

ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act 1998, S.O. 1998, 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 CONSUMERS COUNCIL OF CANADA

I INTRODUCTION

1. These are the submissions of the Consumers Council of Canada (the “Council”) in the application of Enbridge Gas Distribution Inc. (“EGD”) to the Ontario Energy Board (“Board”) for an order or orders approving the balance and clearance of the Class Action Deferral Account (“CASDA”).

2. For the reasons, and subject to the qualifications, set out below, the Council does not oppose the granting of the relief EGD seeks.

II BACKGROUND

3. As set out in EGD’s pre-filed evidence, the CASDA contains costs arising from a class action lawsuit, commenced in 1994, challenging EGD’s late payment penalty (“LPP”) as being a violation of section 347 of the *Criminal Code*. That class action will be referred hereinafter as the “Garland Action”.

4. The history of the Garland Action is described in EGD's pre-filed evidence, and in the court decisions which are attached as exhibits thereto. The Council will not repeat that history herein. However, the conclusions to be drawn from EGD's actions at various stages of that history are relevant in considering whether to grant the relief EGD seeks. Those conclusions are discussed below.

5. The total amount recorded in the 2007 CASDA, as of August 1, 2007, is a debit of \$23, 537,600, plus interest of \$682,400. (Ex. A, Tab 2, S. 1, p. 2)

6. EGD is requesting that the balance of the CASDA be cleared to ratepayers over the course of eight years, from 2008 to 2015. According to EGD, the impact of its request for recovery is \$3.5 million per year, over eight years, which equates to approximately \$1.90 per customer per year. (Ex. A, Tab 2, S. 1, pp. 2 and 3)

III EGD's Position

7. EGD argues that the balance in the 2007 CASDA should be recovered from ratepayers, for the following principal reasons:

1. EGD has acted in the public interest by imposing a LPP which discouraged late payment by delinquent ratepayers, thereby reducing the burden on the balance of ratepayers who would otherwise be required to shoulder the costs of the delinquent payers;
2. EGD adopted the recommendations of the Legislative Assembly, which was subsequently reviewed by the Board, considered by the intervenors, and found to be just and reasonable;
3. The application of the LPP reduced the cost of providing service and the revenue requirement;
4. For each of the relevant years, the Board has approved the inclusion of the LPP in EGD's rates;

5. The intervenors have supported, and the Board has approved the clearance of the CASDA over a number of years.

(Ex. B, Tab 1, S. 1, p. 6)

8. Union Gas Limited (“Union”) has filed a Written Argument, in which it supports EGD’s support for relief. Union argues that “it appears likely that the principles established in this case may have application to the future treatment of similar costs in other cases”. Given that, the Council believes that it is appropriate to address, herein, Union’s arguments, as well as those of EGD.

9. Union’s arguments, in support of EGD’s request, are the following:

1. LPP litigation costs were incurred as a direct consequence of good faith compliance with what were believed to be valid orders of the Board;
2. The LPPs which gave rise to the LPP litigation costs were levied for the benefit of utility customers generally and did, in fact, confer customer benefit.
3. The LPP litigation costs were not incurred dishonestly, negligently or wastefully. They were prudently-incurred costs;
4. The orders of the Board requiring the LPPs to be charged constituted an assurance, intended to have legal effect, that the LPPs were just and reasonable and, therefore, in the public interest. The utilities changed their position in reliance on those assurances to their detriment by not seeking other means to recover the costs caused by late payers. Refusal to allow recovery of the LPP litigation costs now would be “patently unreasonable” and contrary to the principles of regulatory estoppel. (Written Argument of Union Gas Limited, p. 2)

IV Issues

10. EGD asserts that the intervenors have supported the clearance of the CASDA over numerous years. The implication of that argument is that the intervenors have thereby

acknowledged that the amounts in the CASDA should be paid by ratepayers. The Council disagrees with that position. The settlement agreements between the intervenors and EGD with respect to the treatment of the CASDA have been expressly conditioned on the provision that they are without prejudice to the resolution of the issue of whether the ratepayers or EGD's shareholder is responsible for payment of the amounts in the CASDA.

11. The Council submits that EGD's arguments, with the exception noted in the preceding paragraph, and those of Union, are essentially correct. There are, however, alternative arguments which need to be considered.

12. The Council believes that the following issues need to be resolved in considering EGD's request for relief:

(i) Is EGD at risk for incorrect forecasts?

13. In the ordinary course, EGD would be at risk for incorrect forecasts. The extent to which its forecasts were incorrect, and any resulting shortfall in the revenue requirement, would have to be made up by EGD's shareholder.

14. However, the Council does not believe that the circumstances of this case can properly be characterized as a forecasting error. It was not the accuracy of the forecasts that was in issue, but rather whether the formula on which they were based was legal. The annual forecasts of the LPP were predicated on the interpretation of the relevant provisions of the *Criminal Code* in the context of the LLP. That interpretation was accepted by two levels of courts in Ontario. At no point was the forecast challenged by the intervenors, or for that matter by the Board, on the basis that the LPP might constitute a violation of the *Criminal Code*. Given those factors, the Council does not believe that this is properly characterized as a case of forecasting error.

(ii) EGD's shareholder should bear some or all of the risk.

15. The Council agrees that, in the ordinary course, EGD's shareholder bears the risk of imprudent decisions. An example would be a transportation contract entered into imprudently, as was the case with the Alliance/Vector contract.

16. However, the Council does not believe that EGD's shareholder should bear the risk where it acts pursuant to a Board order. To put the matter another way, the Council does not believe that EGD's shareholder should bear the risk of Board orders turning out to be invalid. If EGD's shareholder were to have to bear that risk, then the approved level of ROE would have to be changed.

(iii) EGD cannot rely on Board approval of the LPP from and after the commencement of the Garland Action in 1994.

17. The Supreme Court of Canada in its 2004 Decision on the Garland Action, held that after the action was commenced and the respondent was put on notice that there was a serious possibility that its LPPs violated the *Criminal Code*, it was no longer reasonable for EGD to rely on the OEB rate orders to authorize the LPPs. That finding might be used as an argument that EGD bears the entire risk of the overpayment of the LPPs, from and after the commencement of the Garland Action.

18. The difficulty with that line of argument is that EGD would have had to assumed, at the moment that the Garland Action was commenced, that the essential argument of the Garland Action was correct. To put the matter another way, EGD would have had to have adjusted its LPP immediately upon receipt of the notice of action.

19. The Council believes that it was reasonable for EGD to have defended the Garland Action. Indeed, two levels of Ontario courts supported its interpretation of the LPP and the relevant provisions of the *Criminal Code*.

20. If the Board were now to decide that EGD acted imprudently in not adjusting its LPP immediately following the commencement of the Garland Action, that would effectively preclude EGD, or any regulated utility, from undertaking, in good faith, the defence of actions commenced against it, even where those actions are spurious.

(iv) EGD should be responsible for the excess LPP payments after the 1998 Decision of the Supreme Court of Canada

21. It was the 1998 Decision of the Supreme Court of Canada that found that the LPP violated section 347 of the *Criminal Code*. An argument might be advanced that, from and after that point, EGD should be responsible for the excess LPP.

22. The 1998 Decision of the Supreme Court of Canada did not resolve all of the issues in the Garland Action. It resolved one issue only, and remitted the Action back for trial. EGD was entitled, acting both reasonably and prudently, to advance whatever other defences it felt were appropriate. Again, two levels of courts found that some, although not all, of those defences were reasonable. EGD should be entitled, acting prudently and reasonably, to advance defences to actions commenced against it. If the Board were to rule otherwise, EGD, and any other utility, would effectively be precluded from defending actions commenced against it, even if those actions are spurious.

23. It is also relevant that, from and after 1998, the Board did not direct EGD to change its LPP policy. On the contrary, the Board said that any change in the LPP should await the outcome of the second tranche of litigation.

(v) Allowing EGD to recover the CASDA amount from ratepayers amounts to retroactive ratemaking

24. The Council acknowledges that allowing EGD to recover the CASDA amounts to retroactive ratemaking, something which, in the ordinary course, the Board should not allow. Having said that, however, the circumstances of this case are very unusual. To impose an absolute prohibition on retroactive ratemaking would have the effect of precluding EGD from ever defending any litigation which had some prospect of subsequent recovery of amounts from ratepayers, even if the claim were spurious, defending it was in the interest of ratepayers. The Council submits that it would be contrary to the best interests of ratepayers to hamstring EGD, or any other utility, in that way.

25. The Council does acknowledge, however, that there is an issue of whether the Board has the authority to approve the retroactive recovery of rates even if, as the Council believes is the case here, it should do so.

Other considerations

26. There are other additional factors which militate in favour of granting, subject to the limitation noted below, the relief EGD seeks. One consideration is that ratepayers have benefited, over the years, from the LPP. The second consideration is that, to the knowledge of the Council, no intervenor has ever objected to the LPP. In particular, to the knowledge of the Council, no intervenor has, at any time since 1994, taken the position that a different LPP should be applied because of the risk represented by the Garland Action.

27. While, as a general proposition, the Council does not oppose the granting of the relief which EGD seeks in this case, there is one important qualification. In most, if not all, of the years since 1994, EGD has earned a return in excess of its allowed ROE. It is possible that, for some or all of those years, the LPP forecast has resulted in revenues which have contributed to that over-earning. The Council submits that it would be unfair to burden ratepayers with the full amount of the CASDA if the LPP forecasts had contributed to the shareholder's profit. Accordingly, the Council submits that EGD should, as a condition of a final order granting the relief requested, set out the amounts by which its over-earnings were the result of the difference between the LPP forecast and the actual amount of the LPP.

28. EGD proposes to recover the CASDA amount over a period of eight years. The Council believes that such an extended period will result in inter-generational unfairness. It is inevitable that a substantial number of ratepayers will, over the course of such an extended period, be paying amounts out of the CASDA in circumstances where they did not get any benefits from the former LPP. While the Council believes it is not possible to reduce inter-generational unfairness entirely, it submits that some of that unfairness would be eliminated if the recovery period were reduced to correspond with the period of any incentive regulation regime approved for EGD.

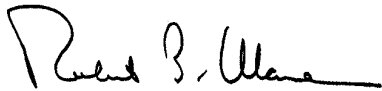
29. The Council has no basis on which to challenge the reasonableness of the ultimate settlement of the Garland Action. The Council notes that the settlement, for practical reasons, requires that damages be paid to the Winter Warmth Program. The Council submits that this practical provision in this settlement agreement has no bearing on the question of whether the

Board has the jurisdiction to require EGD, or any other utility, to implement a low income rate program.

VI Costs

30. The Council asks that it be paid 100% of its reasonably-incurred costs for its participation in this proceeding.

All of which is respectfully submitted.

A handwritten signature in black ink, appearing to read "Robert B. Warren", written over a horizontal line.

Robert B. Warren
Counsel to the Consumers Council of Canada