

ONTARIO ENERGY BOARD

**IN THE MATTER of the Ontario Energy Board Act,
1998, S.O. 198, c.15, Schedule B, as amended;**

**AND IN THE MATTER OF an Application by
Enbridge Gas Distribution Inc. for an Order or Orders
approving the balance and clearance of the Class Action
Suit Deferral Account;**

**AND IN THE MATTER OF an application by
Enbridge Gas Distribution Inc. for an order or orders
amending or varying the rates charged to customers for
the sale, distribution, transmission, and storage of gas
commencing as of January 1, 2008**

**SUBMISSIONS OF THE
SCHOOL ENERGY COALITION**

1. These are the submissions of the School Energy Coalition (“SEC”) regarding the application by Enbridge Gas Distribution Inc. (“EGD”) to approve and clear the balance in the Class Action Suit Deferral Account (“CASDA”).
2. This is the first time that the Board has been asked to determine ratepayer responsibility for the amounts recorded in the CASDA. In the settlement proposal in EGD’s 2006 rate proceeding [EB-2005-0001], the parties settled the CASDA issue on the explicit understanding that the issue of ratepayer and/or shareholder responsibility would be deferred to a later date:

**4.1 Recovery of amounts (estimated at \$1.725 million) in the
2005 Class Action Suit Deferral Account (2005 CASDA)**

(Complete Settlement)

There is an agreement to settle this issue as follows:

As a result of the Supreme Court of Canada's decision of April 22, 2004 in the “Garland” case, the Company is required to repay late payment penalties collected from the plaintiff in excess of the interest limit stipulated in s. 347 of the Criminal Code in a total amount to be determined by the trial judge. The Board has authorized the Company to record in a deferral account the costs

which it incurs related to the litigation and the plaintiff's costs. *There is an issue pertaining to the extent to which ratepayers and/or the shareholder are responsible for any of these amounts, which the Board in its decision in RP-2003-0203 deferred to a later date.*

...

The parties agree that the Board's determination of ratepayer and/or shareholder responsibility for these amounts should await the Court's determination of amounts payable. The parties agree that no amounts in the 2005 CASDA shall be cleared in the 2006 Test Year but, rather, all amounts recorded in the 2005 CASDA at December 31, 2005 should be transferred to a 2006 Test Year CASDA in which further amounts attributable to the litigation and the judgment, if any, will be recorded.

This disposition of the matter is considered by the parties to be compliant with Section 36(4.2) of the OEB Act...

If the Board finds that this disposition of the matter is not compliant with Section 36(4.2) of the OEB Act, then the issue of ratepayer and/or shareholder responsibility for the amounts recorded in the 2005 CASDA will need to be determined at the hearing.

[EB-2005-0001, Exhibit N1/1/1, section 4.1]

3. EGD argues that, since it followed the Board orders with respect to late payment fees and ratepayers benefited from the late payment fees, ratepayers should be responsible for the entire costs of the litigation, including the settlement costs.

"Board Order" Defence Rejected by Court

4. EGD made essentially the same argument- that its reliance on Board orders provided it with immunity from liability- before the Supreme Court of Canada.
5. The Supreme Court rejected that argument. In reversing the previous decisions of the Ontario Superior Court and Ontario Court of Appeal, the Court found that the late payment penalties constituted an unjust enrichment on the part of EGD at the expense of the class, and that the fact that EGD was simply following Board orders did not provide it with a defence. [See Exhibit C, Tab 1, Schedule 11, pg. 3 of 43] That is, its reliance on Board orders did not provide it with a "juristic reason" for the unjust enrichment.

6. The court did find, however, there was a juristic reason for collecting the late payment fees prior to 1994 when EGD was put on notice that the fees were contrary to the Criminal Code:

The reliance of Consumers' Gas on the OEB orders, in the absence of actual or constructive notice that the orders were inoperative, is sufficient to provide a juristic reason for Consumers' Gas's enrichment during this first period.

...

However, in 1994, when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LPPs were in excess of the s. 347 limit. Consumers' Gas could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made. Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble". After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.

[Exhibit C, Tab 1, Schedule 11, pg. 28 of 43]

7. In other words, EGD had a complete defence to the issue prior to 1994 when it was put on notice that the late payment fees were potentially in violation of the Criminal Code.
8. EGD now essentially repeats the same arguments before this Board: that it should be able to recover the costs of the action from ratepayers because it was following the Board orders and the amounts collected benefited customers in any event.

Intergenerational Equity

9. It is not, firstly, clear that the customers who would be paying the CASDA costs are the same customers who benefited from the late payment revenue.
10. Fourteen years have passed already since the beginning of this litigation- and the beginning of the period for which the offending late payment fees were collected. By the time the CASDA is paid out under EGD's proposal, 22 years will have passed. Under EGD's proposal, therefore, ratepayers will be paying for something that benefited ratepayers 10-20 years earlier.

Detrimental Impact on the Members of the Successful Plaintiff Class

11. In addition, if ratepayers are assigned responsibility, then the members of the class on behalf of whom the litigation was brought (those ratepayers who paid late payment fees) would also be paying for the costs of the settlement through rates. Therefore, if EGD's proposal for recovery is accepted, the plaintiffs to the litigation will be paying part of EGD's legal and settlement costs. And since the members of the class received no monetary payment from the settlement, they are actually worse off than they would have been had the litigation never been brought.

Retroactive Ratemaking

12. But there is a more fundamental reason for denying ratepayer responsibility: the late payment fees are like any other cost or revenue item EGD faces. The nature of regulatory compact is that, once these items are forecast, any variation from those amounts are to the account of the shareholder. The possibility that costs or revenues are greater or lower than forecast is part of the regulatory risk for which the utility receives a rate of return on investment.
13. Of course, the reverse is also possible. If during any of the rate years during which the late payment fees were collected the actual amount collected from ratepayers was higher than forecast, EGD would have retained the excess revenue.
14. The same is true for any other cost or revenue item whose actual value is different than the amount included in rates. During time period that is the subject of the CASDA litigation, for example, EGD had the benefit of a number of variations in its costs and revenues that were not shared with ratepayers. For example, for the years 2000, 2001, and 2002, the company operated under a targeted performance based regulation plan ("TPBR"). As a result, intervenors were not able to review the company's cost of service during those years. In 2000, EGD outsourced its customer services costs to an affiliate, Enbridge Commercial Services Inc. When the TPBR period ended and EGD had its next cost of service review, the Board subsequently disallowed some of these customer care costs resulting from the outsourcing arrangements with ESI. In RP-2002-0133, the Board disallowed \$7 million in customer care costs for the 2003 rate year [RP-2002-0133, para. 505]. In EB-2005-0001, the Board disallowed \$14.8 million from the proposed 2006 customer care and CIS costs of \$103.7 million [EB-2005-0001, pg. 52]. Neither of these disallowances, however, affected prior periods. During the TPBR period, therefore, the company was able to benefit from the outsourcing agreement that the Board later found did not fully protect the interest of ratepayers.¹

¹ Although the Board, in RP-2002-0032, reviewed the outsourcing arrangements, it found that the review had no cost consequences for the 2002 rate year since the company's operations and maintenance budgets for that year were determined by the TPBR process. The Board did say, however, that it was "not

15. Although this particular litigation was against EGD, it is not difficult to imagine the reverse scenario: EGD suing a service provider, for example, on the basis that it had been over-charged for services. Since the cost of the service would have been forecasted and included in rates, there would be no retroactive decrease in rates to account for any subsequent refund. The benefit from the litigation, therefore, would likely flow to EGD alone.
16. In SEC's submission, the CASDA litigation is analogous to a variation in any cost or revenue item, which does not normally result in a retroactive adjustment to rates. The same should apply for the CASDA litigation.

Implications

17. We note that the effect of allowing recovery of the CASDA amounts in this case has the potential to significantly alter the regulatory compact in the future. Not only does it invite utilities to seek retroactive recovery of forecast amounts that turn out to be higher than anticipated, but it also invites ratepayers to seek similar recovery where utilities over earn due to costs that turn out to be lower than budgeted. While there are those who would argue that this kind of after-the-fact "true-up" has its advantages to all parties, in our submission this would be a fundamental change in Ontario's utility regulation paradigm.
18. We also note that, if the Board determines that utilities should have the ability to recover amounts lost through their own misjudgment, after the fact, this in our view changes the risk/reward equation on which return on equity is determined. In those circumstances, we would seek an order from the Board that the ROE for EGD be reduced to account for that reduced risk.

Cost Allocation

19. It appears that, in the event EGD is allowed to recover all or a portion of the CASDA balance from ratepayers, it proposes to do so on a per customer basis [Exhibit B/Tab 1/Schedule 1, pg. 6]. Although this will result in the large majority of the costs recovered from residential ratepayers, this method of recovery is consistent with the way in which late payment revenues were credited to ratepayers. EGD's response to EGD interrogatory #1, for example, shows that almost 90% of late payment revenues between 1994 and 2001 were credited to Rate 1, 9.7% to Rate 6, and the rest to the other rate classes.

Issues Raised by Board Staff

20. No submissions.

convinced...that these outsourcing arrangements are beneficial to the utility...[and] intervenors have raised a number of legitimate concerns regarding the potential negative impact on the utility and its ratepayers."

All of which is respectfully submitted this 14th day of January, 2008.

John De Vellis
Counsel to the School Energy Coalition