

February 26, 2010

Kirsten Walli, Board Secretary  
**ONTARIO ENERGY BOARD**  
2300 Yonge Street, 27th Floor  
Toronto, ON M4P 1E5

Dear Ms. Walli:

**Re: EB-2009-0172: Enbridge Gas Distribution Inc. 2010 Rates  
Notice of Motion**

Attached please find a Notice of Motion which we are filing on behalf of the Association of Power Producers of Ontario ("APPrO"), Building Owners and Managers Association of the Greater Toronto Area ("BOMA"), Consumers Council of Canada ("CCC"), Energy Probe, Industrial Gas Users Association ("IGUA"), London Property Management Association ("LPMA"), and Vulnerable Energy Consumers Coalition ("VECC").

Your truly,  
**MACLEOD DIXON LLP**



Ian A. Mondrow

- c. Fred Cass, AIRD & BERLIS, Counsel for EGD.  
Norm Ryckman, EGD  
Christine Kilby, OGILVY RENAULT, Counsel for APPrO  
Randy Aiken, for BOMA and LPMA  
Robert Warren, WEIR FOULDS, Counsel for CCC  
David MacIntosh, for Energy Probe  
Michael Buonaguro, Counsel for VECC  
Intervenors of Record - EB-2009-0172  
Intervenors of Record - EB-2007-0615

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the Ontario Energy Board Act, 1998;

**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.

**NOTICE OF MOTION**

The following parties to the February 4, 2008 Settlement Agreement with Enbridge Gas Distribution Inc. ("EGD") in EB-2007-0615 (the "Agreement"), namely Association of Power Producers of Ontario ("APPrO"), Building Owners and Managers Association of the Greater Toronto Area ("BOMA"), Consumers Council of Canada ("CCC"), Energy Probe, Industrial Gas Users Association ("IGUA"), London Property Management Association ("LPMA"), and Vulnerable Energy Consumers Coalition ("VECC"), will make a motion to the Board, on a date and at a time to be fixed by the Board, at 2300 Yonge Street, 25<sup>th</sup> Floor, Toronto, Ontario.

It is proposed that the motion be heard orally.

THE MOTION IS FOR:

1. An order admitting for filing in this proceeding, in accord with the Board's *Practice Direction on Confidential Filings*, certain documents (hereinafter referred to as the "Confidential Documents") to be identified by the moving parties, which were generated in the course of settlement discussions in EB-2007-0615, being EGD's Incentive Rate Mechanism ("IRM") Application. The order to admit the documents is requested because the documents are relevant to the question posed by the Board in Issue 17 on the Board approved Issues List herein ("the ROE Issue");
2. An order that the parties may refer to the Confidential Documents in making their submissions in this proceeding regarding the ROE Issue;

3. An order allowing intervenors to supplement their written submissions to be filed on March 2, 2010, with respect to the ROE Issue with further oral submissions confined to the conclusions to be drawn from the Confidential Documents regarding the question posed in the ROE Issue; and
4. Such further and other relief as counsel may advise and the Board permit.

THE GROUNDS FOR THE MOTION ARE:

1. The Board's *Rules of Practice and Procedure* (Rules 31.09 and 31.10), the Board's *Settlement Conference Guidelines* (provisions on confidentiality), and the Agreement (page 6) stipulate that certain materials generated in the course of the settlement discussions related to the Agreement are to be maintained by the parties thereto in confidence;
2. The Confidential Documents are relevant to a determination of the dispute pertaining to the interpretation of Section 10.1 of the Agreement;
3. A Board Order admitting the Confidential Documents as evidence is justified because:
  - (a) The law excepts from the confidentiality associated with settlement discussions disclosure outside of such settlement discussions of evidence probative of the intention of the parties reflected in a written settlement, in order to assist in resolution of any ambiguity as to the intended meaning of such written settlement; and
  - (b) The policy behind the Board's rules regarding confidentiality of settlement conference discussions is to support a full and frank discussion of settlement positions without concern that any proposed or agreed to concessions would prejudice a party's position in current or future proceedings before the Board. Such policy is not undermined or offended by the admission, for the purpose of resolving any ambiguity in respect of the meaning or application of the settlement reached, of communications generated during settlement processes that reflect the joint intention of the parties as to the meaning and application of the settlement reached;
4. Resolution of the ROE Issue is not required to set rates for 2010, nor for any other disposition of funds in 2010. The earnings sharing application to which the resolution of the ROE Issue will be relevant cannot, in any event, be filed by EGD prior to 2011; and
5. The Board's discretion to control its own process, sections 25.0.1 and 25.1 of the Ontario *Statutory Powers Procedure Act*, and Rules 4.01, 4.03 of the Board's *Rules of Practice and Procedure*.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. A confidential brief of the Confidential Documents to be provided to the Board Panel hearing this motion either prior to the hearing thereof or at the hearing as the Panel directs;
2. Exhibits E, Tab 1, Schedule 1 and E, Tab 3, Schedule 1 herein;
3. The Board approved issues list herein;
4. Letters dated January 27, 2010 and February 3, 2010 filed on the record of this proceeding by counsel for IGUA, and a letter dated February 1, 2010 filed on the record of this proceeding by counsel for EGD;
5. Correspondence with counsel for EGD requesting consent to the confidential filing of the Confidential Documents; and
6. Such other materials as counsel may advise and the Hearing Panel permits.

February 26, 2010

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TO:

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