

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 Enbridge Gas Distribution Inc. for an Order or Orders approving or fixing just and reasonable rates and other charges for the sale, distribution and storage of gas commencing January 1, 2009.

WRITTEN ARGUMENT OF THE CONSUMERS COUNCIL OF CANADA

I INTRODUCTION AND OVERVIEW

1. On September 26, 2008, Enbridge Gas Distribution Inc. (“EGD”) filed an application with the Ontario Energy Board (“Board”) for an order approving or fixing rates effective January 1, 2009. EGD is currently under a five-year incentive regulation plan whereby its rates are set by a pre-determined formula.

2. EGD’s application was considered in two phases. The first phase dealt with the rate adjustment mechanism, and was resolved through a full settlement agreement approved by the Board on December 18, 2008. The second phase of the proceeding dealt with a number of other proposals contained in EGD’s application, unrelated to the setting of rates. That phase was subject to a further settlement process and a settlement agreement that was approved by the Board on the first day of the oral proceeding. Two issues were unresolved: Those issues are:

1. Is EGD’s request for approval of a change in the requirements for the contracting of upstream transportation that would require direct purchase bundled service customers to contract for firm upstream transportation appropriate?
2. What should be the timing of the next IRM filing (2010 rates)?

3. EGD's proposal, with respect to contracting for upstream transportation, is premised on its claim that there is a serious threat to system reliability. Such a claim, particularly when made by EGD, must be taken very seriously. At the same time, such a claim must be substantiated by credible evidence. The central issue to be resolved, accordingly, is whether EGD has met the onus of demonstrating that there is a serious threat to system reliability. For the reasons set out below, the Consumers Council of Canada ("the Council") submits that it has not discharged that onus.

4. In its Argument-in-Chief, EGD repeatedly refers to parties who may be sceptical of its exaggerated claims of system reliability risk as "those parties who oppose Enbridge's efforts to fulfil its responsibility for system reliability planning". This clever wording disguises the reality that parties, such as the Council, who question EGD's claims are themselves acting responsibly and demanding that EGD do the same.

5. Consideration of EGD's proposal with respect to contracting for upstream transportation raises interesting, and perhaps troubling, issues of the relationship between the regulated and unregulated gas markets. As a corollary, EGD's proposal raises questions about the scope of the Board's jurisdiction, about the impact of the exercise of that jurisdiction on the unregulated market, and, in particular, about the ability of the Board to protect the interests of consumers with respect to prices.

II UPSTREAM TRANSPORTATION REQUIREMENTS

A. Evidence of EGD

6. EGD filed its application in September of 2008. The application included its proposal to revise its Rate Handbook to require direct purchase bundled service customers to demonstrate that they have contracts in place for firm upstream transportation to support deliveries made to EGD's delivery area on behalf of their customers. On March 2, 2009, EGD filed supplemental evidence to provide additional information to the Board regarding its proposal and to further clarify the parameters that will be applied by EGD in implementing the change. (Ex. C/T1/S10/p. 1)

7. EGD's proposed wording changes to the Rate Handbook are as follows:

Unless otherwise authorized by the Company in writing, each Applicant taking service pursuant to an agent type Gas Delivery Agreement must meet its obligation to deliver gas to the Company on any given day by Firm Transportation for at least 90% of the Applicant's MDV. The Applicant must provide to the Company, by November 1 of each year that the Applicant is taking service, or such other date that the Company may reasonably require, sufficient proof of the Applicant's Firm Transportation arrangements.

8. The condition is intended to apply to direct purchase marketers that use EGD's ABC-T bundled delivery service to serve small volume customers. EGD's rationale for imposing this condition is that the decline in firm transportation ("FT") to the franchise in recent years could pose a significant risk to distribution system reliability. EGD's view is that this is a risk that could impact all customers since a failure to deliver adequate supplies to its delivery area could result in a loss of system pressure, and system outages could follow. **(Ex C/T10/p. 1)** EGD has estimated that in the event of an outage affecting 100,000 of its customers the restoration cost could be in the range of \$12 million. **(Ex C/T10/p. 5)**

9. EGD's evidence was that it had been considering the issue of system reliability since April of 2007. At the Technical Conference, Ms Giridhar stated:

No, we have been looking at it for the last two years, because what concerned us was looking at TransCanada's index of customers and seeing how little firm capacity there is to the franchise given so much turnback of firm capacity that we used to hold.

(Technical Conference Tr., Vol. 1, p. 148)

10. Notwithstanding that EGD was "concerned", as early as April of 2007, about the issue, it did nothing about it for the next 18 months. It did not, for example, propose to either the Board or to the ABC-T marketers that there be a change in the contracting arrangements, for the winter of 2007/2008, for example, for arranging for a short-term firm transportation ("STFT"). **(Tr., Vol. 1, p. 31)**

11. In September of 2008, Ms Giridhar made a presentation to EGD's executive management team, describing the decline in firm transportation arrangements, and proposing the solution which forms part of this application. Notwithstanding that presentation in 2008, EGD

did not thereafter make a proposal to the Board or to the ABC-T marketers that arrangements be made, for example, for STFT for the winter of 2008/2009, to address the alleged issue of system reliability (**Tr., Vol. 1, p. 31-33**).

12. In support of its proposal with respect to contracting for upstream transportation, EGD filed supplementary evidence, in March of 2009, in which it referred to a three-day period in January of 2009, when demand for transportation service on the TransCanada PipeLines ("TCPL") mainline exceeded capacity. EGD conceded that it highlighted the experience in that three-day period to underscore its concern about a significant risk. (**Tr., Vol. 1, p. 24**)

13. In fact, during the three-day period there was only one day when EGD got nervous about gas supply. (**Tr., Vol. 1, p. 28**) During this constrained period all direct shipper gas was ultimately delivered to the franchise area. Those shippers that had contracted for interruptible service and were faced with the prospect of capacity restrictions met their obligations through a combination of short term ("ST") firm transportation and diversions. From EGD's perspective the fact that supply was ultimately made up through short-term arrangements does not provide it with assurance that the necessary physical supply will always be available under peak demand or constrained pipeline operating conditions without firm upstream capacity commitments. (**Ex. C/T1/S10/pp. 3-5**)

14. EGD also filed the evidence of Dr. Overcast about the practices of a number of US regulatory authorities requiring firm transportation arrangements to support delivery obligations.

15. Although EGD believes that the use of non-firm upstream transportation services by firm large volume users also poses a distribution reliability risk it is not requiring that large volume customers demonstrate firm transportation arrangements. From EGD's perspective it has the ability to better manage system reliability risks with this group of customers, as they are more amenable to curtailment in the event they fail to deliver. (**Ex C/T1/S10/p. 2**) With respect to these customers EGD proposes to continue to monitor the level of firm transportation arrangements to the franchise area and provide updates in the next two rate proceedings. EGD may impose further conditions on these customers such as expanding the requirement to hold

firm transportation, or instituting a chargeable stand by/back stopping service. (**Ex. C/T1/S10/p. 2**)

16. EGD's proposal to have a 90% FT requirement in place by November 1, 2009, will increase the FT to the franchise area by approximately 200,000 GJs/day for the upcoming winter and increase the amount of FT underpinning direct shipper delivery obligations from 8% to 52%. (**Ex. C1/T1/S10/p.10**) EGD has also indicated that if it remains concerned about a shortfall in FT to meet demand, it will contract for, and seek recovery in rates of, additional FT for subsequent temporary assignment. (**Ex. C1/T1/S10/p. 10**)

17. EGD had considered and rejected a number of other proposals including mandatory assignment of LDC held transportation, penalties and a stand-by service. From EGD's perspective none of those options would sufficiently address its concerns about system reliability.

B. Evidence of Direct Energy

18. Direct Energy Marketing Limited ("**DE**") filed evidence in this proceeding challenging the rationale and justification EGD has provided for its proposal. DE's overall position on the issue was set out in its evidence in the following way:

Direct Energy agrees that the safe and reliable distribution of natural gas is of paramount importance to Enbridge, market participants and our mutual customers. In this proceeding, however, DE believes that EGD has failed to demonstrate and quantify the risks to the system as a result of the transportation practices of direct shippers. Furthermore any risks to the balancing of the distribution system that EGD has raised, by its own admission has also demonstrated that such risks can, and have been, mitigated through the tools and processes available to EGD today.

For the reasons noted in this submission, DE strongly believes that utilities not be able to dictate the manner in which the competitive market should operate and view's EGD unfounded requirement for FT to be a step towards the re-regulation of the Ontario gas market. The overall market benefits from increased efficiencies in gas procurement, transportation and storage. However, EGD seems to be using its market position to limit direct shippers' ability to purchase Ontario landed gas, without demonstrating such risk even

exists. Furthermore, if EGD deems the actual risk to system reliability occurs when demand exceeds capacity on the TCPL mainline under peak conditions, EGD will not have addressed the issue by further demanding FT for direct shipper supplies. Additional pipeline capacity, access to storage, or further curtailment will address this issue, not FT. **(Ex. L/T7/p. 8)**

19. In its pre-filed evidence, DE stated:

The cost to the Ontario marketplace of the over-insurance being requested by EGD is approximately \$53 million over five years. This estimate takes into account the cost to unwind the existing hedges for landed Ontario gas and replace these with new hedges for Alberta gas supply. **(Ex. L/T7/p. 7)**

20. EGD did not, in either written interrogatories or questions posed in the Technical Conference, challenge DE's cost estimate. **(Tr., Vol. 1, p. 37-38)**

21. In its final argument DE indicated that if the Board is persuaded to implement a temporary solution for the upcoming winter they could require marketers to contract the same proportion of FT they required in the 2008/2009 winter for non-Ontario supplies. EGD could then contract for any shortfall of the requested 200,000 GJs/day and treat the costs of that transportation as a load balancing expense to be recovered from all distribution customers.

C. Submissions

22. In considering EGD's proposal the Council submits that the Board must first determine if EGD has substantiated its claim that the decline in FT to its franchise area is posing a significant risk to distribution system reliability. If the Board determines that the risk is real it must consider the relative merit of the alternative options and the cost of those options. Finally, to the extent action is taken by EGD to address the risk, the Board must decide how the costs associated with that action should be allocated.

23. In assessing all of the above the Council submits it is important for the Board to consider the interests of all of EGD's customers, including those taking service under system supply and those who have selected a direct purchase option. Within that direct purchase subset are small volume customers served through the ABC-T service and direct purchase customers

taking service under other arrangements. In addition, the Council recognizes the need to assess the impact of any outcome on the competitive market for gas on Ontario.

(i) System Reliability Risk

24. EGD's proposal is based on the premise that the decline in FT to its franchise area since 2005 could pose a significant risk to distribution system reliability. For a number of reasons the Council submits that EGD has failed to provide sufficient evidence to support its position that the decline in FT deliveries necessitates implementation of the requirement it proposes, namely that the ABC-T marketers be obligated to have 90% of their MDV supported by FT.

(ii) The Evidence of System Reliability Risk

25. In considering whether there is evidence of system reliability risk and, if so, how acute it is, the history of EGD's consideration of the issue is relevant.

26. As stated above, the evidence is that EGD was aware of this issue as early as April of 2007. Notwithstanding that, EGD did nothing substantive about the alleged risk until September of 2008. By substantive, we mean that EGD did not take measures, for the winter of 2007-2008 or the winter of 2008/09, to ensure that the risk was mitigated. In particular, EGD did not initiate discussions with the ABC-T marketers, or seek relief from the Board, for either winter. Ms Giridhar did not take the issue to EGD's senior management until September of 2008. Instead of taking actions to mitigate the alleged risk, for the winter of 2008-2009, by either commencing discussions with the ABC-T communities, or seeking immediate relief from the Board, EGD chose to file this application. EGD knew, or ought reasonably have to known, that the relief it sought in this application would not be granted until the Spring of 2009, at the earliest.

27. The Council submits that the Board should conclude, from EGD's dilatory approach to this issue, that EGD did not really believe that the risks to system reliability were acute. If EGD felt that the risk was acute, it would, acting responsibly, have taken corrective action much earlier.

28. At the time that EGD filed its application, in September of 2008, it could not point to any recent examples of acute system reliability risk. That there may, five or six years ago, have been instances of constrained supply is not significant, particularly given the significant drop in demand, due to the depressed economy and to the impact of conservation measures. It was not until EGD filed its supplementary evidence, in March of 2009, that EGD was able to point to a single instance which it suggested was evidence of acute system reliability risk. All that EGD could point to was a single day, in January of 2009 when, according to EGD, there was some risk of the failure of the system. However, as EGD was compelled to concede, the system in fact worked as it was designed to do, and gas was supplied as required,

29. The Council submits that the evidence of Dr. Overcast, with respect to what other jurisdictions do, is unhelpful. It was introduced by EGD to provide support for a proposal that was not supported by EGD's experience in Ontario. Ironically, Dr. Overcast's evidence suggests that EGD did not believe there really was a problem. If EGD believed that what other jurisdictions did was persuasive then surely it would have acted much earlier. The Council submits that the Board should give no weight to Dr. Overcast's evidence, as it is simply an *ex post facto* attempt to justify a proposal for which there is no evidence.

(iii) The Requirement is Unprecedented

30. The requirement to have the ABC-T marketers contract for FT as proposed by EGD is unprecedented. The evidence of TCPL and EGD is that the FT proportion of Average Daily Winter Season Deliveries to EGD's franchise area have been well below the level EGD is now imposing on the marketers. (**Tr. Vol. 2, p. 6**) In addition, during the peak period last winter where supplies were tight (January 13-15) direct shippers were able to deliver as required under the current requirements. (**Ex. I/T10/S5**) EGD acknowledged that during last winter there was one day on which the gas supply team was concerned about a supply failure, a day on which the system worked. (**Tr. Vol. 1, p. 28**) To now impose a requirement for marketers to contract for FT for an entire year seems to be an extreme and costly approach to addressing a problem that has not been substantiated by EGD.

(iv) Short Term Firm Transportation is Sufficient

31. TCPL offers a number of services used by shippers serving the EGD franchise area. FT is contracted for a minimum of 12 months. TCPL's design ensures that long-term firm contract entitlements will be met during peak demand conditions. Short Term Firm Transportation ("STFT") is another firm service that can be acquired for a period of between 7 and 364 days. (Ex. L/T21/p. 8-9) EGD has effectively conceded that STFT represents an alternative to its proposal. (Tr. Vol. 1, p. 30) Ms Giridhar stated that looking at short term firm transportation for the coming winter could be a potential solution. (Tr. Vol. 1, p. 43)

32. EGD was asked whether, in the event that the Board did not approve its proposal to require marketers to support their deliveries with FT, it would go out and contract for FT itself. They have said they would not without a guarantee that their shareholders would be assured of cost recovery. (Tr. Vol. 1, p. 44) In addition, EGD has said that they would not necessarily contract for STFT either without a guarantee from the Board that they could recover the costs. If the risk to system reliability is as serious as EGD contends, it is puzzling why they would not ensure, to the extent possible, they mitigate that risk even in the event that they have not convinced the Board there is a problem.

(v) Alternative Solutions

33. The Council submits that if the Board determines there is a system reliability risk there are a number of potential solutions, all with different implications and cost consequences. The Council notes that these are short-term solutions that would be applicable for the coming winter. Long-term solutions should be considered in the context of a more comprehensive review of EGD's overall gas supply arrangements. Those short term options are as follows:

1. Implement the proposal advanced by EGD to require ABC-T shippers to contract FT for 90% of their MDV. The cost of this proposal has been estimated to be in the range of \$53 million, an amount not disputed by EGD (Tr., Vol. 1, p. 37). EGD did not undertake any of its own analysis to estimate the cost of this proposal. (Ex. I/T11/S9) It would require that the marketers unwind any current hedges they have in place and contract for FT in place of their current delivery arrangements;

2. Have EGD contract for 200,000 GJs/day of STFT this winter for a given period, 2-3 months. EGD has indicated that STFT would be a potential solution to address the risks they have identified (**Tr., Vol. 1, p. 43, Tr., Vol. 2, p. 81**) The cost of this option has been estimated to be \$21 million (**Tr., Vol. 1, p. 130**);
3. Adopt the proposal put forward by DE to have all marketers contract for the same proportion of firm transportation (FT or STFT) they required during the 2008/2009 winter for non-Ontario landed supplies. EGD would then contract for any shortfall of the requested 200,000 GJs/day that is not addressed through direct shipper contracting (**Final Argument of DE, p. 12**). Although the cost of this option has not been identified the Council assumes it represents the least cost option for both EGD and the marketer community;

34. The Council submits that the evidence in this proceeding does not support the implementation of EGD's proposed solution. Even in the event the Board determines that there is some level of risk of system failure for the upcoming winter, EGD has conceded that other, less costly short-term solutions exist. The Council is of the view that the option supported by EGD could have significant and unnecessary cost consequences for the marketers and their customers, and could negatively impact the retail market. In addition, given the timing of this proceeding and the requirement to have FT in place by November 1, 2009, it is questionable whether the requirement could actually be complied with. Accordingly, the Council urges the Board to reject this approach.

35. DE has put forward a proposal set above. Given it was advanced in its argument EGD has not had an opportunity to respond. The Council is of the view the Board would be assisted if EGD commented on the viability of that proposal relative to the proposal that EGD contract for the full 200,000 GJs per day. To the extent the proposals are comparable, but the DE option less costly, the Council would support the DE option.

36. Overall, assuming the Board is convinced that some measures are required for the upcoming winter, all evidence points to a scenario whereby there is an assurance that during the peak winter period firm transportation, either FT or STFT, must be in place to support ABC-T

shipper deliveries. The Council is of the view that having EGD contract for the STFT, or some combination of the marketers and EGD are acceptable solutions.

(vi) Allocation of Costs

37. It is common ground that there will be cost consequences arising from the Board's approval of what EGD is proposing. EGD itself concedes that there will be cost consequences (**Tr., Vol. 1, p. 34-35**). The cost consequences arise from the need for ABC-T marketers to unwind their existing contractual arrangements, and make new arrangements.

38. Typically, when setting rates costs are allocated on the basis of cost causality. In this case the issue of cost causality is not simple. This issue has evolved since 2000 when EGD's contracts with TCPL came up for renewal. At that time EGD implemented its "turnback" policy. Direct purchase customers and the marketers followed the protocols established by EGD and began to turn back their transportation assignments from EGD. The largest turnback occurred in 2003 (**Ex. I/T12/p.2**)

39. As set out above, EGD's evidence is that in 2007 it began to become concerned about the level of firm capacity underlying supplies to its franchise area (**Tr. Vol. 1, p. 30**). Instead of working with the direct purchase community and other stakeholders to derive potential solutions, EGD applied for approval to change the provisions in its Rate Handbook as part of the annual rate adjustment application in September 2008. Now the Board is being asked to implement a solution, to be implemented in relatively short period of time, which could significantly impact all gas consumers in the Province. The Council submits that EGD's own delay in addressing this issue may well have increased the cost of complying with the proposal. If that is the case, the Council submits that EGD's shareholders should bear some responsibility, both for the current system, if system reliability is really at stake, and for the cost of implementing any solution to deal with it.

40. The Council submits that whether option 2 or 3 is adopted by EGD, the costs should be captured in a deferral account. How those costs are allocated should be determined in EGD's next rate proceeding. It will be incumbent upon EGD to present evidence to justify the allocation of these costs to all of its distribution customers or some subset of those customers

consistent with the principle of cost causality. EGD conceded that the issue of cost allocation would have to be resolved. (Tr. Vol. 2, pp. 182-183)

41. Any consideration of how the Board should address the cost consequences of implementing what EGD proposes, or of implementing some alternative measure, must take into account the fact that the Board's jurisdiction does not extend to the contractual arrangements between the ABC-T marketers and their customers. The Board cannot, for example, direct that the ABC-T marketers themselves bear the cost of the new contractual arrangements. The most that the Board can do is consider whether it should require that ABC-T marketers disclose the cost of transportation arrangements in contracts they sign with their customers. Having said that, however, the Council submits that the fact that customers of ABC-T marketers may be required to bear the costs of those marketers having to comply with what EGD proposes is a factor that the Board should consider whether to approve EGD's proposal.

(vii) Further Review of the Issues

42. The Council recognizes that EGD intends to bring forward an application to further unbundle its services and rates. In addition, EGD indicated that it was considering the implementation of a “vertical slice” methodology similar to what Union Gas Limited has in place. These issues are related to the very issues considered in this case regarding system reliability and potential risks to that reliability. The Council submits that the Board should initiate a process that considers these issue together, allowing all parties to present alternative approaches to how EGD operates its gas supply function, meets peak day requirements and facilitates direct purchase arrangements within its franchise area. The Council acknowledges that BOMA has recommended a similar initiative.

III FILING OF EGD’S NEXT IRM FILING

43. In the EB-2007-0615 proceeding the Board approved a Settlement Agreement setting out the various elements of EGD’s incentive regulation plan. As part of the Agreement the parties proposed a timeline for annual rate adjustments. The Settlement Agreement establishes a filing date of October 1 for the purpose of receiving a Board approved rate order by December 15 for implementation of rates on January 1.

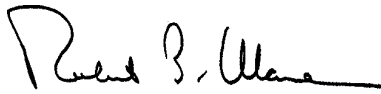
44. EGD has proposed a set of dates applicable to its 2010 application. The Council submits that the proposal is reasonable. Having said that, it should not represent a “fixed” timeline. From the Council’s perspective it should represent a guideline for the next proceeding. Parties, including EGD should not be bound by the schedule. Factors that may not have been anticipated could ultimately necessitate a change to the proposed schedule. In this proceeding Phase I resolved entirely through the settlement process. The proposed schedule assumes the same. To the extent those issues were not resolved a hearing would be required. EGD’s proposed schedule does not anticipate a hearing.

45. The Council supports EGD’s proposal assuming there is some flexibility to the extent unforeseen factors necessitate a need to alter it. The Council assumes all parties support a timely process and the avoidance of retroactive rate adjustments to the extent possible.

IV COSTS

46. The Council requests that it be granted 100% of its reasonably incurred costs for its participation in this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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