OGILVY RENAULT

LLP / S.E.N.C.R.L., s.r.l.

Direct Dial: (416) 216-4865
amark@ogilvyrenault.com
File No. 01009188-0006

SENT BY E-MAIL

January 8, 2008

Ms. Kristen Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, Suite 2700
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

RE: Enbridge Gas Distribution Inc. ("Enbridge") Application for Recovery of Class Action Suit Deferral Account ("CASDA"), Ontario Energy Board File No. EB-2007-0731

Please accept this letter as the Electricity Distributors Association ("EDA")'s final written argument in this proceeding.

Enbridge requests approval of all amounts in the 2007 CASDA account and that the balance in the 2007 CASDA be cleared to ratepayers over the course of eight years, to be cleared at the same rate and at the same time as other deferral and variance accounts are cleared.

The EDA has three primary submissions by way of final argument, as follows:

1. The expenditures in the 2007 CASDA account are properly recoverable in rates;

2. The amounts are properly recoverable from the rate classes who benefited from the expenditures; and

3. The time period over which any reasonably incurred business expenditure is to be recovered in rates should be based upon all relevant factors, which may include:

   a. an examination of the reasonableness of the amount proposed to be recovered on the basis of per customer per year or month;

b. the amount of the periodic recovery proposed in relation to the periodic benefit which accrued to ratepayers in the first instance;

c. the amount of time over which the benefit to ratepayers accrued in the first instance;

d. the overall financial affairs of the utility; and

e. other accepted principles of ratemaking.

Rate recovery

The EDA submits that any expense reasonably incurred in the normal course of business is properly recoverable in rates.

Late payment penalties ("LPPs") were collected from ratepayers pursuant to Board Rate Orders which were themselves consistent with the Guidelines recommended by a Task Force of the Ontario Legislature and the Minister of Energy. Each and every year from and after the amendment resulting in section 347 of the *Criminal Code* in 1981, the Board approved LPPs as a specific component of just and reasonable rates. The LPP amounts were credited to all ratepayers and directly reduced rates. Collection of LPPs was, therefore, inherently reasonable. As a result, all reasonable expenses associated with the collection of LPPs were also reasonably incurred.

In 2004, the Supreme Court of Canada held that the collection of LPPs in violation of the *Criminal Code* was illegal. Up until 2004, the collection of LPPs was reasonable, as was the expenditure of costs to defend the LPP in the class action. Further, the expenditures incurred after 2004, to the extent that they were reasonably incurred in compliance with the Supreme Court of Canada's decision of 2004, were also reasonable.

Furthermore, the LPPs originally collected were applied directly to reduce rates. It is therefore intrinsically fair for ratepayers, as a class, to bear the burden of the Recoverable LPPs.

The LPPs were collected, in good faith, in reliance upon, and in compliance with, orders of this Board. Costs arising from operations of a utility conducted in accordance with the directives of this Board must be recoverable through rates. Such is the fundamental compact which embodies economic regulation. It would be unfair, and inconsistent with accepted rules of economic regulation, for such costs to be disallowed. Such a disallowance would create unacceptable regulatory uncertainty and would impair the ability of the regulated entity to continue to access capital at reasonable rates. In that event, a cost would be imposed upon ratepayers which would likely exceed the very modest cost sought to be recovered in this application.

The CASDA account is really comprised of two components: the portion of the total LPPs collected which, pursuant to a court-approved settlement resulting from the 2004 Supreme Court of Canada decision, must be repaid (the "Repayable LPPs"); and, the costs associated with efforts at minimizing the quantum of the Repayable LPPs. The portion of the 2007 CASDA comprised of Repayable LPPs is recoverable through rates on the basis of being a reasonable expense incurred in the normal course of business.

Beyond the Repayable LPPs (or otherwise stated, the settlement paid in the action), the 2007 CASDA account is made up of what remains of defence counsel's legal and expert costs in this lengthy litigation. The EDA submits that all costs incurred prior to the Supreme Court of Canada's decision in 2004, as well as those following that decision, were reasonable in the circumstances. The costs were incurred reasonably and necessarily to defend legal proceedings which arose directly in connection with the regulated activities of Enbridge.

The EDA submits that such expenditures prior to the Supreme Court of Canada's determination in 2004, where determination of liability on a restitutionary basis was found, were reasonable business expenses in defence of a policy, implemented by Rate Order, which was specifically adopted by the government to encourage timely payment of electricity bills, to the benefit of all ratepayers. Indeed, all courts, both the Ontario Court (General Division) and the Ontario Court of Appeal, until the first Supreme Court of Canada decision in 1998, agreed that the class action was to be dismissed on the basis that there was no liability whatsoever. Again, following the 1998 decision of the Supreme Court of Canada remitting the matter back to the Ontario Court (General Division), both the Ontario Court (General Division) and the Ontario Court of Appeal agreed with the utilities that there was no liability in respect of the collection of LPPs. There can be no doubt, on the basis of the record of court proceedings, that it was reasonable and prudent to expend costs in defence of the collection of LPPs until 2004, when the Supreme Court of Canada ultimately determined that restitution was to be made of LPPs collected from and after the serving of the Statement of Claim in violation of the *Criminal Code*.

From and after that 2004 decision, it remained reasonable and prudent to expend legal and expert fees in relation to the quantum of Repayable LPPs. The Supreme Court of Canada had determined that restitution was to be made of "illegally collected" LPPs from and after the serving of the Statement of Claim, but made no determination of the amount to be paid. The quantum of LPPs collected in violation of the *Criminal Code* was acknowledged by all to be a complex matter, and was remitted back to the lower court for determination. The quantum claimed in the Statement of Claim was $112 million. It was prudent for that quantum to be contested by Enbridge.

Indeed, the settlement resulted in a payment of $22 million, which is less than 20% of the quantum claimed and represents a discount of $90 million over the claimed amount. It is respectfully submitted that defence counsel and experts fees in this case, being less than $1.6 million and resulting in a discount to the damages claimed of $90 million, must be seen as

reasonable and prudent. By contrast, the alternatives open to Enbridge – to concede that $112 million was payable, or to go to trial and risk exposure up to $112 million plus legal costs of all parties – would not have been prudent in the circumstances. The legal and expert costs incurred in contesting the damages and negotiating a hard bargain ought, therefore, to be recoverable as reasonable and prudent business expenditures which avoided potentially greater liability and costs to ratepayers.

Further, in terms of the settlement amount, the EDA submits that there should be a presumption of prudence in these circumstances. Once the Ontario Superior Court of Justice approves a settlement under the authority of the *Class Proceedings Act, 1998*, the settlement has been found to be reasonable to the plaintiff class. The EDA respectfully submits that, absent any evidence before this Board that the settlement resulted in an overpayment to the plaintiff class or was otherwise unreasonable from the defendant's perspective, this Board should deem reasonableness to have been established for the purpose of rate recovery.

The 2007 CASDA, comprised of reasonable expenditures in connection with the collection of the LPPs and reasonable expenditures to discharge and minimize the repayment obligation regarding LPPs once that obligation was found, ought to be recoverable in rates.

Recoverable from whom and over what period

The EDA submits that, where a reasonable expenditure can be tied to specific rate classes as having directly benefited those classes by the reduction of rates to them, it is reasonable that recovery of the expenditure should be from the same rate classes.

Finally, the EDA submits that the time period over which any reasonably incurred business expenditure is to be recovered in rates should be based upon all relevant factors, which may include:

a. an examination of the reasonableness of the amount proposed to be recovered on the basis of per customer per year or month;

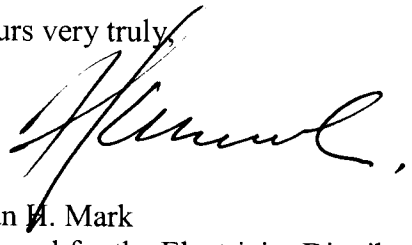
b. the amount of the periodic recovery proposed in relation to the periodic benefit which accrued to ratepayers in the first instance;

c. the amount of time over which the benefit to rate payers accrued in the first instance;

d. the overall financial affairs of the utility; and

e. other accepted principles of ratemaking.

Yours very truly,



Alan H. Mark
Counsel for the Electricity Distributors Association

AHM:il

c. Applicant and Intervenors as listed on Appendix A to Procedural Order No. 1