



By Electronic Filing and by E-mail

January 11, 2008

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
27th floor
2300 Yonge Street
Toronto ON M4P 1E4

Dear Ms Walli

Enbridge Gas Distribution Inc.
Class Action Suit Deferral Account ("CASDA")
Board File No.: EB-2007-0731
Our File No.: 302701-000420

Please accept this letter as the Written Argument submitted on behalf of the Industrial Gas Users Association ("IGUA"). IGUA's submissions focus on the regulatory principles which the Board should consider when determining matters at issue in this proceeding.

I Extent of Ratepayer Responsibility for Utility Wrongful Acts

The relief which Enbridge Gas Distribution Inc. ("EGD") and the other Ontario Energy Board ("OEB" or the "Board") regulated utilities seek is to have utility ratepayers shoulder the entire cost consequences of what the Supreme Court of Canada has found to be wrongful or illegal acts, consisting of the charging and collection of some interest on overdue accounts at a rate which contravenes the provisions of the *Criminal Code*.

The subject matter of this proceeding is the cost consequences of uninsured torts committed by Ontario utilities and countenanced by their regulator and the Province of Ontario. The primary issue to be resolved in this proceeding is the extent to which responsibility for the cost consequences of these wrongful actions should be attributed to utility ratepayers.

That utility ratepayers did not prompt the utilities, their regulator or the Province of Ontario to commit the wrongful acts is obvious. The ratepayers are not one of the tortfeasers. The legal responsibility for committing the wrongful acts rests with the utilities, their regulator, and/or the Province of Ontario.

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If legal responsibility for the wrongful acts is adopted as the guide for determining the extent to which Class Action Suit Deferral Account (“CASDA”) amounts are recoverable from ratepayers, then the recoverable amount should be confined to the legal costs incurred by the utilities to respond to the uninsured tort claims. The judgment amounts, including legal costs payable to the claimants, should not be recoverable from ratepayers.

That the wrongful acts were countenanced by the regulator and the Province of Ontario is clear. These circumstances demonstrate that the “torts” were not intentional. However, these circumstances do not alter the character of the actions as an actionable tort. In this context, IGUA submits that the characterization of the wrongful actions as “prudent” as argued by Union Gas Limited (“Union”) is a characterization which lacks merit. Actionable torts are, by definition, improper.

IGUA agrees that the responsibility for the cost consequences of the wrongful over-collection of interest in years prior to 2002 should be assigned by applying well established principles pertaining to the regulation of public utilities. In addition to taking account of the fact that ratepayers are not legally responsible for committing the wrongful acts, two (2) of these principles are as follows:

- (a) The equity return the Board allows utilities to recover in their rates equates them to unregulated enterprises of low risk. The Board approved equity return is not a guaranteed return;
- (b) Changing current rates to reflect either the over-collection or under-collection of costs or revenues attributable to prior periods is inappropriate. As a general rule, retroactive rate-making should be avoided.

IGUA submits that these two (2) regulatory principles should be considered when the Board determines the extent to which responsibility for the uninsured litigation damages and costs, associated with the extent to which the over-collection of late payment penalties was wrongful, should be attributable to ratepayers.

Low risk unregulated enterprises must write-down assets when they experience uninsured litigation losses. Uninsured litigation losses are one of the business risks faced by low risk unregulated enterprises. When such an event occurs, the owners of such unregulated enterprises generally reduce dividends, temporarily, in order to replenish equity levels.

IGUA submits that a Board order which operates to relieve utility shareholders of the business risks faced by unregulated enterprises of low risk is an order which effectively treats the allowed equity return as a guaranteed return.

There is no evidence to suggest that a write-down by EGD of some or all of the \$24M recorded in the 2007 CASDA will irreparably harm its financial integrity. EGD has utility assets with a total estimated net book value in 2008 of about \$3.8B. The 36% equity component of the net book value of EGD’s utility assets is about \$1.368B. A \$24M write-down of EGD’s equity capital would temporarily reduce it to about \$1.344B

and EGD's owner would need to temporarily reduce dividends payable by EGD in order to restore the 36% equity ratio.

IGUA submits that this level of equity write-down would likely be absorbed, without difficulty, by the shareholders of a non-equity enterprise of low risk. The extent to which an unregulated enterprise of low risk would write-down assets to reflect litigation losses associated with uninsured torts is a factor which the Board should consider when determining the extent to which such losses are recoverable from utility ratepayers.

Since the Board determines the equity return allowance for the utilities it regulates, the Board will know the extent to which "business risk" is covered by that return allowance. IGUA submits that the Board should make a determination of the extent to which "business risk" associated with uninsured litigation losses is covered by the equity return allowance.

EGD's equity risk premium is in the order of 300 basis points. IGUA urges the Board to determine the portion of that equity risk premium which is reasonably attributable to the business risk of uninsured litigation losses. IGUA suggests that at least one third (1/3) or 100 basis points of the 300 basis points equity risk premium should be found to be attributable to the risk of uninsured litigation losses.

If the Board agrees and determines that an amount of about 1% of utility equity capital should be used as a guide for measuring the non-recoverable portion of uninsured litigation losses, then this guide could be used generically to determine the portion of CASDA amounts not recoverable from the ratepayers of all of the utilities the Board regulates.

The fact that rates in prior periods were set by taking account of the revenues attributable to the portion of late payment penalties found by the Supreme Court of Canada to be wrongful or illegal, should not prompt the Board to now attribute all responsibility for the cost consequences of these wrongful actions to ratepayers. If the Board is going to reach back and effectively re-adjust rates in prior periods for an over-collection of late payment revenues, then it should, at the same time, re-adjust rates in these prior periods for the extent to which any of the estimated costs of service recoverable in rates exceeded actual costs. Stated another way, if the equity return EGD recovers in rates is to be retroactively treated as if it were a guaranteed rate of return, then any amounts EGD earned in prior periods in excess of its allowed equity return must be credited to ratepayers. IGUA suggests that the cumulative amounts earned by EGD in excess of its allowed equity return during the years it over-collected late payment penalties would materially exceed the \$24M recorded in the 2007 CASDA.

Based on the foregoing, IGUA submits that ratepayers should not be the only interest group to be held accountable for the cost consequences of the uninsured torts committed by the utilities, their regulator, and the Province of Ontario. A portion of the cost consequences of these wrongful actions equal to about 1% of the equity capital of the affected utility should not be recoverable from ratepayers. In EGD's case, IGUA estimates that the amount not recoverable from ratepayers to be about \$13.7M (1% of



\$1.368B = \$13.7M). As a result, IGUA submits that only \$10.3M of the \$24M recorded in the 2007 CASDA should be charged to EGD's ratepayers. An alternative approach, as set out above, is to limit the amount recoverable from ratepayers to the legal costs incurred by the utilities to resist the uninsured tort claims.

II Allocation of Recoverable Amounts to Rate Classes

IGUA urges the Board to find that customer numbers is the allocation factor to be applied to determine rate class responsibility for the portion of excessive interest on late payments collected in prior years which the Board finds to be recoverable from ratepayers. Rate class responsibility should be allocated on the same basis as the estimated interest revenue was allocated to rate classes when rates were set in the prior years. IGUA submits that any other allocation method would be inconsistent and unfair.

III Costs

IGUA requests that it be awarded 100% of its reasonably incurred costs of participating in this proceeding.

Yours very truly

Peter C.P. Thompson, Q.C.

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c. Applicant
Intervenors
Murray Newton (Industrial Gas Users Association)

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