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March 19, 2014

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Our Matter Number: 1144223

**SENT BY COURIER and ELECTRONIC MAIL
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pro/3/14
Ms. Kirsten Walli BoardSec @ontarioenergyboard.ca
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th Floor, P.O. Box 2319
Toronto, ON M4P 1E4

RECEIVED
MAR 20 2014
ONTARIO ENERGY BOARD

Dear Ms. Walli:

**Natural Resource Gas Limited ("NRG") submission concerning amounts to be paid
(EB-2012-0406/EB-2013-0081)**

Please find enclosed NRG's submission on the calculation of amounts to be paid by NRG pursuant to Decision and Order of the Board dated February 27, 2014.

Yours very truly,

Richard J. King
for: Richard J. King
RK:pgw

Enclosures (1)

c: T. Graat/ L. O'Meara (NRG)
L. Thacker (Co-counsel to NRG)
P. Welsh (Osler)
S. Stoll/D. O'Leary (Counsel to IGPC)

EB - 2013 - 0081

CEB FORM	
File No:	<i>8</i>
Panel	
Licensing	
Other	
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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

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*.

**NATURAL RESOURCE GAS LIMITED
SUBMISSION ON CALCULATIONS**

March 19, 2014

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Co-Counsel for Natural Resource Gas Limited

PART I. INTRODUCTION

1. On February 27, 2014, the Ontario Energy Board (the “Board”) issued its Decision and Order in the combined proceedings (EB-2012-0406 and EB-2013-0081) regarding:

- (a) Integrated Grain Processors Cooperative Inc. (“IGPC”)’s request for an order requiring Natural Resource Gas Limited (“NRG”) to provide gas and distribution services and gas sales for IGPC’s alleged facility expansion and upgrading plans (EB-2012-0406); and
- (b) the Board’s review of the capital costs paid by IGPC to NRG in respect of the pipeline constructed for IGPC’s ethanol plant (EB-2013-0081) (the “Decision and Order”).

2. In the Decision and Order, the Board requested that NRG prepare “a table reflecting the Board’s findings in this Decision concerning all amounts to be paid by NRG to IGPC, including interest, together with all supporting calculations.” This table and supporting calculations can be found as Schedule “A” to these submissions.

3. In preparing the table of amounts to be paid to IGPC, NRG has identified certain statements or conclusions of the Board that appear to conflict with the evidence in the record before the Board, and are therefore in need of correction:

- (a) The Decision and Order referred to an amount of **\$197,643** in legal fees from a Lenczner Slaght invoice dated September 22, 2010. The actual amount in that invoice was \$23,762.92, and was included in the \$132,000 for contingency;

- (b) The Decision and Order described the legal costs claimed by NRG for the 2007 Emergency Motion and the 2008 Letter of Credit Motion as **\$94,800** and **\$82,554** respectively. The correct amounts updated in the evidentiary record were \$68,725 and \$91,554 respectively; and,
- (c) The **\$150,000** amount awarded to IGPC representing the cost of maintaining an unadjusted letter of credit for five years, cannot be supported by any evidence and, NRG respectfully submits,
 - (i) is excessive;
 - (ii) is contrary to the Board's own reasoning in the Decision and Order;
 - (iii) is beyond the scope of the Issues previously determined by the Board; and,
 - (iv) is unfairly punitive of NRG.

4. NRG submits that these corrections can be made by the Board through the process outlined in the Decision and Order. Both IGPC and Board Staff have an opportunity to comment on these submissions pursuant to the Decision and Order, and NRG has the opportunity to reply to any issues raised by IGPC or Board Staff.

5. If the Board has concerns about its jurisdiction to consider the need for corrections, NRG submits that the Board should "correct a typographical error, error of calculation or similar error" pursuant to its powers under Rule 43.01 of the Board's *Rules of Practice and Procedure* (the "Rules"). In the alternative, NRG requests that these submissions

be treated as a Notice of Motion requesting the Board to review and vary the Decision and Order pursuant to Rules 42.01 and 44.01 on the grounds of:

- (a) Error in fact;
- (b) New facts have arisen; and,
- (c) Such further and other grounds as counsel may advise and the Board may permit.

PART II. SUBMISSIONS

A. **The account from Lenczner Slaght dated September 22, 2010 is for \$23,762.92 and not \$197,643**

6. In the Decision and Order, the Board excluded “an account of Lenczner Slaght dated September 22, 2010 for \$197,643” and referred to Appendix A of NRG’s Reply Submission dated November 14, 2013 (“Appendix A”).¹ The Board also indicated that “NRG did not dispute IGPC’s position on this account.” However, that September 22, 2010 account is for \$23,762.92 and not \$197,643.00.

7. NRG acknowledges that there is a line item in Appendix A for “Lenczner Slaght Royce” in the amount of 197,643, however, this amount is unrelated to the September 22, 2010 invoice and it is not the amount contested by IGPC.

8. In IGPC’s Argument-in-Chief submissions, it specifically contested a Lenczner Slaght account of September 22, 2010 for \$23,762.92.² Further, NRG filed a copy of the

¹ NRG Reply Submissions (November 14, 2013):

http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/416858/view/NRG_Reply_SU_B_20131114.PDF

² IGPC Argument-in-Chief (November 7, 2013) at paras. 46-47.

September 22, 2010 Lenczner Slaght invoice with the Board on July 8, 2013 in an amended response to certain interrogatories by IGPC.³ That invoice shows an account of \$23,762.92. This July 8 letter also confirmed that the \$23,762.92 was included in the \$132,000 contingency amount, excluding HST.

9. NRG submits that the correct amount relating to the September 22, 2010 invoice is \$23,762.92 and not \$197,643. Moreover, the amount of \$23,762.92 (less HST) was included in NRG's \$132,000 contingency amount, and therefore is not a separate and distinct amount outside the Board's consideration of the contingency calculation of \$132,000.

10. The proper amount payable by NRG to IGPC for the contingency amount is \$132,000 for legal costs categorized as contingency costs.

11. NRG respectfully requests the Board to correct this error.

B. NRG's legal costs associated with the 2007 Emergency Motion and 2008 Letter of Credit Motion are \$68,725 and \$91,554, respectively, rather than \$94,800 and \$82,554

12. In the Decision and Order, the Board disallowed legal costs incurred by NRG relating to the 2007 Emergency Motion and the 2008 Letter of Credit Motion. Curiously, the Board noted that "the legal costs claimed by NRG were \$94,800 for the [2007] Emergency Motion and \$82,554 for the [2008] Letter of Credit Motion." These amounts are not correct.

³ Amended Interrogatory Response (July 8, 2013):

http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/402575/view/NRG_IRR_Revise_20130708.PDF

13. As far as NRG can tell, the Board selected these amounts based on the Board Staff Submission of November 6, 2013.⁴ However, in identifying these amounts, the Board Staff referred only to NRG's Evidence of June 3, 2013.⁵

14. NRG, in its Written Submissions of November 7, 2013⁶ and its Reply Submissions of November 14, 2013,⁷ corrected these amounts. Specifically, the costs associated with the 2007 Emergency Motion are \$68,725⁸ and the costs associated with the 2008 Letter of Credit Motion are \$91,554.⁹

15. NRG respectfully requests the Board to correct these errors.

⁴ Board Staff Submission (November 6, 2013) at p. 5:

[http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/415889/view/BStaff_Sub_NRG-IGPC_20131106.PDF]

⁵ *Supra* note 4. See also Evidence of Natural Resource Gas Limited (June 3, 2013) at p. 14:

[http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/398381/view/NRG_Evd_20130603.PDF]

⁶ Written Submissions of Natural Resource Gas Limited (November 7, 2013) at para. 40:

[http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/416425/view/NRG_sub_NRG-IGPC_20131107.PDF]

⁷ Reply Submissions of Natural Resource Gas Limited (November 14, 2013) at para. 16:

[http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/416855/view/NRG_Reply_SUB_20131114.PDF]

⁸ NRG provided information regarding these amounts in EB-2010-0018. More specifically, NRG advised that its legal fees payable to Ogilvy Renault for the 2007 Emergency Motion were **\$16,000** (see EB-2010-0018, Undertaking Responses (September 8, 2010) to J-1.9 at page 9 of 17:

[http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/213413/view/NRG_EX_J1.1_20100908.PDF]) and **\$52,725** to Lenczner Slaght (see EB-2010-0018, Response to Interrogatories from Integrated Grain Processors Co-Operative (May 17, 2010), at Exhibit I, Tab 4, Page 19 of 86:

[http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/194338/view/NRG_IRR_IGPC_20100517.PDF]). **\$16,000 (+) \$52,725 = \$68,725.**

⁹ NRG advised that its legal fees for the 2008 Letter of Credit Motion were **\$9000** for Ogilvy Renault LLP (see EB-2010-0018, Undertaking Responses (September 8, 2010) to J-1.9 at page 9 of 17, *supra* note 8) and **\$82,554** for Lenczner Slaght (see EB-2010-0018, Outstanding Undertaking Responses (September 24, 2010) to J-1.7 at page 7 of 17:

[http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/216399/view/NRG_Ex_J1J2J3_20100924.PDF] and also EB-2010-0018, Response to Interrogatories from Integrated Grain Processors Co-Operative (May 17, 2010), at Exhibit I, Tab 4, Page 19 of 86, *supra* note 8. **\$9000 (+) \$82,554 = \$91,554.**

C. **The amount of \$150,000 representing the cost of maintaining an unadjusted letter of credit for five years is inappropriate because it is not supported by any evidence, is excessive, is outside the scope of the Issues previously determined by the Board and is unduly punitive**

(a) *Awarding an amount not supported by any evidence is contrary to the Board's reasoning in the Decision and Order*

16. 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.”

17. 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.”¹⁰ IGPC never provided any detailed breakdown, or any evidence whatsoever, relating to the purported additional costs. Consequently, NRG never had any ability to consider these additional costs, let alone *dispute* them. In addition, as noted below it was NRG’s position that the \$150,000 was not part of the current hearing because it is outside the scope of the Issues determined by the Board.

18. In the Decision and Order, the Board disallowed certain incremental insurance costs incurred by NRG on the basis that there was no evidence that NRG incurred these costs. The Board explained that this “decision is guided by ratemaking principles for just and

¹⁰ 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]

reasonable rates, one of which is that there should be no recovery for costs that have not been incurred.” 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, such that these costs should be denied due to the absolute absence of any evidentiary basis whatsoever.

(b) ***The unsupported amount is excessive and, if actually incurred, should properly amount to between \$20,000 and \$40,000***

19. 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. It is NRG’s understanding that the typical cost of carrying a letter of credit is in the range of 1% per year, with an absolute ceiling of 2%. The fee would be based only on the difference between the adjusted and unadjusted amount. That would mean that IGPC’s costs would be in the nature of \$20,000 to \$40,000, not \$150,000.

20. The Board, without having any evidence whatsoever, and apparently relying only on a bald assertion by IGPC in its written submissions, could not possibly determine whether IGPC’s additional costs were actually incurred.

21. The timing of events relating to IGPC’s request to reduce the letter of credit is also 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, 2012.¹¹ NRG, through its

¹¹ 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/>

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.¹² 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.

22. In light of the market range of between 1% and 2% over a period of 19.5 months, a more reasonable amount representing the cost of maintaining an unadjusted letter of credit is between \$20,085.00 and \$40,170.00.¹³

(c) *An award for costs associated with maintaining an unadjusted letter of credit is beyond the scope of the Issues identified by the Board*

23. In addition to having no evidentiary basis whatsoever and being an excessive amount, the award of \$150,000 representing costs associated with maintaining an unadjusted letter of credit is beyond the scope of the Issues determined by the Board. In Procedural Order Number 2 (May 17, 2013), the Board expanded the scope of the proceeding to include a consideration of the reasonableness of the financial assurance (letter of credit) by changing Issue 3 from "Are the capital contribution amounts paid to NRG by IGPC for the existing NRG facilities serving IGPC reasonable?" to "Are the capital contribution amounts and the financial assurance provided to NRG by IGPC for the existing NRG facilities serving IGPC

¹² 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]

¹³ $(\$5,214,000 - \$3,978,000) \times 1\% / 12 \text{ months} \times 19.5 \text{ months} = \$20,085.00$, or at 2%, $(\$1,236,000) \times 2\% / 12 \text{ months} \times 19.5 \text{ months} = \$40,170.00$

reasonable?”¹⁴ The Board’s rationale for including the “reasonableness of the letter of credit” in Issue 3 was that IGPC had raised issues relating to the *amount of the assurance*:

The Board has revised this Issue to include IGPC’s suggestion to cover the letter of credit provided by IGPC to NRG. However, the Board rejects NRG’s submission to include a discussion of IGPC’s financial condition and viability. Financial assurances such as letters of credit are required to protect against any financial issues faced by IGPC. IGPC has not objected to the provision of the letter of credit but has raised issues with respect to calculating the amount of the financial assurance and reducing its value over time.¹⁵

24. Therefore, while the appropriateness of adjusting or not adjusting the *amount* of the letter of credit was a live issue before the Board, the expenses *related to* the financial assurance were not an issue properly before the Board. NRG respectfully submits that the Board should correct this jurisdictional error by striking the award for costs associated with maintaining an unadjusted letter of credit in its entirety.

(d) *An award of costs that is unsupported by the evidence, is excessive, and is beyond the scope of the Issues identified by the Board is punitive in its effect*

25. NRG respectfully requests that the Board reconsider the award of \$150,000 representing the costs of maintaining an unadjusted letter of credit because the effect of awarding an unsubstantiated lump-sum amount is to “punish” NRG.

26. The primary issue relating to the letter of credit was whether or not the amount should be adjusted. In determining the answer to this question, the Board performed the function of interpreting a commercial contract, and concluded that the letter of credit should in fact be adjusted. However, the Board went one step further and awarded IGPC \$150,000 purportedly

¹⁴ Procedural Order No. 2 (May 17, 2013):
[\[http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/396867/view/po2_IGPC_20130517.PDF\]](http://www.rds.ontarioenergyboard.ca/webdrawer/webdrawer.dll/webdrawer/rec/396867/view/po2_IGPC_20130517.PDF)

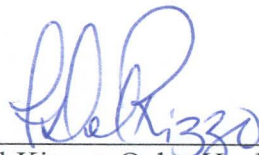
¹⁵ *Supra* note 14 at page 3 [emphasis added].

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 provided by IGPC, is not a proper exercise of the Board’s jurisdiction to set “just and reasonable” rates but rather is a lump-sum punitive award issued by the Board against NRG.

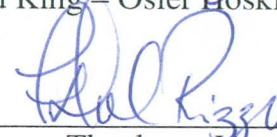
27. NRG respectfully submits that this award is beyond the scope of the Board’s Issues List, beyond the Board’s rate-making jurisdiction, and also reviewable for lack of any evidentiary basis. NRG requests that the Board will reconsider this issue and strike the amount in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 19, 2014



for: Richard King – Osler Hoskin & Harcourt LLP



for: Lawrence Thacker – Lenczner Slaght LLP

Schedule A

Amount Owing to IGPC per OEB Decision:

Legal Costs	
- 2007 Motion	68,725
- 2008 Motion	91,554
- Contingency	132,000
NRG Staff Costs	385,045
Interest	18,671
Insurance	62,000
	<hr/>
	757,995
Interest (4 years)	124,634
Letter of Credit carrying cost	150,000
	<hr/>
	1,032,629
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NATURAL RESOURCE GAS LIMITED
IGPC Interest on Disallowed Items in Dispute

124,634.48

Date	Days	Total	Interest Rate	Interest	Cumulative Interest
1-Jan-10		757,995.00	3.25%		
1-Jul-10	180	770,143.69	3.50%	12,148.69	12,148.69
1-Aug-10	31	772,433.02	3.75%	2,289.33	14,438.02
1-Oct-10	154	784,654.39	4.00%	12,221.37	26,659.39
1-Jan-11	365	816,040.57	4.00%	31,386.18	58,045.57
1-Jan-12	365	848,682.19	4.00%	32,641.62	90,687.19
1-Jan-13	365	882,629.48	4.00%	33,947.29	124,634.48