contribution paid by IGPC in respect of the pipeline. NRG is arguing for the unprecedented acceptance of the Board of some lessor standard to determine the capital contribution payable by IGPC. Until now, IGPC is unaware of any utility attempting to close to rate base costs it did not "actually" incur. As well, to suggest, as NRG does in its

submissions, that the reasonableness of costs actually incurred is irrelevant is contrary to the regulatory compact, common sense, and the PCRA.

4. In one breath NRG argues that this is simply a contractual dispute; yet in another breath, it disregards clearly relevant contractual terms which simply incorporated the standards and methodologies approved by the OEB and which are applied by other utilities throughout the province. For example, NRG does not try to explain how its position is consistent with the express language in the PCRA which states that: "actual capital costs ("ACC") means the reasonable actual Capital Costs (s.1.2(b)" and that IGPC has the ability: "to dispute the reasonableness of costs incurred (s. 3.12)."

5. NRG's argument is also contrary to the evidence of its own witness, Mr. Cowan, who acknowledged that NRG's claimed costs must have the following three elements: (i) the costs must be "actual"; (ii) the costs must be reasonable in amount and required for the construction of the IGPC Pipeline; and (iii) the costs must be of a capital expenditure (i.e. not operating costs).[1] To be clear, this is NRG's evidence, and now they are resiling from it.

6. The Board was very clear in its Decision on the Motion to Review that the contribution in aid of construction was a rate within the meaning of the OEB Act. The Board stated:

> "There can be no question that the Board has the exclusive jurisdiction over all matters related to the setting of just and reasonable rates, and no contract can transfer that jurisdiction to a court or any other body.
>
> The PCRA essentially applies the formula for the calculation of capital contributions as set out by the Board in EBO 188. It is no doubt a useful document agreed to by the parties which formalizes the details surrounding the exact calculations, timing, etc. of the capital contribution. It does not usurp the Board's underlying jurisdiction: indeed section 36(1) of the Act explicitly recognizes that, in setting just and reasonable rates, "[the Board] is not bound by the terms of any contract." The ultimate responsibility to ensure the rates paid by consumers are just and reasonable lies with the Board."[2]

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[1] IGPC Pre-filed, Ex. A, p. 27; EB-2010-0018, Transcript, September 9, 2010, Vol 1, page 31
[2] EB-2012-0396, Decision with Reasons, page 15.

7. As such, the Board has the power to determine the appropriate amount of the reconciliation payment, interest, costs and financial assurance for the rate(s) implemented through the PCRA.

8. NRG did not appeal the Board's Decision in EB-2012-0396, nor did it request a review. To once more argue that this proceeding is solely a contractual dispute is not only wrong, it amounts to a collateral attack on the Board's decision. NRG's position is illustrative of its pattern of conduct to date of ignoring decisions it does not like and its contempt for its customers and this Board.

Estimates are simply estimates

9. NRG's assertion that there is a presumption that costs incurred are reasonable solely because they are less than the amounts forecasted in EB-2006-0243 is not correct. An estimate may very well be reasonable for the purposes of determining the capital contribution or aid to construct that is required, but an estimate always is precisely that – an estimate. If a cost originally forecast is not actually incurred, it can never be described as an "actual cost" regardless of whether it was in the estimate or not.

10. Costs must also have been prudent or reasonable in the circumstances. The estimates provided in EB-2006-0243 indicate that 13% or $989,380[3] was attributed to contingency amounts; $240,000[4] was for land rights of which only $12,165 was spent, **and** NRG did not build the Custody Transfer Station at the connection to Union Gas. Given that NRG did not incur these estimated costs, it is not surprising that the actual costs are less than the estimated costs.

IGPC is in full compliance with PCRA

11. There has been no breach by IGPC. While NRG's lawyers have repeatedly stated that IGPC breached the PCRA, they have never, not once, put forward any evidence of any such breach. There is no evidence because it did not occur.

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[3] EB-2006-0243, Exhibit C, Schedule 4, Page 4 (noted as 1 of 1 in footer).
[4] EB-2006-0243, IGPC IR#3 wherein NRG confirmed it did not appear that land rights would be required.

12. In contrast, NRG has breached the obligation to use best efforts to minimize costs, (Section 3.9 of the PCRA). It has also breached Sections 3.13 and 3.14 through its obstruction and refusal to complete a proper reconciliation. Further, given its unwillingness to permit the reduction of the financial assurance as expressly provided in the PCRA (Section 7.6), it is in breach of this provision as well.

13. NRG's references to the Customer Letter of Credit ("**Customer Letter of Credit**") as being an issue of any relevance is simply not supported by the evidence. It is raised time and again by NRG solely to confuse and obfuscate. While a reply is, frankly, not required, to set the record straight, IGPC notes the following.

14. The PCRA provides that a letter of credit may have been requested for long lead time items, such as the pipe or the stations. The PCRA also provided that to the extent cash was provided, the Customer Letter of Credit could be reduced. IGPC paid cash for the pipe, the stations, the Union Gas Aid-to-Construct, and for many other expenses related to the IGPC Pipeline. Member Spoel pointed this out at the Aylmer Motion.[5] NRG never put forth to IGPC a request for, or the form of a letter of credit for the Customer Letter of Credit. As such, there was and is no breach in this regard.

15. With respect to the Delivery Letter of Credit, the amount could not be calculated until after the construction contract was tendered as provided in the PCRA.[6] IGPC provided the Delivery Letter of Credit in the amount of $5,214,173 in April, 2008. As such, NRG was never exposed to any financial risk and there was never a breach of the PCRA by IGPC.

16. Despite providing the Delivery Letter of Credit, as noted, NRG has failed to permit IGPC to reduce the Delivery Letter of Credit since the IGPC Pipeline was placed into service more than five years ago. This has forced IGPC to incur significant costs to maintain the existing excessive amount for the Delivery Letter of Credit.

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[5] EB-2006-0243, Motion Hearing Transcript (Revised), February 28, 2008, page 65, ll. 8 - 18

[6] The PCRA provides that the Delivery Letter of Credit is calculated based upon the Revised Estimated Aid-to-Construct which is limited to include a maximum of 10% of the construction contract in respect of contingencies. As such, the construction contract must have been tendered to make such a calculation.

No evidence that NRG legal fees were reasonable

17. NRG knew that the reasonableness of the legal fees that it has claimed and rate based were an issue in this proceeding. It had an opportunity to adduce evidence supporting the need for and reasonableness of the legal fees NRG had paid and rate based. It did not provide such evidence.

18. There is no evidence from any contractor or lawyer which states that the construction of the pipeline was unduly complicated resulting in extraordinary legal fees. The evidence in fact suggests the opposite, the extraordinary legal fees were all NRG generated.

19. NRG suggests that if the Board were to now examine its lawyers invoices and docket entry's, it arguably would amount to a misuse and perhaps an abuse of the Boards process. Yet this is precisely what the Board does in respect of every cost claim advanced by a party. This is precisely what happens when a party has the account of its own lawyer or the other sides lawyer assessed. NRG adduced no evidence from its counsel as to why, for example, Messrs. Thacker, Moran and Mr. King were all involved heavily in the emergency motion. Similarly, NRG has adduced no evidence as to the appropriateness of its refusal to execute the subject contracts.

20. NRG characterizes the extraordinary quantum of legal fees as being part of the administrative burden yet adduced no evidence as to why and what value its opposition to the motions that were heard provided to the project. Had NRG signed the agreements and accepted the financial assurance in the amount of $5.3 million dollars, the motions would not have been necessary. NRG cannot point to any material benefit which arose from its conduct.

Mr. Bristoll's salary was recovered in rates

21. NRG implies that the position it has taken in respect of Mr. Bristoll's time is necessary to protect its other rate payers. It neglects to identify the fact it paid Mr. Bristoll his normal salary which was contemplated and recovered in NRG's base rates and then added $394,405.00 to rate base <u>without</u> capitalizing any portion of it.

22. NRG eludes to the hours spent by Mr. Graat and the hundreds of emails sent by Mr. Bristoll but it failed to identify in evidence precisely what benefit Mr. Graat brought to the equation and the need and value of the email's sent. To the extent the emails related to excessive demands, refusals to sign agreements, the unwillingness to respond to service requests, the refusal to reduce the financial assurance and, importantly, the unwillingness to provide a credible reconciliation of the actual cost of the pipeline against the estimated cost, then none of the time expended is reasonable. Most importantly, NRG has failed to say why Mr. Bristoll's actions were not part of his expected job duties namely, to grow the business.

Contingency cost claims are improper

23. NRG made little effort to justify the inclusion in rate base of costs that did not incur. It did not deny that the costs primarily relate to legal fees incurred in respect of this proceeding. Whether the costs of this proceeding should be recoverable from IGPC remains an open question. These costs should not have been rate based in 2008.

NRG is subject to the Boards CWIP methodology

24. Recognizing that it had earlier referenced two separate and contradictory provisions in the PCRA as the provisions which govern interest during construction, it should come as no surprise that NRG fails to identify in its submissions the clause in the PCRA upon which it now relies. NRG does not even attempt to suggest that it is not subject to the Board's determination of the appropriate CWIP rate as determined by the Board in docket # EB-2006-0117. The rate as determined by the Board should apply because of the PCRA and because NRG is required to comply with it. In addition, NRG has included in rate base just under $60,000.00 for interest during construction which accrued after the capital costs were closed to rate base. In other words, it accrued interest on amounts that were also earning a return. This again is double recovery.

Insurance have been expensed and rate based

25. As is clear from IGPC's evidence, NRG has both expensed 100% of its insurance costs in each of the years of the construction of the pipeline. It has then self-servingly rate based $62,000.00 and failed to capitalize any of this amount. It has therefore recovered the full

amount of insurance costs in rates and is now recovering the same costs again through rate base. It has done this despite acknowledging that it purchased no additional insurance for the purposes of constructing the IGPC pipeline.

Conclusion in respect of NRG's argument

26. The Board is required to be guided by the objectives set out in Section 2 of the *Ontario Energy Board Act, 1998.* Specifically, Subsection 2 states that the Board is required to:

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

27. Briefly stated, NRG has included in rate base costs it did not actually incur and costs which do not remotely meet the definition of reasonable. These costs now exceed $1 million. IGPC is specifically respectfully requesting that the Board exercise its jurisdiction and protect IGPC's interests as a significant consumer.

28. NRG suggests that a review of the actual costs of the IGPC Pipeline in this proceeding is unprecedented and something which other utilities have not faced. This may well be the case, but IGPC is unaware of Union Gas Limited, Enbridge Gas Distribution Inc., or any other utility in the Province ratebasing "contingency costs" it did not specifically forecast and did not incur for the purposes of constructing a capital asset. IGPC is unaware of any utility in the province recovering its internal staff costs and insurance costs in rates and then adding the same costs to rate base without capitalizing the allocable component.

29. If NRG was truly concerned about any "cross-subsidy", it would have capitalized the alleged insurance allocation and its staff costs and attended before the Board for an adjustment to its rates to benefit its residential and small general service customers. Instead, NRG did not seek any adjustment to its rates, while at the same time ratebasing costs already recovered. Without a decision from the Board granting the relief sought by IGPC, NRG will have recovered the same costs from both its residential and commercial ratepayers **and** from IGPC. Perhaps

this explains how NRG was in a position to pay $457,000 in management fees to a related company in fiscal 2008 according to NRG's financial statement as of September 30, 2008[7].

30. NRG has continuously abused its monopoly position to try to extract monies and concessions from IGPC. Such conduct is improper for a regulated public utility in the Province of Ontario.

Reply to Board Staff Submissions

31. IGPC agrees with a good number of Board Staff's submissions and in particular those which support NRG not recovering the costs allegedly incurred in respect of Mark Bristoll's time and insurance. Board Staff correctly noted that these amounts have already been recovered through rates and in the case of the insurance costs, were not directed to the IGPC pipeline. In respect of each of these costs, none were capitalized.

32. In respect of the legal costs claimed by NRG, IGPC agrees with Board Staff that the costs associated with the 2008 motion in Alymer should be denied. Board Staff take the position that the record is not sufficiently clear to warrant a complete denial in respect of the emergency motion. IGPC submits that NRG's failure to adduce any reasonable explanation for its refusal to execute the agreements both as at the date of the motion and following the Board's order requiring their execution is a clear indication that NRG lacks any reasonable explanation. For the reasons set out in IGPC's Argument in Chief, it is submitted that the full amount of these costs should be denied.

33. In respect of the contingency costs included in the rate base, IGPC notes that NRG supports the claims by pointing at invoices issued by its counsel, the majority of which relate to this proceeding. It was inappropriate to include these costs in rate base. The costs of this proceeding are a matter for the Board in this proceeding. NRG should not be allowed to use this proceeding as a justification for rate basing $132,000.00 in 2008.

34. IGPC submits that if rate payers were advised by any utility in the province that it was including in rate base contingency costs for some unforeseen and indescribable event, such

[7] NRG IRR to IGPC #2, Q. 11 (Round 2), Financial Statement, Schedule of Expenses, page 24

costs would be adamantly opposed. The amounts were not rate based for the purposes of, for example, providing funds for warranty work in respect of the work by a third party consultant. The costs even as currently supported by NRG, have nothing to do with the actual construction of the pipeline. They should be denied in their entirety.

35. Finally, in respect of the interest during construction claims, Board Staff did not reference the applicable section of the PCRA (section 13.14) which specifically provides that utility costs shall include "the reasonable costs of interest during construction calculated in accordance with the OEB approved methodology"..... There is no OEB approved methodology other than EB-2006-0117.

36. It also appears Board Staff did not address the question of NRG in effect continuing to accrue interest during construction after the date the pipeline was placed in service and the "actual costs" upon which NRG is claiming interest during construction were then also learning a return on capital.

37. The interest calculation used by NRG for interest during construction uses an improper rate and accrues it over an improper period of recovery. Ms. O'Meara acknowledged NRG would be earning a return as soon as the IGPC started paying invoices effective July 15, 2008, as the existing Rate 3 had a return component within it.[8] Interest is not calculated upon receipt of the invoice, nor should it be recoverable after the IGPC Pipeline has been placed into service. As such, IGPC stands by its assertion that the Board should only permit NRG to recover $25,000 in interest costs.

Summary and conclusion

38. IGPC submits it has provided a detailed explanation of why the legal costs claimed by NRG are vastly excessive. Costs for the motions, the appeals and costs unrelated to the construction of the IGPC Pipeline are not appropriate. IGPC also submits that NRG's continual shifting of costs and contingency claims throughout the proceedings has been the result of an

[8] EB-2010-0018, Transcript Vol. 1, September 9, p. 57, ll. 16-28, p. 58, ll. 1-11.

intentional strategy to confuse the record. For example, there was no need for both Ogilvy Renault and Harrison Pensa to review the same documents. This is simply over-lawyering.

39. IGPC submits the record is clear that NRG has refused to show any sort of reasonableness to settle this matter. It is unreasonable for IGPC to be expected to sit idly by and watch NRG add $132,000 to rate base for "contingency costs" that were not forecast and for which there were no plans for it being spent. What utility gets to close money to rate base, claim depreciation and earn a return where the money was never spent? This is precisely what NRG has done and is now seeking to have the Board endorse. To permit NRG to continue to be financially rewarded for its unreasonable conduct will only encourage such conduct in the future.

40. Further, NRG's contingency claims are in fact legal costs of this proceeding and as such should be handled in the context of this proceeding and not as part of a capital expenditure from more than five years ago.

41. NRG has had the use of IGPC's money for more than five years. IGPC has been put to tremendous cost and hardship to recover what it is rightfully entitled to under the PCRA and the regulatory framework. The Board should send a message to NRG and its shareholder that such conduct and behaviour is unacceptable and will not, and cannot, be tolerated by the Board. The Board, the municipal franchise holders such as the Town of Aylmer, and ratepayers deserve better.

42. IGPC is entitled to: (i) reimbursement of $981,708 paid to NRG as a contribution in aid of construction related to the construction of the IGPC Pipeline; (ii) interest in the amount of $212,689.89; (iii) an order reducing the amount of financial security to be provided by IGPC to NRG from $5,214,173 to $3,491,731 to match the undepreciated cost of the IGPC Pipeline; and (iv) its legal costs in this proceeding, which IGPC submits should be paid by the shareholder – not NRG's other ratepayers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: November 14, 2014

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for Scott Stoll

FOR Dennis O'Leary

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