THE CORPORATION OF THE TOWN OF AYLMER
SUBMISSIONS

Introduction

1. The Corporation of the Town of Aylmer (the "Town") intervened in EB-2012-0406 by letter dated April 9, 2013, and was recognized as an Intervenor in this combined proceeding by Procedural Order #1 dated April 22, 2013, Appendix "B".

2. The sole issue to be addressed in these submissions is Issue 1, as defined in Procedural Order #2 dated May 17, 2013, Appendix "A", as follows:

> **Issue 1 – Is an Order of the Board requiring NRG to provide gas distribution services and gas sales to IGPC to meet its facility expansion and upgrading plans necessary and appropriate?**

3. The Town submits that this question must be answered "Yes".

Relevant Prior Proceedings and Findings by the Board

4. The Town has intervened in a series of proceedings before this Board concerning the ethanol plant facility referred to in Issue #1 (the "Plant"), including the original application under EB-2006-0246 (the "Leave to Construct"), by which NRG was granted the right to construct the natural gas pipeline that serves the Plant (the "Pipeline").

5. The Town has provided evidence before this Board on several occasions describing the project which led to the development of the Plant, and its significance to the economic development of the Town and surrounding communities. That included evidence in the original Leave to Construct, an Affidavit and documentary Exhibits filed in the motion for the Compliance Order issued on June 29, 2007 (since varied as to penalty by the Board), as well as Written Submissions with attachments dated February 27, 2008 filed in response to a Notice of Review issued by the Board on its own motion on February 22, 2008. All these proceedings were held in the Leave to Construct.

6. Although that evidence has never been challenged by NRG, its answers to the Town's interrogatories in this case refused to confirm or update the relevant facts, and denied that the Town has any right to file evidence herein.

7. Accordingly, the Town will rely upon the following findings, already made by this Board, concerning the Plant and the Pipeline.

8. In its Decision and Order granting Leave to Construct dated February 2, 2007, this Board:

a. found that the construction of the Pipeline was necessary to meet the natural gas distribution requirements of the original Plant;[1]

b. held that the interests of NRG and of ratepayers in relation to anticipated risks relating to the project were adequately protected for the following 7-year period by the terms of a Gas Delivery Contract ("GDC") and Pipeline Cost Recovery Agreement("PCRA") approved by the Board at that time, which provided among other things for (1) a $3.8 million capital contribution by IGPC; (2) an irrevocable delivery letter of credit for the entire balance of the Pipeline cost of $5.3 million, to be posted by IGPC and maintained on a declining basis in an amount equal to the net book value of the Pipeline assets; and (3) a security deposit in the amount of 1 months gas supply;[2] and

c. found that this project "is a significant expansion of NRG's facilities and will expand its rate base by approximately 50 per cent".[3]

9. In its Compliance Decision and Order dated June 29, 2007, the Board reaffirmed these findings.[4] It also:

a. held that the Board's powers under s. 42(3) of the *OEB Act* included the powers to enforce the GDC and PCRA, and further to order the execution of certain other documents contemplated by the GDA and PCRA, and required to give timely effect to a multi-party financing of the project;[5]

1 Leave to Construct Decision, p. 1

2 Leave to Construct Decision, pp. 2-3

3 leave to Construct Decision, p. 4

4 Transcript, June 29, 2007, pp. 81-82; Order June 29, 2007

5 Transcript, June 29, 2007, p. 85

b. noted that the financing for this project included approximately $11.9 million from the federal government, $14 million from Ontario, over $45 million from an 840-member co-operative of local farmers and rural community members, in addition to financing from a syndicate of lenders to IGPC; and

c. specifically found that:

> "... various parties to this proceeding, includ[ing] the Town of Aylmer as well as IGPC, have invested substantial sums in the expectation that this contract would proceed and this plant would be built. We are aware, from the main case, that the economic base of the Town of Aylmer is disintegrating, as a result of the problems in the tobacco industry. It was the expectation of all parties as well as the Board's that the parties would proceed expeditiously to develop this facility within the expected timelines."[6]

10. In that context, due to the urgency of the financing, the Board issued an Order under ss. 42(3) and 112.3 of the *OEB Act* that NRG sign the required documents, at the conclusion of the hearing on June 29, 2007.[7]

11. In its Decision dated March 12, 2008, on the Board's own Notice of Review issued February 22, 2008, the Board

a. found that "[t]he overriding principle where a utility is incurring capital costs for an individual customer such as IGPC is that in the event the project fails, the other ratepayers should not be responsible for those capital costs."[8]

b. found, based upon the terms of the Leave to Construct Order and an acknowledgement by NRG, that even if the Plant ceased operation, the Pipeline "could be integrated into the NRG system at a cost of $600,000, that those costs would form part of the ratebase, and that the cost to ratepayers would be insignificant;"[9]

c. further ordered that IGPC could proceed directly to put in place security arrangements with Union to provide for "the full amount of the capital cost" of

6 Transcript, pp. 82 and 86, dated June 29, 2007

7 Transcript p. 86, Order p. 2, last recital, dated June 29, 2007

8 Decision on the Board's own Motion to Review, p. 6

9 Decision on the Board's own Motion to Review, p. 7

Union's investment in this project, and that there was "no need for NRG to enter these discussions;"[10] and

d. again recognized "the importance of this project to the Community", and the substantial financial commitments involved.[11]

12. The above findings sufficiently confirm the Board's recognition of the significance of this project to the economic recovery and development of the Town and surrounding communities. Those findings are supplemented and updated by the unchallenged facts set out in paragraphs 4-6 of IGPC's Pre-filed Evidence,[12] and in paragraph 5 of IGPC's Argument-In-Chief dated November 4, 2013, which are adopted by the Town.

13. Paragraphs 7-8 of that Pre-Filed Evidence also detail some of the additional economic investments and benefits anticipated by the Town and surrounding communities from an expansion of the Plant that is now proposed by IGPC (the "Expansion Plan").

14. There have been numerous other proceedings relating to the project, and the relevant Board findings in them are well summarized in the Argument-in-Chief of IGPC, if it is necessary for the Board to refer to them in relation to Issue #1.

Refusal of IGPC's Request for Service Related to its Expansion Plan

15. By letter of June 18, 2012, IGPC requested a meeting with NRG to discuss gas service for the Expansion Plan. NRG does not dispute that such discussions were required in order to:

a. understand the available unused gas supply capacity of the Pipeline;
b. determine its sufficiency to accommodate the additional loads required to supply the Expansion Plan; and
c. determine what, if any, potential modifications to IGPC's customer station might be required to provide adequate supply.[13]

10 Decision on the Board's own Motion to Review, pp. 6-7

11 Decision on the Board's own Motion to Review, p. 7

12 Marked as Exhibit "A" herein.

13 IGPC's Pre-Filed Evidence, Exhibit A, paras. 59, 60 and 62 and Exhibit C , Tabs 4 and 6

16. It cannot be disputed that NRG's response, by letters dated June 18 and July 9, 2012 effectively refused any such meeting, or discussions, or the provision of any requested information until certain conditions are met.[14]

The Points Raised by Issue #1 and the Town's Position

17. IGPC argues that Issue #1 raises the following substantive points for the Board's determination:

a. Whether NRG's conduct was a denial of service under s. 42(3) of the *OEB Act*?
b. Whether the conditions imposed by NRG are lawful?
c. What are the appropriate form and terms of any remedial Board Order?

18. The Town takes the position that the refusal by NRG to meet and discuss the proposed Expansion Plan is *per se* a denial of service within s. 42(3) of the *OEB Act*, regardless of any detailed arguments as to the substantive validity or otherwise of the conditions purportedly imposed by NRG.

19. The appropriate Order is to require provision of the requested services by NRG, unconditionally, without prejudice to the parties' rights in a further application for an Order relating to the costs incurred, prudently or otherwise, in relation to the provision of gas supply to meet the needs of the Plant Expansion, and the just and reasonable rates to be charged in that regard.

A. Whether NRG's Conduct was a Denial of Service

(1) The Obligation To Provide Service

20. The obligation of a gas distributer to provide ***all*** services for which it holds a monopoly, to ***all*** customers and potential customers in their service area is a fundamental term and condition of the monopoly they enjoy, and of the regulatory compact under which they operate.

21. Subsection 42(3) of the *OEB Act* is the primary expression of that obligation. It is the only method for its effective enforcement. It provides:

14 IGPC's Pre-Filed Evidence, Exhibit C, Tabs 5 and 7

> **42.(3) Upon application, the Board may order a ... gas distributor ... to provide any gas sale ... [or] distribution ... service or cease to provide any gas sale service.**

(2) The Scope And Definition Of "Service"

22. The Town submits that this Board must interpret the term "service" within s. 42(3) broadly, in order to give effect to its fundamental purpose, which is to require the provision of ***all*** services that are within a gas distributor's monopoly, or that are related to the conduct of its monopoly activities to all customers or potential customers. The applicable principle of statutory interpretation is well settled:

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[15]

23. A broad, inclusive approach to the definition of "service" in s. 42(3) is consistent with the plain words used that provision, which on their face include not only the financial aspects of a "sale" of gas, but also the technical or systemic aspects of its "distribution".

24. This approach is necessarily consistent with a purposive analysis of s. 42(3), which begins with the Board's "purposes" for gas regulation as set out in s. 2 of the *OEB Act*. A broad interpretation of the scope of "services" within s. 42(3) is necessary to support, and does directly support, the purposes in paras. #2 ("to protect the interests of consumers with respect to prices and the reliability and quality of gas service"), and #6 ("to promote communication within the gas industry and the education of consumers") within s. 2.

25. Such an approach has already been applied by this Board in its Compliance Decision and Order between these very parties dated June 29, 2007. There, the term "service" for purposes of s. 42(3) was held to include not only the signing by NRG of the specific contracts previously approved by the Board in the original Leave to Construct, but also the signing of other

[15] Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at p. 76, quoted in Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at p. 1, which was adopted by the Supreme Court in, *inter alia*, *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at 41. See also *Bell Express Vu Limited Partnership v. Rex*, [2002] SCC 42 and the cases sited at para. 26. The *Rizzo* case is discussed infra at pp. 10-11.

documents contemplated by those approved contracts, or necessary or incidental to their timely implementation, even in the context of a complex series of financing transactions that involved parties and documents not before the Board on the original Leave to Construct. The Board found that the parties in the approved contracts "specifically contemplated and agreed" that additional documents "would be executed to the benefit" of parties and their lenders. The Board found no basis to conclude the refusal to execute was reasonable, and so applied s. 42(3) to require their execution, relying also upon s. 112.3 of the *OEB Act* with regard to the interim nature of the proceedings and the Order.[16]

(3) The "Services" At Issue In This Case

26. The Town respectfully submits that a similar approach must be taken in this case. Here the "service" alleged is the obligation of a gas distributor to respond to an inquiry, either by an existing customer requesting an expanded use of an existing connection to the gas distributor's system, or by a proposed new customer requesting a new connection. It is respectfully submitted that such response is a "service", and is directly related to the distributer's monopoly activities. As such, it is submitted that the response required must include, at a minimum, the obligation both:

a. to provide relevant information concerning applicable technical specifications or requirements, as well as information concerning all Board-approved rates and charges applicable to the enquiry; and
b. in that context, to engage in substantive, good faith discussion and negotiation of all other technical or financial terms and conditions proposed by either party relating to the request.

27. This interpretation is again consistent with the Board's "purposes" for gas regulation as set out in s. 2 of the *OEB Act*. Responding to customer inquiries about arrangements for new or expanded gas usage directly supports not only the purposes in paras. #2 and #6 of s. 2, cited above, but also that in #3 ("to facilitate rational expansion of transmission and distribution systems"). In this case, it also indirectly supports or is capable of supporting those in para. #5

16 Transcript, p. 86

("to promote ... energy efficiency") and #5.1 ("to facilitate the maintenance of a financially viable gas industry"), by promoting opportunities for the fuller or better use of existing capacity within a gas distributor's system.

28. More fundamentally, as the context in this case clearly highlights, these specific "services" are not simply internal to the "gas industry". Rather, they are absolutely vital to the broader purposes of the entire natural gas system, in supporting the economic development and prosperity of Ontario's communities. Access to Ontario's energy resources is fundamental in this regard. Natural gas supply is vital to attract new business ventures in a number of fields, including grain processing and ethanol production. Communities like Aylmer cannot possibly be successful in identifying, attracting, or promoting new ventures in those fields (and particularly economically significant ones like the Plant Expansion), unless their incumbent gas distributor immediately brings the relevant information into the discussion, and takes an active and supportive role in these projects.

(4) Is The Obligation Or The Service To Be Provided A "Conditional" One

29. The Town respectfully submits an obligation to provide gas distribution and sale services that is enforceable under s. 42(3) is only conditional if the legislature in a relevant Act or Regulation, or if this Board in some other regulatory instrument, has expressly imposed a condition.

30. Subsection 42(3), on its face, is express and unconditional.

31. By contrast, where the legislature intends to make an obligation that is enforceable under s. 42(3) conditional, it does so by express provision in the legislation creating the obligation. So, for example, ss. 42(1) and (2) create obligations of gas transmitters and distributors, respectively, that are "subject to" compliance with other specified legislation and contracts. The obligations thereby recognized inherently include, and only become enforceable upon compliance with, the specified conditions. Similarly, where the Board intends conditions to apply, it expressly imposes such conditions, for example though its power to set "just and reasonable" rates for services. The obligation then only arises upon, or exists subject to, payment at the approved rate.

32. However, unless there is relevant legislation or a Board instrument that creates a condition, the Town respectfully submits that the relevant obligations and service requirements are unconditional. A gas distributor, such as NRG, certainly has no legal authority to create, or impose, or enforce conditions of its own, that serve it own interests, and apply to its own performance of a given monopoly obligation, or provision of a given monolpoly service. It has accepted those obligations, and must provide those services, unconditionally, as a fundamental term of its privileged monopoly position.

33. Gas distributors can of course always ask the legislature to impose new conditions for their benefit, or they can apply to this Board for a just and reasonable rate to compensate them from providing a given service.

34. They cannot, however, simply create or impose conditions of their own, in their own interest, as NRG has purported to do. To do so, or to sanction such actions, would be fundamentally contrary to the essential terms of their monopoly, and the regulatory compact relating to its operation. It would convert the obligation to provide monopoly services into a discretion of the distributor, which would be legally wrong.

(5) Has There Been A Denial Of Service?

35. The Town submits the undisputed evidence here constitutes a denial of the relevant services. NRG's own letters of June 18 and July 9, 2012 assert a discretion to impose conditions which NRG simply does not possess in law. It has not in fact provided the requested services, and asserts a right to continue its refusal

36. Moreover, IGPC has led evidence or relies upon prior findings, from which this Board can only conclude that:

a. the issue of excess capacity of the pipeline to serve a future expansion of the Plant was specifically contemplated and provided for at the time of the original Leave to Construct;[17]

17 IGPC's Pre-Filed Evidence, Exhibit A, para. 60

b. IGPC has already protected ratepayers of both NRG and Union from the entire capital cost of constructing the Pipeline, including any excess capacity it may now have; [18]
c. it is therefore entirely in NRG's own interests to earn a return on any such unused capacity of the Pipeline, and to recover any attendant, prudently incurred costs through new arrangements, to be entered into with IGPC and, if necessary, approved by this Board; and
d. as such, there was and is no basis for the Board to find that NRG's refusal to provide the services requested was reasonable.

B. The Appropriate Order In This Case

37. The Town is sympathetic to, and supportive of, the many other points argued by IGPC in its Argument in Chief.

38. The Town has previously argued, without success, that the same and other similar misconduct of NRG disentitles it from continuing as the incumbent monopoly gas supplier in the Town's area.

39. Based upon that same conduct, the Town has also joined, without success, in an appeal to the Province to provide this Board with additional supervisory powers to curtail NRG's actions and enforce standards of conduct of the kind proposed by IGPC.

40. However, the Town believes that what is now essential is that this Board assert and apply those powers that it unquestionably does have, at a minimum, as follows:

a. to Order NRG to provide to IGPC all required financial and technical information that is related to the provision of gas supply to the proposed Plant Expansion;
b. to Order NRG to offer the supply of gas to IGPC to the full extent of any existing unused capacity of the Pipeline, subject only to (1) a requirement that IGPC hold other ratepayers harmless for the full capital cost of any required modifications to IGPC's customer station; and (2) payment by IGPC of an interim security deposit

18 Leave to Construct Decision, pp. 2-3 and 4

in the amount of 1 months additional gas supply, at the currently approved rates for supply of the existing Plant; and

c. to reserve all other issues relating to the costs incurred, prudently or otherwise, in relation to the provision of gas supply to meet the needs of the Plant Expansion, and the rates to be charged in that regard, to a future rate hearing.

41. The implementation of this Plant Expansion ought to have commenced on an expedited basis some 16 months ago. The residents and ratepayers of the Town of Aylmer and surrounding communities, and many other stakeholders of the project, have been deprived of the anticipated benefits of this needed expansion for too long.

42. On this aspect of the combined proceeding, a cost sanction, refusing NRG recovery of its costs from ratepayers and requiring payment by NRG's shareholders is warranted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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AND TO: Integrated Grain Processors Co-operative Inc.

AND TO: Intervenors