EB-2009-0172

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, transmission and storage of gas commencing January 1, 2010.

SUBMISSIONS OF THE CONSUMERS COUNCIL OF CANADA ON THE JURISDICTIONAL QUESTIONS

I BACKGROUND

1. Enbridge Gas Distribution Inc. (EGD) has stated that it intends to pursue initiatives and to own and operate assets capable of generating and distributing alternate forms of energy. It indicates that it intends to design, market, invest in, own, and operate assets that would focus on space heating and cooling and domestic hot water for its customers. It refers to these initiatives and assets collectively as its "Green Energy initiatives". **[Ex. B, T2, Sch. 4, p. 1]**

2. EGD estimates that the total cost of these initiatives is approximately $10 million, of which approximately $4 million is to be closed to rate base in 2010. The anticipated revenue requirement will be approximately $300,000. **[Ex. B, T2, Sch. 4, p. 4]**

3. EGD proposes that the Green Energy initiatives be included in the regulatory utility and be a component of rate base for ratemaking purposes.

4. EGD's description of the Green Energy initiatives, in its pre-filed evidence, was supplemented by a more detailed description of individual programs, set out in a letter to the Board dated November 13, 2009.

5. None of the Green Energy initiatives are for the sale, transmission, distribution or storage of gas.

6. Reduced to its essence, EGD seeks approval to have its ratepayers pay for its investments in energy businesses and activities that are unrelated to the sale, distribution, transmission and storage of natural gas. Broadly speaking, its rationale for this proposal is that the Green Energy initiatives are, whether on the basis of the Ontario Energy Board's (Board's) jurisdiction under subsections 36(2) and (3) of the of the *Ontario Energy Board Act, 1998,* S.O. 1999 c. 15, Schedule B, as amended (the "OEB Act"), or as that jurisdiction is augmented by certain Directives or by the policies of the Ontario government, within the scope of EGD's regulated activities and so subject to the Board's jurisdiction.

7. The Board has, in Procedural Order No. 2, asked parties to address the following questions:

1. Are the Green Energy Initiatives described in Enbridge's Application (Ex. B, Tab 2, Sch. 4), their associated costs, assets and revenues properly part of the regulated operations of Enbridge and thus under the Board's ratemaking authority?

2. If not, does the Board have jurisdiction to deal with the Green Energy Initiatives, their associated costs, assets and revenues outside of the ratemaking process?

8. These are the submissions of the Consumers Council of Canada ("Council") in response to the Board's questions.

9. For the reasons set out below, the Council submits that the Green Energy initiatives, their associated costs, assets and revenues are not properly part of the regulated operations of EGD and are, thus, not under the Board's ratemaking authority. In addition, and again for the reasons set out below, the Council submits that the Board does not have the jurisdiction to deal with the Green Energy initiatives, their associated costs, assets and revenues outside of the ratemaking process.

10. The Council has read the excellent submissions of Board Staff on the jurisdictional questions and agrees with them.

II EGD's Arguments

11. EGD has four basic arguments in support of its position that the Board has jurisdiction to consider the Green Energy initiatives as part of EGD's regulated activities. We will consider those four arguments, individually, below.

1. Subsections 36(2) and (3) of the OEB Act are sufficiently broad to grant the Board jurisdiction

12. EGD's proposal, on the treatment of the Green Energy initiatives, forms part of its application for approval of its rates for the sale, distribution, transmission and storage of gas commencing January 1, 2010.

13. The Board's jurisdiction to approve those rates is found in subsection 36(2) of the OEB Act. That subsection provides as follows:

> The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.

14. In this context, it is important to remember the Board's statutory obligation when setting rates under section 36 of the OEB Act, and the public policy goal that underlies that obligation. The nature of the Board's obligation was succinctly stated, in the case of *Advocacy Centre for Tenants - Ontario v. Ontario Energy Board*[1] (the "LIEN case"), as follows:

> The Board's regulatory power is a proxy in the public interest for competition in view of a natural gas utility's geographic natural monopoly. Absent the intervention of the Board as a regulator in rate setting, gas utilities (for the benefit of their shareholders) would be in a position to extract monopolistic rents from consumers, in particular, given a relative inelastic demand curve for their commodity. Clearly, a prime purpose of the Act and the Board is to balance the interests of consumers of natural gas with those of natural gas suppliers. The Board's mandate through economic regulation is directed primarily at avoiding the potential

[1] *Advocacy Centre for Tenants - Ontario v. Ontario Energy Board* [2008] O.J. 1970 (Div. Ct.), at p 39

> problem of excessive prices resulting because of a monopoly distributor of an essential service is.

15. EGD is attempting to enlarge, and in the process distort fundamentally, the Board's core statutory function by engrafting onto the regulated services of sales, transmission, distribution and storage of natural gas, activities which are wholly unrelated to them.

16. EGD relies on a number of judicial statements to the effect that the Board's powers are broad. With respect, those comments are meaningless when taken out of context. The exercise of the Board's powers, under subsection 36(2), must always relate to the sale, transmission, distribution, and storage of natural gas.

17. EGD argues that the Board's powers under subsection 36(2) are broadened yet further by subsection 36(3).

18. Subsection 36(3) of the OEB Act provides that:

> In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

19. The Council submits that the method or technique referred to in subsection 36(3) must be related to the rates for the sale, transmission, distribution and storage of gas. To put the matter another way, subsection 36(3) does not allow the Board to approve a method or technique for fixing just and reasonable rates for a gas distributor to generate and distribute electricity.

20. In support of its argument that the subsections can be interpreted broadly, EGD relies on the decision of the Divisional Court in the LIEN case. The issue in the LIEN case was whether the Board could take income levels into consideration when setting rates for the sale, transmission, distribution, and storage of natural gas. The issue, in other words, was how far the Board could go in the exercise of its statutory obligation to set rates. The Divisional Court held that the Board's power was sufficiently broad to allow it to allocate rates based on considerations of income. The LIEN case does not, directly, or by necessary implication, address whether subsections 36(2) and (3) could be interpreted to allow the regulation of activities unrelated to the sale, transmission, distribution, and storage of natural gas. The Council submits that the reasoning in the LIEN case does not support the argument that EGD advances in this case.

21. The Council submits that the Board implicitly acknowledged that there is a narrow band of regulated activities for distributors when it issued "Guidelines: Regulatory and Accounting Treatment Of Distributor-Owned Generation Facilities" (Guidelines). In the Guidelines, the Board stated as follows:

> Section 78(3) of the OEB Act only permits the Board to set rates for the transmission and distribution of electricity and for the retailing of electricity. The statutory framework does not currently give the Board the power to include generation assets in rate base, nor to permit rate recovery for any associated operations and maintenance expenses for distributors.[2]

22. The Guidelines apply to electricity distributors. But the Board's analysis of the scope of its jurisdiction under subsection 78(3) of the OEB Act applies with equal force to the scope of its jurisdiction under subsections 36(2) and (3) of that Act. The Council submits that the Board cannot, as a matter of analytical consistency, come to a different conclusion when interpreting subsections 36(2) and (3). The Council further submits that the Board should not come to a different conclusion, lest it create contradictory regulatory schemes based on essentially identical legislative provisions.

23. The Council submits, then, that the question is a simple one: Do subsections 36(2) and (3) of the OEB Act allow the Board to set rates for businesses unrelated to the sale, transmission, distribution, and storage of natural gas? The Council submits that the answer, on a plain reading of the statute, is no.

2. The Directives expand the jurisdiction of the Board under s. 36 of the OEB Act

24. EGD argues that two Directives have expanded the jurisdiction of the Board under section 36 of the OEB Act.

25. The question is whether the Directives issued pursuant to section 27.1 of the OEB Act can enlarge, and have enlarged, the jurisdiction of the Board under subsections 36(2) and (3) of the OEB Act. The Council notes that that is a different question from whether the Directives have enlarged the scope of the businesses which EGD may engage in.

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[2] Ontario Energy Board G-2009-0300 "Guidelines: Regulatory and Accounting Treatments for Distributor-Owned Generation Facilities", September 15, 2009, pp. 2.

26. EGD relies on two Directives. The first is a Directive issued on August 10, 2006, by Order-in-Council No. 1537/2006, which directed the Board to dispense with the requirement that EGD comply with the restrictions contained in the Enbridge Undertakings which limited the range of businesses that EGD could enter into. The Directive authorized EGD to engage in businesses that related to, among other things, "the promotion of electricity conservation" natural gas conservation and the efficient use of electricity", and "the promotion of cleaner energy sources, including alternative energy sources and renewable energy sources". The Council notes that this Directive enlarges the scope of the activities EGD may engage in. The Directive does not, directly or by necessary implication, imply, let alone require, that these activities be regulated.

27. The second Directive was issued under the authority of Order-In-Council No. 1540/2009, on September 8, 2009. That Directive further modified the Enbridge Undertakings to permit EGD, among other things, to own and operate "renewable energy electricity generation facilities, each of which does not exceed 10 megawatts" and to own and operate "assets required in respect of the provision of services by Enbridge Gas Distribution Inc. … that would assist the Government of Ontario in achieving its goals in energy conservation and includes assets related to solar-thermal water and ground-source heat pumps".

28. There is nothing in the second Directive which, directly or by necessary implication, implies or requires that these activities be regulated. Indeed, the second Directive makes exactly the opposite point when it states that:

> This directive is not in any way intended to direct the manner in which The Ontario Energy Board determines, under *the Ontario Energy Board Act, 1998*, rates for the sale, transmission, distribution and storage of natural gas by Enbridge Gas Distribution Inc. and Union Gas Limited.

29. Neither Directive purports to amend section 36 of the OEB Act. Indeed, neither Directive could. The legislature cannot delegate to the LGIC, or to the Minister, the authority to amend the OEB Act. That remains the exclusive prerogative of the legislature.

30. Consideration of the effect of the Directives must turn, in the first instance, on the approach to statutory interpretation. That approach has been articulated, in a number of Supreme Court of Canada decisions, as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[3]

31. In the same decision, the Supreme Court of Canada made the following observation:

> As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme…[4]

32. The Council submits that the clear intent of the legislature in enacting subsections 36(2) and (3), and in not amending those subsections in the green energy legislation, was to regulate certain monopoly services in the public interest. The core function of the Board, under similar legislation, was expressed by the Supreme Court of Canada in the following terms:

> The limits of the Board's powers are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.[5]

33. To accept EGD's argument about the scope of the Board's jurisdiction would be to derogate from the Board's ability to carry out its core function. Accepting EGD's argument would result in, among other things, the ratepayers of a monopoly service subsidizing competitive services. The Council submits that clear and unequivocal language would be required to change, so fundamentally, the Board's core function. The Council submits that, even if the Directive could amend subsections 36(2) and (3) of the OEB Act, which the Council

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3 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board*) [2006] 1 S.C.R. 140, pp. 37
4 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board*) [2006] 1 S.C.R. 140, pp. 49
5 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* [2006] 1 S.C.R. 140, pp 7

submits they cannot, they do not represent a clear and unequivocal change in the sections which define the Board's statutory jurisdiction.

34. The Board's historic view of the scope of its jurisdiction, in setting rates, is based on sound regulatory principles. To accept EGD's argument about the scope of the Board's jurisdiction would be to abandon those principles, and to embrace, instead, a regulatory system that would require, among other things, ratepayers of an essential, monopoly service to subsidize non-essential, competitive services.

35. As the Board will be aware, a sustained effort has been made, over the course of the past decade, in many cases, to separate utility from non-utility functions. This effort was made in order to protect ratepayers, who rely on EGD for the provision of an essential service, from having to subsidize non-essential, non-utility functions. This effort has been more than an exercise in statutory interpretation: it has been an exercise intended to ensure that the Board, in adhering to its core statutory obligation, protects the interests of consumers. So, while the issue posed by the jurisdictional questions is whether the Board can accept EGD's proposal, the Council submits that the Board should not, as a matter of public policy, do so.

3. Doctrine of jurisdiction by necessary implication grants the Board the necessary jurisdiction

36. EGD also argues that the common law doctrine of jurisdiction by necessary implication supports the position it is taking. In support of that proposition, it relies on the decision of the Supreme Court of Canada in the ATCO decision. In the ATCO decision, the Supreme Court of Canada held that, in order to impute jurisdiction to a regulatory body, there must be evidence that the exercise of the power in question is of practical necessity for the regulatory body to accomplish the goals prescribed by the legislature.[6]

37. In this case, the goals prescribed by the legislature are the setting of rates for the sale, transmission, distribution, and storage of natural gas. It is not practically necessary for the Board, in order to set those rates, to regulate activities wholly unrelated to the functions of the sale, transmission, distribution, and storage of natural gas. Simply put, the doctrine of jurisdiction by necessary implication does not assist EGD in its argument.

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6 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board*) [2006] 1 S.C.R. 140, pp. 77

4. The Board is granted jurisdiction as a result of government policy

38. EGD also argues that the broad policy objectives of the provincial government, to promote energy conservation, in effect require the Board to include the Green Energy initiatives within EGD's regulated activities.

39. Section 2 of the OEB Act requires the Board, in carrying out its responsibilities in relation to gas, to be guided by a number of objectives, including the promotion of energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumers' economic circumstances. To state the obvious, section 2 of the OEB Act does not, directly or by necessary implication, amend section 36 of the OEB Act or confer a jurisdiction on the Board. The Board can only take those objectives into consideration to the extent that they do not alter the Board's primary obligation to set just and reasonable rates for the sale, transmission, distribution, and storage of natural gas.

40. EGD argues that one of the effects of the Directives, and of government policy generally, is to create what it calls an "integrated approach to energy". Implicit in that argument is the notion that regulatory regimes for gas and electricity have somehow been merged.

41. That argument is at odds with the fact that the legislature chose, notwithstanding the *Green Energy and Green Economy Act*, to leave the separate regulatory regimes for gas and electricity in place.

42. EGD suggests, repeatedly, that, if the Board does not include the Green Energy initiatives within the scope of its regulated activities, EGD will not be able to pursue these initiatives and that, therefore, the government's policy initiatives will, to that extent, be thwarted.

43. That argument is based on two false premises. The first is that, if the Board does not include the Green Energy initiatives within the scope of its regulated activities, EGD will not be able to carry them on. That is, of course, not true. EGD is at liberty to carry on these activities without their being regulated by the Board.

44. The second, and related false premise, is that, if the Board does not include the Green Energy initiatives within the scope of EGD's regulated activities, the policies of the

government will be thwarted. As long as EGD carries on those activities, it will be furthering the policies of the government. There is no impediment to EGD carrying on those activities outside its regulated operations.

45. It is important, in this context, to focus on what EGD is and is not seeking. It is not seeking the ability to carry on these activities. Rather, it is seeking the ability to have gas ratepayers pay for those activities. To put the matter another way, EGD wants its ratepayers to protect it from the risk of engaging in a competitive activity.

46. The Green Energy initiatives which EGD proposes to pursue are not monopolistic functions. They are unrelated to EGD's function as a monopoly distributor of an essential service. They are, accordingly, outside of the scope of the Board's jurisdiction. In addition, and since the Green Energy initiatives are outside the scope of EGD's regulated functions, the Board has no jurisdiction to deal with the Green Energy initiatives, their associated costs, assets and revenues, outside of the ratemaking process. They are competitive functions, and should take place wholly within the competitive, unregulated market.

III Conclusion

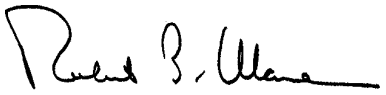
47. In response to the questions posed in Procedural Order No. 2, the Council's answers are:

1. The Green Energy initiatives, their associated costs, assets, and revenues are not properly part of the regulated operations of EGD, and are not under the Board's ratemaking authority.

2. The Board does not have the jurisdiction to deal with the Green Energy initiatives, their associated costs, assets and revenues outside of the ratemaking process.

48. If EGD pursues the Green Energy initiatives within the utility, but outside the scope of its regulated activities, it should be required to do so on a fully-allocated cost basis only.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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