



**EB-2014-0291**

**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 hearing on the Board's own  
motion.

**BEFORE:** Christine Long  
Presiding Member

Allison Duff  
Board Member

**DECISION AND ORDER**  
**May 7, 2015**

Natural Resource Gas Limited (NRG) is a privately owned utility regulated by the Ontario Energy Board (OEB) that sells and distributes natural gas within southern Ontario to approximately 7,000 customers. In 2008, NRG built a dedicated pipeline to serve the Integrated Grain Processors Co-operative Inc. (IGPC) ethanol plant after receiving leave to construct from the OEB (the Pipeline).

In a decision dated February 27, 2014 (the Original Decision)<sup>1</sup>, the OEB awarded IGPC \$150,000 for additional costs related to a letter of credit for the Pipeline. NRG wrote to

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<sup>1</sup> EB-2012-0406/EB-2013-0081 Decision and Order dated February 27, 2014

the OEB asking it to review this award. The OEB decided to commence a review of the Original Decision by way of a motion to review (the Motion).

## Background

The Pipeline required a capital contribution that was paid by IGPC to NRG. Under the terms of the Pipeline Cost Recovery Agreement (PCRA) between NRG and IGPC, IGPC was required to post a letter of credit matching the capital cost of the pipeline minus the capital contribution. The PCRA specified that the value of the letter of credit would be lowered every year to account for the depreciating value of the pipeline.

IGPC disputed some of the capital costs for the Pipeline identified by NRG and brought the issue before the OEB (the Original Proceeding)<sup>2</sup>. In that decision, the OEB determined the capital costs of the Pipeline for ratemaking purposes, adjusted the capital contribution from IGPC and the letter of credit amount accordingly. However, NRG did not adjust the letter of credit from 2008 to 2013.

IGPC claimed that it had to incur additional costs of approximately \$150,000 to maintain the unadjusted letter of credit for five years<sup>3</sup>. In the Original Decision, the OEB awarded IGPC \$150,000, to be paid by NRG, for the additional costs of maintaining the unadjusted letter of credit.

After receiving the Original Decision, NRG filed a letter asking that the OEB reverse its Original Decision regarding the \$150,000 award to IGPC. NRG claimed that IGPC had not provided a detailed breakdown of the \$150,000 in additional costs and that the OEB did not have the evidentiary basis to make its finding.

The OEB decided that revisiting the \$150,000 award to IGPC would amount to a substantive change. Revisiting the dollar amount of the award could not be considered a typographical error, error of calculation or similar error contemplated by Rule 41.02 of the Board's *Rules of Practice and Procedure*. As a result, the OEB determined that it would re-hear the issue by way of a motion to review<sup>4</sup>. The OEB accepted all intervenors and adopted the evidence filed in the Original Proceeding. The Motion was

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<sup>2</sup> EB-2012-0406/EB-2013-0081

<sup>3</sup> IGPC Pre-filed Evidence EB-2013-0081/EB-2012-0406, June 3, 2013, paragraph 152

<sup>4</sup> EB-2014-0291 Procedural Order No. 1

heard in writing and included argument-in-chief by NRG, submissions by parties and reply submission by NRG. The OEB indicated that submissions were not to include or refer to any new evidence that was not part of the evidentiary record of the Original Proceeding.

### **Motion to Review the \$150,000 award**

NRG submitted that the \$150,000 award to IGPC was not supported by any evidence, was excessive to the point of being punitive and the cost was partially the responsibility of IGPC. NRG provided a calculation, based on a 1% interest rate for 19.5 months, and submitted that IGPC's carrying costs should have been approximately \$20,000.

OEB staff submitted there was no doubt that IGPC had to incur some costs to maintain the unadjusted letter of credit. OEB staff did not agree with the \$20,000 calculation but submitted that the award be reduced to \$81,958 based on a 1.5% interest rate for 38 months. OEB staff indicated that the letter of credit was not a significant issue in the Original Proceeding, perhaps the reason why NRG did not counter IGPC's \$150,000 estimate during that proceeding.

IGPC submitted that the OEB should not alter its Original Decision regarding the \$150,000 award. According to IGPC, NRG did not object to the requested costs and OEB staff did not question the reasonableness of the \$150,000 claim in the Original Proceeding yet both parties had ample opportunity to test the evidence and make submissions. IGPC submitted that NRG's motion was simply an attempt to re-litigate a decision which it did not like.

In reply argument, NRG dismissed the claim that it had ample opportunity to test the evidence in the Original Proceeding. NRG submitted that IGPC never provided a detailed breakdown of the incurred costs or any additional evidence. NRG submitted that IGPC had abandoned its position regarding the cost of maintaining letter of credit because it did not provide any additional evidence to support its \$150,000 claim.

### **Board Findings**

The Board has considered the submissions of all parties and has determined that the Original Decision stands. The Board will not vary the \$150,000 award.

Rule 42.01 of the Board's *Rules of Practice and Procedure* provides the following grounds for a motion to review: an error in fact, change in circumstances, new facts

which have arisen or facts not in evidence that could not have been discovered by reasonable diligence at the time. Although this list is not exhaustive, the Board regards it as a good guide to the types of matters that are generally suitable for a motion to review. A motion to review should not be viewed as an opportunity to simply re-argue a case.

The Board has determined that none of the criteria established in Rule 42.01 have been met. The Board finds that the calculations provided by NRG and OEB staff could have been provided or discovered by reasonable diligence in the original proceeding. There was a full discovery process in the Original Proceeding, and a motion to review is not meant to be an opportunity to ask questions on, or make submissions on, issues that could have been addressed in the first instance. If NRG had concerns about IGPC's claimed costs of \$150,000, the appropriate time to pursue those concerns was in the Original Proceeding. Instead, IGPC's evidence (i.e. its claim that it had incurred costs of \$150,000) went unchallenged. The Board can dismiss the motion for this reason alone.

The Board has also reviewed the evidence in the Original Proceeding. The \$150,000 estimate of "additional costs" appears to have included both financing and legal costs, not just the carrying costs for the letter of credit. IGPC indicates it incurred "legal and other costs" in its interrogatory response #2 filed on October 28, 2013 and filed copies of letters, which in turn referred to telephone conversations, between IGPC's lawyer and NRG<sup>5</sup>. Although proposed award calculations were provided in the submissions of NRG and OEB staff, those calculations relate only to financing costs for carrying the letter of credit, not the legal costs of IGPC trying to resolve the issue with NRG.

Further, this panel does not find merit in NRG's comparison of the \$150,000 award to the insurance costs claimed by NRG for the capital cost of the Pipeline. The Original Decision disallowed the recovery of insurance costs as the Board was not convinced that any additional insurance costs had been incurred. In contrast, the Board had no doubt that IGPC had incurred additional costs to maintain the unadjusted letter of credit for 5 years.

### **Costs of Proceeding**

In its argument-in-chief, NRG requested costs to participate in this proceeding. IGPC in its submission also sought costs for this proceeding. OEB staff argued that no party

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<sup>5</sup> Eb-2012-0406 / EB-2013-0081, IGPC interrogatory response #2

should be awarded costs. OEB staff indicated that the dispute arose because NRG did not adjust the letter of credit in accordance with the PCRA. If NRG had adjusted the letter of credit, no additional costs would have been incurred by IGPC and the matter would not have been brought forward to the Board.

In reply argument, NRG submitted that OEB staff had conflated the issues in the original proceeding with the issues in the Motion. NRG did not dispute its obligation regarding the letter of credit; NRG disputed the quantum of the IGPC award. NRG submitted that its dispute was made on a principled basis in an attempt to correct an error made by the Board.

NRG indicated that if IGPC had provided a detailed breakdown in the Original Proceeding, all parties would have had the opportunity to assess the appropriateness of the claim and the Motion would not have been necessary.

### **Board Findings**

The Board finds that NRG and IGPC will be responsible for their own costs of participating in the Motion. No cost awards will be made. The Board finds both parties participated equally in the Original Proceeding by filing evidence and submissions and both parties participated equally in the Motion.

As the Board initiated the Motion, there is no applicant in this proceeding to pay cost awards, the standard practice at the OEB. Accordingly, the Board will absorb its own incidental costs in the Motion and will not invoice either party.

### **ADDRESS**

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

E-mail: [boardsec@ontarioenergyboard.ca](mailto:boardsec@ontarioenergyboard.ca)  
Tel: 1-888-632-6273 (Toll free)  
Fax: 416-440-7656

**DATED** at Toronto May 7, 2015

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli  
Board Secretary