March 6, 2014

VIA RESS AND COURIER

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Ms. Kirsten Walli
ONTARIO ENERGY BOARD
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto, Ontario
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Dear Ms. Walli:

Re: EB-2014-0043: Enbridge Gas Distribution Inc. (EGD) Application for Disposition of Amounts from Purchased Gas Variance Account.

Industrial Gas Users Association (IGUA) Comments.

We write as legal counsel to IGUA, and pursuant to the Board's Procedural Order No. 1, herein.

EGD has applied for final approval for the Rider C commodity unit rates that were approved on an interim basis in the December 20, 2013 Interim Order of the Board, by delegated authority. That interim order was made in the matter of EGD's January 1, 2014 Quarterly Rate Adjustment Mechanism (QRAM) application. In that Interim Order, the delegated decision maker approved Rider C as applied for by EGD, including a credit of $10.1 million to system gas customers arising from a "mechanical error" in EGD's recent QRAM calculations which resulted in over collection of this amount in previous rate riders.

EGD disclosed this "mechanical error" in its January 1, 2014 QRAM application, and the relief sought in that application included refund of the past over collection to customers. In its December 16, 2013 submission on EGD's January 1, 2014 QRAM application, IGUA noted its consultant's review of the proposed $10.1 million credit, and Board Staff's questions in respect of that proposed credit. In one of those questions, Board Staff asked EGD to address a potential concern that application of the credit to Rider C would entail "retroactive ratemaking".

EGD addressed Staff's concern regarding "retroactive ratemaking" in an interrogatory response filed in the January 1, 2014 QRAM application (and refiled as Exhibit B, Tab 3, Schedule 1 in this application). EGD's position on the issue of retroactive ratemaking, as IGUA understands it, is that as the Rider C, inclusive of the $10.1 million credit, is to be applied to customers' bills on a prospective basis (that is, on volumes current for the future billing period), as opposed to recalculation of past bills by application of a revised Rider C to historical and already billed volumes, EGD's proposal is not retroactive ratemaking. IGUA agrees with this position.

Scott Hempling provides an instructive working definition of "retroactive ratemaking" in his book *Regulating Public Utility Performance*[1]:

> *To "correct" a pre-existing rate based on end-of-year results, the commission would have to order a change to previously approved rates, then apply that change to a past period. That is the definition of retroactive ratemaking.*

Professor Hempling explains, with reference to U.S. jurisprudence, the policy basis for the rule against retroactive ratemaking as follows:[2]

> *The rule "ensures predictability and stability of utility rates and generally prevents utility companies from recovering losses that stem from 'past company mismanagement or improper forecasting'".*

This Board has expressed similar sentiments. In a 2006 decision which considered the topic in some detail, the majority of the Hearing Panel wrote:

> *When investors and consumers cannot be assured that final rates are indeed final, the resultant risks increases [sic] costs for everyone. In addition, intergenerational inequities arise, with today's consumers paying the costs of past events. In this case, it is not appropriate for either the utility or its ratepayers to bear the implications of a retroactive rate change. To burden the utility would be contrary to the regulatory compact. To burden the ratepayers would be wrong, especially given the length of the retroactivity.*[3]

Vice Chair Kaiser, a member of the hearing panel in that 2006 case, wrote a dissenting opinion, disagreeing with the majority on whether retroactive ratemaking was engaged as an issue, but not on the characterization of the rule against retroactive ratemaking. After citing judicial authority for the rule that *"…the Board must act prospectively, and may not award rates which will recover expenses incurred in the past and not recovered from rates established for past periods"*[4], Vice Chair Kaiser wrote:

> *The reason is that the regulatory compact assumes that between rate hearings, there will always be over earnings or under earnings but the utility must accept the consequences. It is not entitled to be reimbursed if it does not make its full allowed rate of return. On the other hand, the utility does not have to give money back to the ratepayers if it earns in excess of that amount. Rates are to be corrected at the time of the next hearing on a going forward basis. They are not made retroactive. This allows the utility to finance its operations on a predictable basis and provides finality to the proceedings.*[5]

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[1] Published by American Bar Association, Section of Environment, Energy and Resources, page 326.
[2] Ibid, page 327, citing *Archer Daniels Midland Co. v. Iowa*, 485 N.W.2d 465, 467 (Iowa 1992); *Citizens Utils. Co. v. Ill. Commerce Comm'n*, 529 N.W.2d 510, 515-17 (Ill. 1988).
[3] EB-2005-0013/0031, Decision and Order, February 24, 2006, p.7.
[4] EB-2005-0013/0031, Decision and Order, February 24, 2006, p.17, citing *Northwestern Utilities Ltd. v. City of Edmonton*, [1979], 1 S.C.R. 684.
[5] EB-2005-0013/0031, Decision and Order, February 24, 2006, p.17.

In IGUA's submission, the circumstances giving rise to EGD's proposal for refund of the $10.1 million over collected does not engage the policy concerns described in the past by this Board and cited by Professor Hempling regarding retroactive rate making. In particular:

- EGD is proposing to return to customers amounts over-collected in error, which does not offend the policy against allowing a utility to revisit its forecasting or management decisions and thereby avoid historical losses.

- As EGD's refiled interrogatory response underscores, the proposed refund relates to commodity costs only. The Board's QRAM process is designed precisely to allow commodity costs, in respect of which EGD does not earn a return, to flow-through to customers as actually incurred. The QRAM mechanism for tracking and truing up commodity cost riders is premised on prospective adjustment of the rider to account for historical over or under collection relative to commodity costs actually incurred. This is distinct from delivery rates which are intended to be final and generally not subject to subsequent "true up".

- Were the Board to reject EGD's proposal to credit Rider C with the $10.1 million over-collected, the result would be a windfall to EGD's shareholder, at the expense of EGD's system gas customers, as a result only of a spreadsheet error which EGD has now discovered and corrected. Correction of a calculation error through refund of the over-collected amounts is not a circumstance that engages the "regulatory compact" protected by the rule against retroactive ratemaking. Indeed, such a correction is fully in line with this Board's practice and the expectations of the gas utilities and their customers, as enshrined in the QRAM mechanisms, that actual commodity costs are passed through to customers.

- As noted above, IGUA understands EGD's proposal to be that the $10.1 million credit, is to be applied to customers' bills on a prospective basis (that is, on volumes current for the future billing period), as opposed to recalculation of past bills by application of a revised Rider C to historical and already billed volumes

As noted by Vice Chair Kaiser in the 2006 decision noted above;

> *There is ample authority in the regulatory jurisprudence that credits going forward do not constitute retroactive ratemaking. This is particularly the case where it reflects a one time fixed amount adjustment to an overpayment that the tribunal finds unjust.*[6]

Accordingly, IGUA supports EGD's proposal that Rider C, previously approved by delegated authority on an interim basis inclusive of the $10.1 million system supply customer credit, be approved on a final basis.

Costs

Pursuant to the Board's *Practice Direction on Cost Awards*, and Procedural Order No. 1 herein, IGUA is eligible to apply for a cost award as a party primarily representing the direct interests of

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[6] EB-2005-0013/0031, Decision and Order, February 24, 2006, p.21, citing *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S. 2d 587 (1960) and *ATCO Gas and Pipelines Ltd. v. Alberta Energy and Utilities Board* [2006] S.C.J. 4 at para. 137.

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ratepayers in relation to regulated gas services. IGUA requests that the Board award it costs reasonably incurred in review of, and comment on, the instant application.

While IGUA's constituents are not major consumers of system supply (though some of IGUA's members do use some system gas), IGUA has, together with CME, been a regular reviewer and commenter on the QRAM applications filed by EGD and Union Gas. As noted above, IGUA reviewed, and commented on, EGD's January 1, 2014 QRAM application from which the instant application arises. Further, proper application of the rule against retroactive ratemaking is a matter of broader concern, beyond the instant proposal.

IGUA has, in the past, been consistently awarded modest costs for review of QRAM applications. IGUA respectfully submits that the Board, in making such awards, has recognized some value (commensurate with modest costs) in the independent and informed review of such applications. IGUA further submits that the same consideration should apply in the case of IGUA's considered comment on the broader issue engaged by the instant application.

IGUA submits that it has acted responsibly with a view to informing the Board's review and decision on this application. On this basis, IGUA is requesting recovery of its costs for participation in this process.

Yours truly,

Ian A. Mondrow

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Intervenors of Record (EB-2012-0459)

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