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December 15, 2014

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Our Matter Number: 1144234

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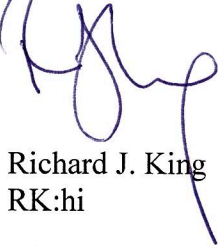
Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street  
27th Floor, P.O. Box 2319  
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Natural Resource Gas Limited**  
**OEB File No. EB-2014-0291**

Further to Procedural Order No. 1 in the above-noted proceeding, enclosed please find the Argument-In-Chief of Natural Resource Gas Limited.

Yours very truly,



Richard J. King  
RK:hi

Enclosure

c: All Parties to EB-2013-0081/EB-2012-0406

**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** a review of the capital contribution costs paid by Integrated Grain Processors Co-operative Inc. to Natural Resource Gas Limited pursuant to sections 19 and 36 of the Act;

**AND IN THE MATTER OF** a motion to review by Natural Resource Gas Limited.

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**NATURAL RESOURCE GAS LIMITED  
ARGUMENT-IN-CHIEF**

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December 15, 2014

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## **PART I. INTRODUCTION**

1. In the EB-2013-0081/EB-2012-0406 Decision, the Board made a determination on the total capital costs of the pipeline constructed by Natural Resource Gas Limited (“NRG”) to serve the Integrated Grain Processors Co-operative Inc. (“IGPC”) ethanol plant in Aylmer.
2. The Board in its Decision awarded IGPC \$150,000 in additional costs that IGPC claimed were incurred to maintain an unadjusted letter of credit (corresponding to the value of the pipeline in rate base) for five years.
3. NRG has sought to review the Board’s determination with respect to the \$150,000. The Board assigned docket number EB-2014-0291 to this review motion.
4. NRG submits that the Board erred in its determination to award \$150,000 to IGPC for additional costs to maintain an unadjusted letter of credit for the following reasons:
  - (a) the amount awarded to IGPC is not supported by any evidence;
  - (b) the amount awarded is excessive, to the point of being punitive; and,
  - (c) the quantum claimed by IGPC, if accurate, should be partially the responsibility of IGPC.

## **PART II. SUBMISSIONS**

### **A. The amount awarded is not supported by any evidence**

5. The Board ordered NRG to pay \$150,000 to IGPC “representing the cost of maintaining an unadjusted letter of credit for five years.” The Board acknowledged that “no

substantiating evidence was provided concerning the estimate of \$150,000, but neither did NRG dispute it.”

6. With respect, NRG cannot be said to have “not disputed” the \$150,000 because NRG never had the *opportunity* to dispute the amount suggested by IGPC. IGPC, in its pre-filed evidence of June 3, 2013, indicated that it was “in the process of developing a detailed breakdown of the [estimated \$150,000 in] additional costs incurred and will provide same in the near future.”<sup>1</sup> IGPC never provided any detailed breakdown, or any evidence whatsoever, relating to these costs. Consequently, NRG never had any ability to consider these additional costs, let alone *dispute* them.

7. As discussed above, IGPC has not provided a “detailed breakdown”, or any evidence, regarding its claim for \$150,000 in additional costs. The evidentiary record remains unchanged. In Procedural Order No. 1 of this proceeding (issued December 4, 2014), the Board stated (at page 2):

The Board will refer to the evidence filed in EB-2013-0081/EB-2012-0406 and invite parties to make submissions on this matter. The Board also reminds parties not to file or refer to any new evidence that was not on the evidentiary record in the EB-2013-0081/EB-2012-0406 proceeding.

8. Clearly IGPC bears the burden of demonstrating and justifying these costs, and NRG submits that IGPC has not discharged this burden. Importantly, IGPC has not demonstrated that its claim for \$150,000 in additional costs have even been incurred. The Board, in denying NRG’s claimed incremental insurance costs in this case, on the basis of no evidence,

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<sup>1</sup> Pre-Filed Evidence of Integrated Grain Processors Co-Operative Inc. (June 3, 2013) at para. 152: [[http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/398346/view/IGPC\\_Prefiled%20Evid\\_20130603.PDF](http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/398346/view/IGPC_Prefiled%20Evid_20130603.PDF)]

stated that: “[This] decision is guided by ratemaking principles for just and reasonable rates, one of which is that there should be no recovery for costs that have not been incurred.”<sup>2</sup> NRG submits that similar reasoning should be applied to IGPC’s claim for \$150,000 in additional costs for maintaining an unadjusted letter of credit.

9. Indeed, while IGPC has not provided a “detailed breakdown” or other evidence regarding its claim for \$150,000 in additional costs, NRG was required to provide an unprecedented amount of evidence to justify its costs spent on the IGPC , including, *inter alia*: third party invoices to justify equipment purchases; invoices from NRG’s legal counsel (with detailed docket entries) in order to justify legal costs; time dockets for NRG’s staff; spreadsheets showing interest calculations; etc. The evidence provided to the Board to justify NRG’s costs amounted to hundreds of pages. Where NRG could not provide this level of detail to justify its expenditures (as in the case of the incremental insurance claimed by NRG), the Board denied NRG’s claim on the basis of lack of evidence.

10. NRG submits that the same burden be placed on IGPC. The Board cannot hold NRG to one evidentiary standard, and IGPC to another. The Board cannot require NRG to back up every penny spent with documentary evidence, but award \$150,000 to IGPC without having any evidence whatsoever, and apparently relying only on a bald assertion by IGPC in its written submissions. The Board could not possibly determine whether IGPC’s additional costs were actually incurred.

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<sup>2</sup> OEB Decision and Order, EB-2012-0406/EB-2013-0081, February 27, 2014, p.21.

**B. The unsupported amount is excessive to the point of being punitive**

11. The inappropriateness of awarding \$150,000 with absolutely no evidentiary basis is exacerbated because, in NRG's respectful submission, the amount of \$150,000 is excessive. As noted in its original submission giving rise to this motion (March 19, 2014), the typical cost of carrying a letter of credit is in the range of 1% per year.

12. Applying a rate of 1% on the difference between the adjusted and unadjusted amount for a period of 19.5 months (not five years, for reasons set out in the next section of this Argument-in-Chief) would mean that IGPC's costs of carrying an unadjusted letter of credit should be approximately \$20,000.<sup>3</sup>

13. In order to arrive at an amount of \$150,000, IGPC would have to be paying a rate that is more akin to a loan rate. But we are not talking about a loan, but rather a letter of credit.

14. The effect of awarding an unsubstantiated lump-sum that is far in excess of anything plausible is to "punish" NRG.

15. The tone of the Board's decision confirms this. Although the issue before the Board in this proceeding was to determine the quantum of financial assurance required, the Board went one step further and awarded IGPC \$150,000 purportedly due to "NRG's refusal to enable the revision of the letter of credit on an annual basis which was in clear contravention of section 7.6 of the PCRA." NRG respectfully submits that this award, without any evidence

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<sup>3</sup> The following calculation was provided in NRG's March 19, 2014 submission on this issue:  $(\$5,214,000 - \$3,978,000) \times 1\%/12 \text{ months} \times 19.5 \text{ months} = \$20,085$ .

provided by IGPC and in an amount greater than any plausible actual amount incurred by IGPC, amounts to a punitive award issued by the Board against NRG.

16. NRG respectfully submits that the Board has no jurisdiction to issue punitive awards in these circumstances. Moreover, punitive damages in breach of contract claims are exceedingly rare. They are an extraordinary remedy. For breach of contract damages awards which this amounts to, compensatory damages provide adequate compensation.<sup>4</sup>

17. As a result, any amount that the Board determines should be awarded to IGPC must be devoid of a punitive element, and limited to an amount representing IGPC's actual reasonable costs of carrying an unadjusted letter of credit for a 19.5 month period, which NRG submits to be approximately \$20,000, and not \$150,000.

**C. Even if IGPC incurred \$150,000 in costs, IGPC must be partially responsible**

18. Even if IGPC did in fact incur \$150,000 in additional costs for maintaining an unadjusted letter of credit, IGPC bears responsibility for some of those costs, for the following reasons:

- (a) The appropriate time period for calculating damages is 19.5 months, not five years.
- (b) The reasonable expectation of damages would be in the nature of \$20,085 (a typical letter of credit interest rate over a 19.5 month period, per footnote 2 above).

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<sup>4</sup> Waddams, S.M., *The Law of Contracts* (5<sup>th</sup> ed.), (Toronto: Canada Law Book Inc., 2005), p.538.

- (c) If IGPC did pay a loan rate as opposed to a letter of credit rate, it must be because IGPC is either poorly managed and/or is such a risky economic venture that it must pay extraordinary rates to maintain a standard letter of credit. NRG should not be held responsible for any costs caused by these factors.

19. The timing of events relating to IGPC's request to reduce the letter of credit is important in calculating the proper amount representing IGPC's additional carrying costs. The Board's finding that IGPC was forced to maintain an unadjusted letter of credit for a period of five years is not borne out by the evidence. IGPC first requested NRG's acceptance that the letter of credit be amended and reduced in a letter dated March 14, 2012.<sup>5</sup> NRG, through its counsel, advised IGPC's counsel on October 28, 2013 that NRG was ready to exchange the new letters of credit with the letters of credit held by NRG.<sup>6</sup> Consequently, NRG submits that the appropriate timeframe forming the basis of any obligation by NRG to compensate IGPC for its additional carrying costs should be from March 12, 2012 to October 28, 2013, or a period of 19.5 months (not five years).

20. As noted above, when such costs are calculated at a typical letter of credit interest rate of 1% over a 19.5 month period, then the additional costs incurred by IGPC should be in the range of \$20,000.

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<sup>5</sup> Correspondence from D. Blair (IGPC) to J. Howley (NRG), Re: Amendment No. 1 (March 14, 2012), Pre-Filed Evidence of IGPC (June 3, 2013), p. 151 of 343:  
<http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/398346/view/>

<sup>6</sup> Correspondence from L. Thacker to S. Stoll (October 28, 2013):  
[\[http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/415131/view/NRG\\_Corresp\\_IGPC\\_20131028.PDF\]](http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/415131/view/NRG_Corresp_IGPC_20131028.PDF)

21. If IGPC did pay a loan rate as opposed to a letter of credit rate, it must be because IGPC is either poorly managed and/or is such a risky economic venture that it must pay extraordinary rates to maintain a standard letter of credit.

22. It is well-developed law that awards for breach of contract should be limited to those amounts that “may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”<sup>7</sup>

23. The amount of damages being claimed by IGPC (\$150,000) are not reasonable, and could not have been foreseeable by NRG. If the quantum claimed is in fact what IGPC spent to maintain the unadjusted letter of credit, then it is clear that other factors were at play. Either IGPC is poorly managed and did not know that letter of credit rates are nowhere near loan rates, or they are so financially unstable that a financial institution required special letter of credit rates. Either way, the remoteness of these factors suggests that NRG not be held responsible.

#### **D. Conclusion and costs**

24. NRG respectfully requests that the Board revise the additional costs owed to NRG as a result of having to maintain an unadjusted letter of credit from \$150,000 to \$20,000.

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<sup>7</sup> *Hadley v. Baxendale* (1854), 9 Ex. 341.

25. NRG further requests that it be awarded its costs to participate in this proceeding, in accordance with the Board's authority under section 30 of the *Ontario Energy Board Act, 1998*.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

December 15, 2014



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Richard J. King – Osler, Hoskin & Harcourt LLP