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November 14, 2013

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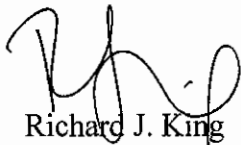
Ms. Kirsten Walli BoardSec@ontarioenergyboard.ca
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th Floor, P.O. Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Natural Resource Gas Limited
Reply Submissions on Issues 2 through 5
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 reply submissions on Issues 2 to 5.

Yours very truly,



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.

**REPLY SUBMISSIONS OF
NATURAL RESOURCE GAS LIMITED**

November 14, 2013

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PART I. INTRODUCTION

1. This Reply Submissions responds to the submissions of Board Staff and IGPC in respect of Issues 2 through 5 in this proceeding, which are:

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. Before beginning, NRG notes that the parties appear to still be at odds as to the precise amounts still in dispute. NRG has tried to reconcile them in a way that is helpful to the Board, using the Detailed Schedule NRG has used throughout this hearing. We have attached the latest version of this Detailed Schedule to this reply argument (as Appendix A), but were not entirely sure how IGPC came up with some the numbers used in its argument.

3. NRG reminds the Board of its submissions made in paragraphs 4 through 8 of its initial submissions on November 7, 2013. These issues in dispute arise from a bilateral contract between IGPC and NRG. In taking jurisdiction over this dispute (which the Board ultimately did

after declining jurisdiction in the first instance), the Board's deliberations must be governed by the language of the contract, and the applicable principles of contract law. This is not a rates proceeding.

4. Indeed, the capital cost of the IGPC pipeline for the purposes of rates was determined in a separate proceeding (i.e., NRG's last rate case, EB-2010-0018). For rate purposes those findings are final and binding on IGPC. They are *res judicata*. The legal test binding upon the Board in that case was whether the rates resultant from the capital cost determination were just and reasonable. That is not the legal test here. Consequently, NRG emphatically disagrees with the Board submission at the top of page 4 which states that "[The PCRA] is not formally binding on the Board with respect to what determines a just and reasonable total cost to IGPC for the pipeline."

5. The "just and reasonable" test is binding on the Board only in respect of rates. The *Ontario Energy Board Act, 1998* ("OEB Act") is very clear on this (subsection 36(2)). To take jurisdiction over this resolution of this contractual dispute, and then dismiss the contract as not formally binding on the Board is wrong at law. The phrase "just and reasonable total cost" is found nowhere in the OEB Act or any other legislation governing the Board's jurisdiction.

6. If the Board is going to take jurisdiction over private contractual disputes, the Board must be governed solely by the law of the contract. The appropriate legal test in this proceeding is to determine exactly what the parties agreed to when the Pipeline Cost Recovery Agreement ("PCRA") was entered into, based on a plain reading of the clear and express words

in that contract. The only jurisdiction the Board has here is to apply the words of the PCRA to the issues in dispute.

7. To recap, the two parties to the PCRA agreed that:

- (a) The appropriate initial estimated capital cost for the pipeline was \$9.1 million (section 3.1, PCRA).
- (b) The costs of the pipeline would include all costs such as overhead, engineering, surveying, consultants, legal, major materials, internal and external construction and commissioning costs (section 3.4, PCRA), as well as interest costs incurred (section 3.8, PCRA).
- (c) NRG would use best efforts to minimize the actual capital cost of the pipeline (section 3.9, PCRA).
- (d) IGPC had the right to be notified of any expenditure in excess of \$100,000, and such expenditure required IGPC's consent (but such consent could not be unreasonably withheld) (section 3.9, PCRA).
- (e) IGPC had the right to dispute the reasonableness of the costs incurred (section 3.12, PCRA).

8. That was the essence of the agreement between the parties.

9. By Decision and Order dated February 2, 2007, the OEB determined that the terms and conditions of the PCRA adequately protected the interests of NRG and its ratepayers, and that the pipeline was in the public interest.

10. Board Staff suggests that because the PCRA provides for a reconciliation of the estimated capital costs to the actual capital costs (and does not exempt the parties from having to do a reconciliation if the pipeline came in under budget), there can be no implication that the actual costs are reasonable.

11. The assertion by Board Staff that coming in under budget is (in effect) irrelevant, cannot be right. The fact that the pipeline was ultimately built under budget is very relevant, and supports a strong presumption that all of the constituent cost items were incurred reasonably, for the purpose of meeting the contractual estimate. NRG submits that if the project had come in well over budget, NRG's costs (by the express terms of the PCRA) would not enjoy the same presumption of reasonableness.

12. Thus, any attempt to question the reasonableness of the pipeline costs must be viewed through the lens of the ultimate results achieved by NRG in ensuring (as the PCRA requires) that the pipeline be built on time and on budget.

13. For example, one of the most significant items in dispute is NRG staff costs (noted in Issue 2.3). IGPC may dispute the time and resources spent by NRG on this matter, but the reality is that in fulfilling its obligation under section 3.9 of the PCRA to "use best efforts to minimize the actual Capital Cost" of the pipeline, IGPC utilized its most valuable asset – the senior executives of NRG at the time (Mr. Bristoll and Mr. Graat) who had longstanding expertise in the construction sector. Together, Mr. Bristoll and Mr. Graat worked diligently to ensure the costs of the project were minimized, as NRG committed to do so in the PCRA. Mr. Graat did not charge IGPC anything for this work. NRG is seeking to cover only costs associated with Mr. Bristoll. IGPC cannot now claim that the costs incurred by NRG to minimize the capital costs of the pipeline were "unreasonable". To the contrary, they were both required to be incurred by section 3.9 of the PCRA, and reasonable because they achieved project completion on time and under budget.

* *

14. The PCRA did not prescribe how NRG was to go about ensuring that the pipeline be built on time and at least cost. That was left to NRG to determine how best to achieve this and discharge its duties under the contract. And NRG did this successfully. The fact that IGPC would have done things differently is irrelevant. IGPC got its pipeline (a pipeline that it agreed to pay the full costs of – including consulting costs, legal costs, interest, insurance, etc.) and got it before the scheduled completion date and for a capital cost less than the budgeted amount that IGPC agreed to in the PCRA. Only in the most extraordinary circumstances could this ever be considered to be an unreasonable outcome.

PART II. REPLY ON SPECIFIC ISSUES

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. Legal Costs (2.1)

15. IGPC states that it is disputing \$271,785 in legal costs (excluding the contingency costs). NRG is not sure how IGPC came up with this amount. Board Staff suggests that a much larger amount is in dispute (\$319,887). NRG understands how Board Staff came up with this number (utilizing the \$458,407 amount from NRG's Detailed Schedule of the capital costs, and then removing \$132,000 in contingency costs and \$6,510 that IGPC considered "shareholder

advice”). Clearly IGPC is not disputing the entire legal costs with the exception of these two items.

16. NRG believes that the amount in dispute is \$201,705 (as set out in the table below), comprised primarily of:

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

17. As noted in Board Staff’s submission, the majority of this relates to two motions brought by IGPC related to the pipeline. It is important to note that both were initiated by IGPC, on grounds of alleged “urgency” and without any prior notice to NRG.

18. In that context, NRG submits that the only way any of NRG’s costs should be considered unreasonable is if: (a) NRG needlessly caused these motions; or (b) NRG could have refrained from participating in the motions (i.e., not incurred the legal costs associated with responding to the motions). NRG submits that it did not needlessly cause either of these motions, and that it had no choice but to participate in the two motions.

The June 2007 “Emergency Motion”

19. The facts of this motion have been put to the Board on numerous occasions. IGPC filed an “emergency” motion on June 28, 2007 in response to a request by IGPC. The Board took IGPC’s assertions as to the urgency of the matter at face value and, in unprecedented

fashion, acceded to IGPC's request and scheduled the motion to be heard orally the very next morning. The claim by IGPC was that the entire deal to construct the ethanol production facility would fall apart unless NRG was forced to immediately sign two contracts (an Assignment Agreement and Bundled-T Service Agreement).

20. We now know that to be untrue. As Board Staff states on page 4 of its argument:
"[T]he actions of NRG did not terminate the deal as claimed by IGPC."

21. The 2007 motion brought by IGPC was an ill-fated fiasco. IGPC relied on false evidence of urgency to cause the OEB to issue orders that were so fundamentally flawed that, when faced with NRG's judicial review before the Divisional Court, the OEB on its own motion reviewed those orders and eventually vacated and set them aside. In the end, the 2007 IGPC application was dismissed in its entirety. No relief was granted.

22. The facts are clear, in NRG's submission. The financing arrangements entered into by IGPC required that IGPC obtain from NRG and deliver to IGPC's lenders two agreements:

- (a) a Consent and Acknowledgement Agreement (the "Assignment Agreement") between NRG, IGPC Ethanol Inc., IGPC and Société Générale (Canada Branch); and
- (b) a Bundled T-Service Receipt Contract between NRG and IGPC Ethanol Inc. (the "Bundled T-Service Agreement").

23. NRG:

- (a) at no time agreed to sign these contracts;
- (b) was never consulted about these contracts in advance;

- (c) received no consideration whatsoever for signing these contracts; and
- (d) had no contractual or other legal obligation to sign them.

24. After IGPC agreed to obtain these agreements from NRG and deliver them to IGPC's lenders, IGPC demanded that NRG sign them. NRG needed to determine if it was in the best interests of NRG to sign them.

25. IGPC's response was to commence an emergency motion falsely alleging its financing would be revoked and the entire project cancelled if NRG was not immediately to sign those agreements. In the early evening of June 28, 2007, the OEB issued an Emergency Notice of Hearing ordering that an oral hearing would be held at 8:30 am the next day, June 29, 2007:

- (a) without any notice to NRG or without having any response from NRG;
- (b) without allowing NRG any opportunity to respond to IGPC's request that the motion be heard on an urgent basis; and
- (c) without compliance with the notice requirements set out in the OEB's *Rules of Practice and Procedure*.

26. NRG was forced to retain new counsel because the emergency hearing precluded its existing counsel from attending. NRG's new counsel attended at the motion, and requested a short adjournment to permit NRG time to respond to the motion. It was not, as IGPC suggests in its argument, out of some belief that NRG's lawyers would be required to give evidence. That assertion by IGPC does not even make sense. 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; 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.

27. 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 equity funds raised for the financing would 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]

28. Subsequent events have proven that the evidence of Mr. Kovnats was not correct.

29. 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.¹

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

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

32. When NRG did not immediately comply, within minutes, the OEB immediately made a finding of non-compliance and made the Administrative Penalty Order, which imposed an administrative fine of \$20,000 per day until NRG signed the assignment agreement.

¹ *Transcript of OEB Proceedings*, pp. 10-11

33. By letter to the OEB sent July 5, 2007, counsel for NRG advised that, contrary to statements in the Kovnats Affidavit, the oral evidence of Martin Kovnats and George Alkalay and representations of counsel made on behalf of IGPC 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.

34. NRG appealed the Assignment Order and Administrative Penalty Order to the Divisional Court. NRG's appeal was scheduled to be heard on January 28, 2011. Within two weeks of receiving notice of that appeal hearing date, the OEB commenced its own motion to review and reconsider those Orders.

35. On December 7, 2010, the OEB issued a Notice of Motion to Review and Procedural Order No. 1 stating that it had determined it would review and reconsider the Administrative Penalty Order.

36. On February 11, 2011, the OEB issued a decision vacating the Assignment Order and the Administrative Penalty Order:

The Board has reviewed the submissions of the Parties and the transcripts of the proceedings giving rise to the Orders which are the subject of this review. The Board has concluded that, in EB 2006-0243 it failed to observe the statutory and common law notice requirements respecting the hearing of June 29, 2007, and with respect to the imposition of the administrative penalty. It is the Board's view that the appropriate course of action in light of this serious deficiency is to vacate the administrative penalty in its entirety, together with the finding of non-compliance giving rise to it, effective immediately.

Similarly, the Board concludes that it failed to meet the requirements of procedural fairness in ordering NRG to execute the contracts with IGPC respecting the pipeline and its supply. In light of the fact that the contracts were in fact entered into, and continue to be in full force and effect, the Board does not need to make provision for any remedy arising from this failure of procedural fairness.

37. NRG did not needlessly cause the motion nor the excessive legal costs that resulted. NRG did not sign the two agreements because it was worried about its exposure under those agreements, and did not believe the ethanol plant deal would fall apart. The two agreements were significant contracts, from NRG's perspective and it wanted more time to consider them. NRG ultimately took that time, signed the agreements a week later and the ethanol plant deal did not collapse. The "emergency" motion was not an emergency at all.

38. Once the Board scheduled the motion, NRG had no choice but to participate. Board Staff acknowledges this, but its ultimate recommendation as to who should bear these legal costs is flawed. At page 4 of its argument, Board Staff says:

Board staff is of the view that it is not clear from the record-to-date whether NRG was at fault for not signing the agreements on the date required by IGPC. In addition, the actions of NRG did not terminate as claimed by IGPC. Board staff therefore submits that NRG's costs related to the emergency motion should be shared equally between NRG and IGPC (\$47,400 owed to IGPC).

39. On the one hand, Board Staff clearly states that the record is not clear as to who prompted the hearing (i.e., who was at fault) but confirms that, contrary to IGPC's demands, there was not, and never was, an emergency (as IGPC claimed).

40. If there is no factual basis upon which to conclude that NRG needlessly caused the motion, then there can be no basis to say the costs incurred were unreasonable. IGPC brought this motion on an urgent basis despite there being no urgency. This forced NRG to incur

greater costs (new counsel had to be retained overnight). NRG had no choice but to prepare for and attend the proceeding.

41. This Board should disregard IGPC's groundless speculation about why NRG retained litigation counsel instead of having its regulatory lawyers argue the June 29, 2007 motion. It has now been established that NRG committed no breach of contract or regulatory obligation. All findings against NRG were absolutely and unconditionally set aside by this Board, thereby confirming that the procedure commenced by IGPC was fatally flawed, legally unsupportable and without any foundation and fact. The urgency alleged was simply false.

42. Moreover, NRG was required to seek judicial review before the Divisional Court. There is no question that NRG would have completely successful in its judicial review in setting aside both the decision on liability and the decision on penalty. The Board recognized this and essentially confirmed that in its own decision to set aside unconditionally and absolutely both decisions on liability and on penalty.

43. NRG's other ratepayers should not be required to subsidize and bear the burden of legal costs incurred by NRG as a result of IGPC's inappropriate conduct and false evidence before this Board. IGPC is the only party that should be required to pay the costs incurred by NRG in responding to a motion that should have never been brought, dealing with false evidence introduced by IGPC and seeking judicial review to correct the numerous denials of procedural fairness and natural justice that IGPC caused the Board to make.

44. Moreover, as IGPC admits in paragraph 27, NRG has successfully received a Board approved rate based on those legal costs. As IGPC states, it is a requirement of the PCRA

and the Board that only costs prudently incurred can be included in rate base. Because the new fees have already been included in rate base in a proceeding in which IGPC participated fully, the decision to include those legal fees and rate base is final and binding against IGPC. It is *res judica*. The Board has already found that those costs had been prudently incurred by NRG and are required to be paid in full by IGPC. That issue cannot now be re-litigated.

The February 2008 Aylmer Motion

45. IGPC's submissions on the Aylmer motion are similarly inconsistent with the actual facts including the findings of the Board at the Aylmer motion. By February 15, 2008, IGPC had failed to provide any letter of credit to secure the advance material purchases and construction costs for the pipeline.

46. The facts of this motion have also been put to the Board on numerous occasions. This motion dealt with several issues, including: (a) the failure of IGPC to provide letters of credit under the PCRA; (b) the quantum of the letters of credit; (c) Union Gas' aid to construct; (d) advance payments to Lakeside Controls; and (e) the failure of IGPC to pay NRG's invoices and the potential construction delays associated therewith. Some of these issues were resolved that day, and others were the subject of written submissions.

IGPC Refused to Give NRG the Letter of Credit Required by the PCRA

47. As a regulated utility whose stakeholders include commercial and industrial consumers, customers and municipalities, NRG has an obligation to ensure that any transaction it enters into does not expose it to inappropriate financial liabilities and/or other unacceptable risks.

Accordingly, the purpose and intent of the PCRA was to ensure that NRG would at all times be fully secured for all costs related to the construction of the Pipeline.

48. The PCRA provides for NRG to be fully secured for all costs, obligations and risks by way of letters of credit. There are two letters of credit required under the PCRA: (a) a Customer Letter of Credit (Section 7.1); and (b) a Delivery Letter of Credit (Section 7.3). The fundamental purpose of the letters of credit is to ensure that in the event IGPC defaults on its obligations to purchase natural gas from NRG, NRG would be fully secured for the unrecovered capital cost, as defined in the PCRA, of constructing the Pipeline and related expenses.

49. Article 7.1 of the PCRA provides that IGPC will, prior to NRG ordering the pipe and stations, provide NRG “an irrevocable letter or letters of credit (“Customer Letter of Credit”) in an amount equal to the quoted cost of the pipe and the stations minus any payments made by the Customer to the Utility in respect of the pipe and the stations.”

50. IGPC breached its obligations under Article 7.1. IGPC never delivered a Customer Letter of Credit. As a result of IGPC’s breach, NRG was forced to require IGPC to pay to NRG the amounts required to order the pipe, so those amounts could be paid over to the pipe supplier.

51. IGPC’s failure to provide the Customer Letter of Credit caused numerous delays with construction. For example, NRG was unable to provide an aid-to-construct to Union Gas and had to obtain an OEB Order compelling IGPC to comply with its obligations. NRG was also unable to order components and materials from Lakeside Controls Process Controls Ltd.

(“Lakeside Controls”) for the stations, and IGPC refused to pay Lakeside Controls directly the amounts it required to deliver components and materials according to the construction schedule.

52. Article 9.7.3 of the PCRA provides that prior to the award of the construction agreement by NRG, IGPC will provide to NRG an irrevocable Letter of Credit (“Delivery Letter of Credit”) in an amount equal to the difference between the Revised Estimated Capital Cost and the Revised Estimated Aid-to-Construct.

53. As of February 28, 2008, despite repeated requests by NRG, IGPC refused to provide NRG with the Delivery Letter of Credit. Without an appropriate letter of credit, NRG’s financial integrity and continuing operations might have been put at risk.

54. At a hearing held February 28, 2008, the OEB specifically found that IGPC had breached the PCRA by refusing to provide the required Delivery Letter of Credit:

“The central issue is, first and foremost, IGPC’s failure to deliver credit and the dispute as to the proper amount of that Letter of Credit”

55. Despite being in clear and fundamental breach of the PCRA by failing to provide the required letter of credit, IGPC once again commenced a motion for the Board. IGPC should have simply provided the letter of credit that it was required to provide under the PCRA. Instead, presumably once again because it was financially unable to provide the required letter of credit, it attempted to blame NRG for its financial shortcomings and operational failures.

56. Despite the OEB’s ruling, it was not until April 18, 2008, that IGPC provided the required Delivery Letter of Credit to NRG. IGPC was in default of its obligations from October 2007 until April 18, 2008. Nonetheless, NRG proceeded with the design and construction of the

Pipeline throughout that period, despite having an absolute contractual right to terminate the Pipeline due to IGPC's ongoing default and breach of its contractual obligations owed to NRG.

Union Gas and Lakeside Controls

57. As a result of IGPC's failure to deliver the required Letter of Credit to NRG, NRG was unable to pay amounts demanded by Union as aid-to-construct for a 1.6 kilometre extension that was an integral part of the Pipeline located in the Union franchise area. This was recognized by the OEB. NRG demonstrated that the complaints of Union Gas were caused solely by IGPC's default. As a result of IGPC's failure to provide NRG with the Delivery Letter of Credit, the OEB ordered IGPC to pay Union Gas the required amounts directly. That was suggested by NRG, because NRG did not wish to have the progress of the Pipeline impaired by IGPC's default of its financial obligations.

58. Eventually, after the OEB order, IGPC paid Union \$736,000 as an Aid-To-Construct and delivered a Letter of Credit to Union in the amount of \$73,100.

59. Despite IGPC's failure to provide NRG with the Customer Letter of Credit and the consequent breach of the PCRA, NRG continued to move forward with construction of the pipeline. NRG obtained quotes from both Union Gas and Lakeside Controls for essential components of the pipeline construction that were required to be purchased in advance to ensure timely delivery. NRG forwarded details about the quotes to IGPC as it acquired that information, and conveyed the requests for payment as well.

60. The PCRA does not specifically contemplate a system whereby NRG makes arrangements with subcontractors and asks IGPC for payment to fulfill the contracts. That is because under the PCRA, NRG would have received the Customer Letter of Credit from IGPC, thus enabling NRG to remit the payments directly to the subcontractors without delay. However, because IGPC refused to deliver the Customer Letter of Credit, NRG was required to seek ad hoc financing or security from IGPC for each advance payment or liability that it incurred to keep the construction on the required timeline.

61. These delays and frustrations were exacerbated by IGPC's refusal to cooperate with NRG. NRG initially asked IGPC to pay directly to Union the \$700,000 it required. IGPC refused to do so.

62. The inefficiency inherent in such a process was evident in the inevitable delays in reviewing invoices, requisitioning payments and remitting those payments through multiple parties. However, these were all caused by IGPC's refusal to provide the Letters of Credit it was contractually bound to deliver.

IGPC Delays and Breach of PCRA

63. IGPC was in deliberate and continuous breach of the PCRA from October 2007 to April 18, 2008. Despite this continuing failure, NRG did everything possible to continue with the project, and ensured that the project could proceed. 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..."

64. IGPC had absolutely failed to comply with its obligations under Article 7.1 and, as a result, IGPC was in breach of the PCRA. Moreover, IGPC's failure to comply with Article 7.1 caused delays with construction.

65. 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 had the right to elect not to proceed further with any of its obligations under the PCRA. Moreover, if NRG had elected 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".

66. NRG chose to move forward with construction, despite IGPC's failure to comply with its obligations under the PCRA. NRG did so in order to cooperate with IGPC and move the project forward as fast as possible.

67. The Pipeline was completed by NRG as agreed by July 1, 2008.

68. The outcome of the February 2008 motion was favourable to NRG. It received satisfactory outcomes on the issues of most importance to NRG – namely, getting IGPC to provide the letters of credit under the PCRA (which IGPC was required to do, but had resisted), and getting IGPC to pay amounts owing to NRG (i.e., to stop financing the project on the backs of NRG's shareholders and ratepayers).

69. For some reason, Board Staff suggests that only the quantum of the letters of credit were at issue at the February 2008 motion (i.e., Board Staff's submission only deals with issue (b) in the paragraph above). Because NRG was unsuccessful in getting the quantum of the letters of credit increased, Board Staff suggests that NRG should bear the costs of the motion. Board Staff makes this assertion on the bottom of page 4 of its submission: *"Board staff is of the opinion that IGPC was not at fault for filing the motion before the Board in response to an unreasonable request from NRG. NRG essentially sought financial assurance that was 3.5 times the estimated value of construction the pipeline."* In other words, Board Staff suggests that NRG needlessly caused this motion.

70. NRG is unclear why Board Staff failed to consider the motion's other issues, and merely accept how IGPC has characterized the motion (IGPC characterized the motion as only being about the increased quantum, because they succeeded on that issue). The Board's decision on the motion speaks for itself:

We have received submissions, both written and oral, with respect to non-compliance by both parties. **This relates to the failure to deliver letters of credit** and the failure to proceed with construction. It is not necessary at this point to go into the details of those delays.

The central issue is, first and foremost, IGPC's failure to deliver credit and the dispute as to the proper amount of that letter of credit. That delivery letter of credit is now set at \$5.3 million, and that is in the Decision I referred to. NRG has pointed to additional costs which they believe should be reflected in that letter of credit. That is, the letter of credit should be increased to reflect those additional costs.

Those costs are over and above the adjustment that is contemplated by Section 7.3, of the Pipeline Cost Recovery Agreement ("PCRA") which indicates that the letter of credit may have to be increased by any differential between the actual costs and the estimated costs that were used to determine the 5.3 million amount. ...

The second issue was the Union Gas aid to construct and the third issue, a related issue, was the Lakeside Process Controls Limited advance payments.

We have now resolved that the ethanol plant can deal directly with those suppliers and take NRG out of the loop.

There is a further issue related to IGPC's failure to pay NRG's invoices. The parties have agreed, on consent, that those disputes will be resolved elsewhere. And that this issue will not impact construction.

(Board Decision, delivered orally By Chairperson Kaiser, February 28, 2008)

71. This excerpt speaks for itself. IGPC filed the motion, but as can be seen from the Board's Decision, there were a variety of issues that needed resolution by February 2008. Quite frankly, either party might have brought a motion by this point in time. However, NRG has always preferred to discuss matters with customers rather than immediately resort to the Board. From NRG's perspective, the two key issues were resolved in NRG's favour.

72. In NRG's submission, there is nothing unreasonable about a utility spending legal fees to ensure that a new customers lives up to its contractual obligations to pay the utility and provide the requisite letters of credit to ensure the utility and its ratepayers were not unnecessarily exposed to the construction costs of the project.

Shareholder Advice

73. IGPC has contested certain legal costs (\$25,000) on the basis that the advice was for the benefit of NRG's shareholder. This is IGPC's characterization of certain line items on legal invoices provided by NRG to IGPC. NRG never classified, nor sought to claim, any legal costs in this proceeding as for the benefit of NRG's shareholder.

74. NRG confirmed this in its response to IGPC's Interrogatory #7 (June 28, 2013). There is no evidence on the record to refute this. Consequently, there is no evidentiary basis

upon which the Board could possibly find any of NRG's legal costs as unreasonable on the basis of being for the benefit of NRG's shareholder.

Project Management

75. Again, as a result of combing through the docket entries in NRG's legal invoices, IGPC has chosen to characterize certain docket entries as "project management", and not work that should be done by a lawyer. Again, this is IGPC's characterization of certain legal costs, not NRG's characterization.

76. It has never been clear to NRG how IGPC could seek to disallow the involvement of legal counsel given the circumstances of this pipeline's development and construction. These circumstances were: (a) the fact that IGPC began initiating disputes about the pipeline development from the very beginning; and (b) IGPC utilizes legal counsel extensively. IGPC has never had a contentious facility build, and certainly never one that was basically dealt with through legal counsel.

77. The record on this point is extremely clear. The example provided in Exhibit B to NRG's Evidence (re-iterated in NRG's initial submission) is indicative of why NRG needed counsel throughout the process, where NRG has never had to utilize counsel in the past.

78. The example provided at Exhibit B to NRG's evidence was documentation related to the process of quotes received for pipe. NRG submitted what it considered to be the most desirable quote to IGPC's counsel who, by way of a letter, raised a plethora 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.

79. This was a quote to buy pipe, which had to be passed by IGPC's legal counsel, who then asked for the above-noted items which by any interpretation have to be viewed as extraordinary. IGPC chose to utilize its legal counsel in this way, yet it somehow now argues that for NRG to counter by utilizing its counsel in similar circumstances would incur costs that are "unreasonable" and therefore should not be payable by IGPC.

80. There is nothing extraordinary with an entity in a bilateral contract using legal counsel to deal with matters when its counterparty is using legal counsel. NRG submits that no amount of NRG's legal costs should be disallowed on the basis of IGPC's categorization of certain time entries as "project management".

81. This Board should reject any assertion that there was duplication of legal work involved. IGPC has failed to produce its own dockets that would demonstrate how many lawyers it paid to attend either the June 2007 motion or the February 2008 Aylmer motion. However, IGPC typically has had at least two, and often three or four lawyers from the same firm attending every aspect of every proceeding.

82. Given that IGPC has refused to produce any of its own legal accounts that would demonstrate the numbers of lawyers it thought were required to attend, this Board should reject

any allegation that NRG has used excessive numbers of lawyers. At all times, NRG has been far more efficient and cost-effective in the legal resources it has chosen to deploy in responding to IGPC's legal games and multiple vexatious litigation proceedings.

83. Once again, as IGPC has confirmed at paragraphs 36 and 37 of its argument, those legal costs for the Aylmer motion had already been determined to be appropriate for inclusion in NRG's rate base which constitutes a determination by the Board that they were prudent and reasonable. This determination is final and binding against IGPC and cannot now be re-litigated. IGPC's attempt to do so is yet another abuse of process.

B. Contingency Costs (2.1)

84. With respect to NRG's contingency costs, NRG submits that the proper test for this Board to apply (based on the wording in the PCRA) is whether: (a) it was unreasonable to make provision for contingencies in this case; or (b) whether any of the amounts claimed could have been avoided.

85. NRG agrees with Board Staff that it was entirely reasonable for NRG (knowing early on how litigious the relationship was with IGPC) to make provision for contingencies. As Board Staff notes: "*NRG therefore expected a litigious relationship and wanted some protection against unanticipated legal fees.*" That is precisely correct.

86. NRG does not, quite frankly, understand IGPC's argument on this point. IGPC claims that the contingencies should be disallowed because they were not incurred until after construction is complete. The Oxford English Dictionary defines "contingency" as: "*An event*

conceived or contemplated as of possible occurrence in the future." Yet IGPC wants to disallow them because they were not incurred until after the pipeline was in service.

87. As Board Staff noted on page 8 of its argument: *"Board staff agrees with NRG's position. The fact that there were several motions filed prior to the construction of the pipeline may have prompted NRG to reserve additional monies for future legal costs."*

88. NRG made provision for such costs, and as the record shows, these costs were incurred. There is nothing unreasonable about these costs.

89. History has proven beyond any doubt that NRG's inclusion of a contingency for cost was absolutely prudent and necessary to protect NRG's other ratepayers from having to bear the costs that IGPC has caused NRG to incur. All of the accounts for legal fees and disbursements incurred by NRG in dealing with IGPC have been produced and are undisputed. IGPC is reduced to alleging that it cannot discern exactly what particular proceeding certain work related to.

90. First, it is self-evident by looking at the description of the work and the date on which it occurred, what particular proceeding the work related to. Moreover, the undisputed evidence is that all of the work that Lenczner Slaght did for NRG was responding in one way or another to IGPC's multiple litigation proceedings.

91. In short, IGPC has introduced no evidence to contradict the invoices and does not dispute that the work was done as described. Its position is nothing more than an assertion that NRG alone or NRG's ratepayers should bear those legal costs. Once again, IGPC having failed

to produce any evidence as to its own legal costs in dealing with those very same issues, the undisputed evidence is that the work was done, as described and there is no evidence whatsoever that it was not reasonable and prudent to incur those costs.

92. This Board should draw the adverse inference, from IGPC's failure to produce any of its own legal accounts or any information whatsoever as to (a) the number of lawyers that it used, (b) the time those lawyers spent, or (c) the fees incurred by those lawyers, and find that this evidence would not support IGPC's allegations on these issues.

93. This proceeding is part of the cost of constructing the IGPC pipeline. This proceeding and all proceedings with IGPC are directly related to and caused by the construction of the IGPC pipeline. These legal fees were incurred by NRG as a result of IGPC's overly litigious strategy and unnecessary adversarial tactics. IGPC has chosen to play "hardball" with NRG. In doing so, it has filed false evidence before this Board and made false allegations of urgency that were subsequently proven to have been false and unsupportable at the time. The only party who should bear these costs is IGPC. Certainly NRG's other ratepayers should not bear any costs incurred by NRG as a result of IGPC's improper conduct.

C. NRG Staff Costs (2.3)

94. The dispute with respect to NRG Staff costs is more fundamental. Essentially, Board Staff and IGPC take the view that NRG is "double-dipping" because the cost of Mr. Bristoll was already being recouped in NRG's rates.

95. Although this is not a rate case, Board Staff and IGPC have drawn the issue of rate recovery into their arguments. However, NRG submits that the issue of NRG's staff costs

must still, in this proceeding, be approached on the basis of whether these costs can be considered unreasonable in the context of the contractual bargain between IGPC and NRG.

96. Viewed in this context, NRG submits that the appropriate legal test for the resolution of this issue is three-fold:

- (a) Is it reasonable for IGPC to assume that it can take up virtually all of NRG's President's time and energy in 2007 and 2008 and not pay under the terms of the PCRA, because provision has been made in a previous NRG rate case for a President's salary (within NRG's global OM&A)?
- (b) Is it unreasonable for NRG, as events unfolded with IGPC, to dedicate its President to the pipeline project (with the assistance of Mr. Graat) and bill IGPC for the President's time, while continuing to manage its overall global OM&A within its OM&A envelope?
- (c) More simply, was Mr. Bristoll's time and rate unreasonable?

97. With respect to the first point, it has been made clear on the record of this proceeding that IGPC wanted to be (and have its counsel be) heavily involved in the development of the pipeline. IGPC does not contest that, and NRG does not quarrel with IGPC's desire to play such a role.

98. However, NRG does not believe that IGPC can expect to pay nothing for monopolizing the most senior employee of the company. Moreover, utilities routinely bill for the type of project management work that Mr. Bristoll undertook. This can be done via service charges that allow for contract work to be done for customers (see, for example, NRG's Schedule of Service Charges) or arrangements that typically allow for the utility's standard overhead to be recovered (see any Connection Cost Recovery Agreement approved by the Board). It is simply unreasonable for IGPC to believe that it would bear no internal costs of

NRG. It is particularly unreasonable given the extent to which IGPC's conduct mandated the continuous involvement of Mr. Bristoll (and Mr. Graat).

99. With respect to the second point (reasonableness of NRG dedicating Mr. Bristoll to the IGPC pipeline project), NRG believes it was not only reasonable but necessary in the circumstances. It was necessary for several reasons:

- (a) Mr. Bristoll (and Mr. Graat) had extensive experience in construction matters;
- (b) the IGPC relationship very early on became antagonistic, and it was prudent that the relationship be dealt with at the highest level within NRG;
- (c) this was a major project for NRG (and indeed, for any utility); and
- (d) it was clear that IGPC wanted to be extensively involved (with their advisors) in the minutiae of project development, and this warranted Mr. Bristoll's involvement because he was both senior in the company (capable of liaising with IGPC's and NRG's external advisors) and had a background in accounting and construction.

Simply put, it was both necessary and reasonable for Mr. Bristoll to essentially pull himself out of NRG's day-to-day business and manage the IGPC matter on a virtual full-time basis.

100. Although NRG's rates had included provision in salaries for a President, there was no concept at the time of applying for those rates that Mr. Bristoll would have had to play the role that he did. Moreover, NRG does not manage its business on a line-by-line item. Like any utility, NRG is conscious of its budget but manages its costs within an overall OM&A budget. That's why the Board approves OM&A costs on an envelope basis.

101. It was also not the case that in 2006 through 2008, NRG was overearning as a utility by having the costs of Mr. Bristoll's time paid for by IGPC. At the end of the day, in

these years NRG's earnings were in-line with its Board-approved revenue requirement, and IGPC was paying the cost of NRG's employee that was dedicated to it.

102. That is reasonable. The ultimate beneficiary of Mr. Bristoll's work (and Mr. Graat's, which IGPC obtained for free) was IGPC. Were it not for Mr. Bristoll and Mr. Graat's extensive experience in negotiating construction contracts, and the level of attention given to the pipeline, NRG believes the capital cost of the pipeline would have been higher.

103. With respect to the third point, in order to demonstrate the reasonableness of both Mr. Bristoll's time and rate, NRG retained an auditing firm and engineering firm (post-construction) to review the work that Mr. Bristoll did for IGPC and his qualifications:

- (a) Mr. Bristoll's hourly rate (\$295) was benchmarked to the rate charged by a Chartered Accountant of Mr. Bristoll's seniority in London, Ontario to demonstrate its reasonableness (NRG Response to Undertaking JT 1.16, EB-2010-0018).
- (b) Mr. Bristoll's emails (for the eleven months from December 2007 to October 2008) were audited to show that Mr. Bristoll sent/received a total of 1,959 emails relating to the pipeline (approximately nine per working day). Based on the auditor's report, this would amount to full time work, which if IGPC had been charged a rate more reflective Mr. Bristoll's expertise (e.g., \$295 per hour) would have cost IGPC \$577,905. Instead, Mr. Bristoll's actual cost billed to IGPC for that period of time was only \$258,460.
- (c) An engineering firm concluded that the typical soft costs of a major pipeline project (consulting, legal, contract administration, procurement, etc.) would be 17.5% of the total construction costs of a project. On that basis, the NRG staff costs are reasonable.

104. IGPC has no evidence to challenge this analysis and does not deny that any of this work was done, and does not contest the conclusions of the independent audit.

D. Interest Costs During Construction (2.4)

105. As Board Staff correctly notes, the interest charges claimed by NRG are calculated on the basis of the PCRA between IGPC and NRG.

106. The amount being claimed is \$106,172, which is the original \$113,271 less the \$7,099 that NRG agreed was included in error. Board Staff suggested that only \$7,099 of interest should be disallowed (as conceded by NRG) although Board Staff identifies a smaller amount in dispute (\$88,272). IGPC believes it should only pay \$25,000 in interest.

107. In the context of the PCRA, the proper test for the Board to apply is to consider whether NRG is collecting interest: (a) that, by NRG's own fault, could have been avoided; or (b) in a manner different than contemplated by the PCRA. IGPC places great emphasis on this latter point.

108. NRG submits that the proper interpretation of the contract is as follows. IGPC and NRG agree that section 3.8 of the PCRA applies to interest on the Aid-to-Construct payments to be made under the PCRA. With respect to section 3.14(d), NRG's interpretation is different than that of IGPC's. IGPC is arguing that section 3.14(d) applies to project interest during construction and that section 3.14(d) requires the use of the posted Board interest rates for CWIP (for the purposes of rate-setting). This is not correct.

109. Section 3.14(d) is operative during capital cost disputes between the parties. Section 3.14 states:

If the Customer does not agree with the Actual Capital Cost and Actual Aid-To-Construct, the Parties shall negotiate in good faith ... If the Parties are unable to agree after such negotiations then either party may refer the matter to the OEB for resolution. In determining reasonable costs attributable to the Capital Cost, the following considerations will be taken into account: ...

(d) Utility costs shall include the reasonable cost of interest during construction calculated in accordance with the OEB approved methodology and

110. The section references certain “considerations” that the Board should consider in resolving a capital cost dispute. It is not a stand-alone specification of the rate to be used in calculating project interest during construction. The reference to “OEB approved methodology” does not refer to a specific rate. NRG is of the view that this refers to the methodology employed by the Board to allow utilities to recover carrying charges for capital project during the course of construction. The regulatory principle is that the utility must not be financing a customer’s capital project, and that regulatory principle is noted for the Board’s consideration when determining interest costs disputed by the Customer under the PCRA. The amount charged by NRG under the PCRA was a commercially reasonable amount and, as NRG stated in its initial submission, typical for the industry.

111. Not much actually turns on this distinction, because it appears that IGPC’s main point of contention on the actual cost of interest is that NRG started accruing interest on the date that it received an invoice from a contractor despite it not being payable for potentially 30 days. This makes no difference – there would be no change in interest if the dates in the schedules referenced by IGPC were changed to the due dates. This is because the interest does not start to get calculated until the date of the last Aid-to-Construct payment (and runs through to the date the final invoice from the primary contractor was received). This accurately reflects the period during which NRG was financing the construction costs of the pipeline – i.e, the days outstanding – so changing the start date in the table is of no consequence .

112. NRG agrees with Board Staff that there is no evidence on the record that, by NRG's own fault, certain interest charges could have been avoided. In addition, NRG argues that its calculation of interest was in compliance with the PCRA, and more importantly, that IGPC's assumption that a change to the start date in the interest schedules would decrease the amount claimed, is factually incorrect.

E. Insurance Costs and Other Service Costs (2.5)

113. NRG is seeking to recover \$62,000 for insurance costs as part of the capital cost of the pipeline. The \$62,000 insurance figure represents an allocation of NRG's insurance during the development and construction of the IGPC Pipeline.

114. Board Staff believes that because no new insurance was purchased by NRG, IGPC should not have to pay for any of NRG's insurance coverage that it might have utilized had it been required during construction.

115. IGPC appears to be taking a ridiculous and indefensible position that no insurance should have been obtained on the pipeline during its construction. This is contrary to all common sense and contrary to long established industry practice. It also defies all credulity that IGPC lenders would permit IGPC to spend borrowed money to pay for the construction of an uninsured capital asset. If IGPC wanted to obtain insurance coverage to cover the pipeline during construction, it was at all times free to do so. However, it simply relied on NRG's insurance and never objected.

116. NRG believes that, when viewed in the context of the PCRA, the appropriate analysis for the Board to utilize is as follows: (a) from IGPC's perspective, would it be

reasonable for IGPC to presume that it would enjoy insurance coverage during construction without having to pay for it?; and (b) from NRG's perspective, was it reasonable to allocate a portion of its purchased insurance to IGPC, and manage its global OM&A going forward for its other customers on that basis?

117. On the first point, NRG submits that it would be unreasonable for IGPC to assume that it could enter into a major construction contract with a supplier and not bear any costs for insurance coverage during construction.

118. On the second point, NRG submits that its approach to the insurance issue was reasonable. 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. IGPC would have been covered by NRG's policy during construction had an issue requiring coverage arisen. By allocating a fair portion of NRG's purchased coverage to IGPC, NRG was able to manage its global OM&A on that offsetting basis. This is not only reasonable but fair to all parties.

119. As noted in NRG's initial argument in this proceeding, while NRG had insurance costs incorporated into its revenue requirement (pursuant to which NRG was operating at the time of construction of the IGPC Pipeline), the Board does not dictate how to manage those costs within the utility's revenue requirement envelope. There is nothing on the record to suggest that NRG was "double dipping" by requiring some insurance cost to be borne by IGPC and re-allocating its OM&A within its overall revenue requirement envelope. Had that been the case, NRG would have shown huge revenue sufficiencies and over-earning, but that is not the case.

On this point, even if the salary and management fees are adjusted accordingly to reflect the amounts in NRG's audited financial statements, there is a cumulative deficiency of \$380,177 during the three year period from 2007 to 2009.

120. This Board should reject any argument from IGPC about the insurance cost. The pipeline during construction had to be insured. There is no evidence whatsoever that the cost of insurance incurred by NRG was not reasonable or prudent. IGPC has submitted no evidence as to any other available insurance at a different rate. Given that the only evidence is the actual evidence of the costs incurred by IGPC and IGPC has introduced no contrary evidence, the insurance costs incurred by NRG should be allowed as part of the capital costs.

121. In essence, NRG provided a monetary benefit to IGPC by allowing IGPC to have the advantage of NRG's insurance history and premium discount. If IGPC had been required to obtain separate coverage on the pipeline, the amount of that coverage would have undisputedly been an actual and reasonable part of the capital cost. The only evidence on the point is that the cost incurred by NRG is significantly less than the cost that IGPC would have incurred. Presumably, if IGPC could have incurred coverage at a lower rate it would have done so.

F. Administrative Penalty (2.6)

122. There is no issue here. In light of the Board having vacated (on its own motion) the penalty, no costs are being claimed.

G. Costs Arising from This Proceeding (2.7)

123. 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.

124. The genesis of this entire dispute (and all costs incurred along the way) was IGPC's request for service to connect a pipeline. In the first instance, then, none of this occurs without IGPC requiring a pipeline.

125. Despite having repeated opportunities to do so, IGPC has not introduced any evidence whatsoever of what legal fees it has incurred. Presumably this is because IGPC's actual legal fees, and the number of lawyers and number of hours incurred by those lawyers, are significantly greater than those incurred by NRG. Therefore, the truth would undermine IGPC's position completely. As a result, IGPC has chosen to introduce no such evidence.

126. NRG submits that this Board cannot in the absence of any evidence, make an order for costs, nor should it do so.

127. The only evidence is that the costs claimed by NRG have actually been incurred, and have had to be incurred, and were necessarily incurred as a result of IGPC's litigation tactics. In any event, NRG submits that IGPC has caused virtually all of the costs of this proceeding as a result of:

- (a) its repeated attempts to re-litigate issues already decided by the Board,
- (b) its collateral attacks on existing Board decisions binding against IGPC; and
- (c) its hardball litigation tactics.

128. NRG's other ratepayers should not be required to bear the burden of IGPC's improper conduct. NRG certainly should not be required to bear the costs of NRG's inappropriate conduct. IGPC should be ordered to pay NRG's costs of this proceeding.

129. Many of the interrogatory questions that IGPC asked were simply improper questions. This was also true in the first round of interrogatories to which NRG provided complete and detailed answers. In the first round, IGPC nevertheless asserted that NRG's answers were incomplete and brought a motion to compel further answers. IGPC was essentially completely unsuccessful in its motion. The Board on the motion confirmed that virtually all of NRG's refusals were proper and IGPC's questions were improper.

130. In the second round of interrogatories, IGPC once again asked numerous inappropriate questions in an attempt to fix its evidentiary shortcomings by trying to cause NRG to introduce evidence that IGPC could have introduced but chose not to. NRG provided full and complete answers to proper questions from IGPC. Numerous questions were improper. NRG nevertheless answered some of those improper questions in the interest of expediency, and refused to answer other or certainly improper questions.

131. IGPC's failure to challenge NRG's answers confirms that IGPC itself understands its questions were improper from the outset, and NRG had no obligation whatsoever to answer them. For example, a number of the questions IGPC asked were requests for NRG to provide certain calculations that IGPC could have done but chose not to do. In accordance with the Board's prior ruling that NRG is not required to do calculations that IGPC is capable of doing

itself based on information NRG has already disclosed, NRG refused to provide those calculations.

132. IGPC's allegation that NRG's responses to interrogatories are inadequate is utterly false. NRG provided complete answers to every proper question. Many of IGPC's interrogatories were contrary to the Board's procedure and rules of practice and did not merit any answer. This was the finding of the Board made when IGPC attempted to challenge NRG's answers in the first round of interrogatories. Because it lost, and would lose again, IGPC failed to challenge NRG's answers to the second round of interrogatories. In those circumstances, it is clear that NRG's answers were appropriate and IGPC's questions were largely inappropriate and another example of IGPC's abuse of this Board's process.

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

133. NRG agrees with the submissions of Board Staff that once the OEB determines the capital cost of the pipeline in this proceeding, the letter of credit should be adjusted based upon the net book value of the pipeline. That is what the PCRA requires.

134. With respect to the EBO model and the scenario conducted by IGPC in Attachment 4A, we agree with the capital cost number used (\$8,399,881, which is not a net present value ("NPV") figure). However, their NPV of Revenue plus Tax Shield is incorrect. IGPC should have used the NPV calculation embedded in the Excel spreadsheet in the original EBO. The corrected Schedule is attached as Appendix B hereto, and has been vetted by two separate consultants for correctness.

135. Finally on this portion of IGPC's argument, NRG feels it necessary to reply to the allegations by IGPC in paragraph 116 of its argument, wherein IGPC makes very serious allegations about NRG deliberately falsifying elements associated the model. These allegations are false, and completely unsubstantiated by any evidence. They are also outside the scope of this proceeding and NRG has had no opportunity to respond to them by introducing evidence.

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

136. As noted in NRG's initial argument, the amount of any payment owing from NRG to IGPC will be based on the Board's determination of the capital cost (i.e., issues 2.1 through 2.7 in this proceeding).

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

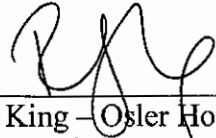
137. Should the Board determine that NRG owes anything to IGPC, NRG agrees with Board Staff's submission that a deferral account be established.

PART III. RELIEF SOUGHT

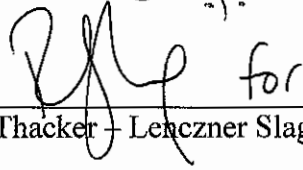
138. NRG respectfully requests an Order by the Board finding that pursuant to the terms of the PCRA, NRG's capital costs related to the IGPC pipeline facilities were reasonably incurred, and that IGPC's application should be dismissed in its entirety, with costs to NRG.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 14, 2013



Richard King – Osler Hoskin & Harcourt LLP

 for

Lawrence Thacker – Lenczner Slaght Royce Griffin LLP

APPENDIX A

1A 19

1A 19

1A 19

Cost of Pipeline - Detailed Schedule

	IGPC Amount	NRG Amount	Disputed
Pipe			
Lakeside Steel Corporation	863,420	863,420	
Sub-total	863,420	863,420	
Custody Transfer Station			
Prime Contract	884,003	884,003	
Sub-total	884,003	884,003	
Construction Material			
C.R. Wall & Co. Inc.	34,539	34,539	
COMCO Pipe & Supply Company	35,696	35,696	
KTI Limited	22,587	22,587	
Sub-total	92,822	92,822	
Prime Contract			
Prime Contract - Sommerville (Note 1)	3,180,642	3,180,642	
Bell Canada	2,576	2,576	
Black & McDonald	823	823	
Wellmaster Pipe & Supply Inc	11	11	
Fastenal	141	141	
Sub-total	3,184,193	3,184,193	
Project Management/Customer Liaison			
Mark Bristol		385,045	
Ayerswood Development		9,360	
Sub-total	-	394,405	394,405
Design, Drafting, Procurement, Testing			
MIG Engineering - Project Services	199,673	199,673	
MIG Engineering - Approved Change Orders	115,135	115,135	
AUE Utility Engineering	474,856	474,855	
TSSA	750	750	
NRG Corp	1,046	-	(1,046) Note 1
Ayerswood Development Corporation	402	402	
Corrosion Protection	3,714	3,714	
Sub-total	795,576	794,529	(1,046)

	IGPC Amount	NRG Amount	Disputed
Environmental			
Stantec Consulting Ltd.	26,329	26,329	
Senes Consultants Ltd.	51,030	51,030	
Canadian Pacific Railway	650	650	
Catfish Creek Conservation Authority	100	.. 100	
Kettle Creek Conservation Authority	500	500	
The Corporation of the County of Elgin	800	-	(800) Note 1
The Township of Malahide	1,160	1,160	
Upper Thames Conservation Authority	800	-	(800) Note 1
The Municipality of Thames Centre	150	150	
Sub-total	81,519	79,919	(1,600)

Regulatory

Ogilvy Renault	Total per IGPC	280,304	
Lenczner Slaght Royce		197,643	Per IGPC \$640,494
Other (could not be identified by IGPC's submission)	160,264		
Motion 2007	127,156	68,725	
Motion 2008	94,852	91,554	
	382,272	638,226	255,954
Aiken & Associates	7,718	7,718	
Harrison Pensa	19,099	25,609	6,510 Note 1
L'Observateur	1,935	1,935	
Martin Malette	292	292	
The London Free Press	7,585	7,585	
Viva Voce Reporting Ltd.	2,195	2,195	
A.S.A.P. Reporting Services	7,476	7,476	
Helix Courier Limited	198	198	
Purolator	498	468	(30) Note 1
Neal, Pallett & Townsend	-	7,369	7,369
EB-2006-0243 Cost Award	6,281	12,562	6,281 Note 1
	53,277	73,407	20,130

Subsequent Invoices

Lenczner Slaght Royce		124,360	124,360
Ogilvy Renault		7,640	7,640
Sub-total	-	132,000	132,000

Survey

FKS Land Surveyors	72,118	72,118	
Sub-total	72,118	72,118	-

Non-Destructive Testing

MIG Engineering Ltd.	211,809	211,809	
Sub-total	211,809	211,809	-

	IGPC Amount	NRG Amount	Disputed
Finance Fees			
Harrison Pensa LLP	29,295	29,295	
Belanger, Cassino & Coulston	1,929	1,929	
Bank of Nova Scotia - Commitment Fee	10,400	10,400	
Societe Generale	6,518	6,518	
Sub-total	48,142	48,142	-
NRG Commissioning	3,528	3,528	
Union Gas Commissioning	3,980	3,980	
Insurance	-	62,000	62,000
	7,508	69,508	62,000
Customer Transfer Station			
Union Aid to Construct	736,000	736,000	
Land - NRG Side	12,105	12,105	
	748,105	748,105	-
Interest	25,000	106,173	81,173
	7,449,764	8,392,779	943,016
	Per IGPC		981,708
	Difference Unclear		(38,692)

Note 1 - these were in dispute at one point but are not referred to in the final submission of IGPC

APPENDIX B

DESCRIPTION: IGPC Ethanol Plant

Costs \$ 8,399,881

Should be NPV calculation per original EBO; incorrect
to calculate based on mid year, per discussions with 2 consultantsNPV of Costs \$8,399,881 8,399,881
NPV of Revenue plus Tax Shield \$4,995,902 4,873,569

Aid To Construct Difference	Rate Base Difference
3,526,312	4,872,180
3,579,814	4,873,569
(53,502)	(1,389)

Aid to Construction \$3,403,979 \$3,526,312

Benefit/Cost Ratio 0.595

Pipeline Costs	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Total
6"	\$ 7,552,127	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 7,552,127
4"	-	-	-	-	-	-	-	-
3"	-	-	-	-	-	-	-	-
2"	-	-	-	-	-	-	-	-
1.25"	-	-	-	-	-	-	-	-
1"	-	-	-	-	-	-	-	-
1/2"	-	-	-	-	-	-	-	-
Total Pipeline Costs	7,552,127	-	-	-	-	-	-	7,552,127
Service Costs	-	-	-	-	-	-	-	-
Meters & Regulators	847,754	-	-	-	-	-	-	847,754
less Class 49 Pipelines	-	-	-	-	-	-	-	-
Class 1 Equipment	8,399,881	-	-	-	-	-	-	8,399,881
Class 49 Equipment	-	-	-	-	-	-	-	-
Project Costs	\$ 8,399,881	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 8,399,881

Tax Shield
PV of tax shield =Class 61
\$ 1,347,932

Formula based on the following
 Tax shield = (UCC x tax rate x CCA rate) (2+discount rate)
 (CCA rate + discount rate) 2x(1+ disc rate)

Customer Additions	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7
Rate Class							
Residential	-	-	-	-	-	-	-
Commercial	-	-	-	-	-	-	-
Industrial - Rate 1	-	-	-	-	-	-	-
IND - 4	-	-	-	-	-	-	-
Seasonal	-	-	-	-	-	-	-
Industrial - Rate 3 - Firm	1	-	-	-	-	-	-
Industrial - Rate 3 - Interruptible	-	-	-	-	-	-	-
(FIRM CD - M ³)	108,188	-	-	-	-	-	-
Total	1	-	-	-	-	-	-

Sales Volumes (m ³)	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7
Rate Class							
Residential	-	-	-	-	-	-	-
Commercial	-	-	-	-	-	-	-
Industrial - Rate 1	-	-	-	-	-	-	-
IND - 4	-	-	-	-	-	-	-
Seasonal	-	-	-	-	-	-	-
Industrial - Rate 3 - Firm	33,416,616	-	-	-	-	-	-
Industrial - Rate 3 - Interruptible	-	-	-	-	-	-	-
Total	33,416,616	-	-	-	-	-	-

Gas Sales Revenues (\$)	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7
Residential	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Commercial	-	-	-	-	-	-	-
Industrial - Rate 1	-	-	-	-	-	-	-
IND - 4	-	-	-	-	-	-	-
Seasonal	-	-	-	-	-	-	-
Industrial - Rate 3 - Firm	1,246,774	1,246,774	1,246,774	1,246,774	1,246,774	1,246,774	1,246,774
Industrial - Rate 3 - Interruptible	-	-	-	-	-	-	-
Total Revenue	1,246,774	1,246,774	1,246,774	1,246,774	1,246,774	1,246,774	1,246,774

Less	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7
M9 Delivery Costs	422,217	422,217	422,217	422,217	422,217	422,217	422,217
O&M Expense	50,000	50,000	50,000	50,000	50,000	50,000	50,000
Capital Tax	23,940	23,940	23,940	23,940	23,940	23,940	23,940
Property Taxes	58,405	58,405	58,405	58,405	58,405	58,405	58,405

Add	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7
Fixed Revenue	334,029	334,029	334,029	334,029	334,029	334,029	334,029

Pre-Tax Revenue	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7
Less: Income Tax	1,026,240	1,026,240	1,026,240	1,026,240	1,026,240	1,026,240	1,026,240
Net Revenue	370,678	370,678	370,678	370,678	370,678	370,678	370,678
Net Revenue mid-period	327,781	327,781	327,781	327,781	327,781	327,781	327,781
Interest Expense	244,601	239,204	233,546	227,613	221,392	214,870	208,030
Depreciation	130,000	130,000	130,000	130,000	130,000	130,000	130,000
	\$ 280,961	\$ 288,358	\$ 292,016	\$ 297,949	\$ 304,170	\$ 310,692	\$ 317,532

655,562

On EBO this was \$24,585 but referenced formula of 00285 x Cost