Ontario Energy Board

Commission de l'Énergie de l'Ontario

RP-2001-0032

IN THE MATTER OF the *Ontario Energy Board Act,1998*, S.O. 1998, C.15, Sch B;

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc., formerly The Consumers' Gas Company Ltd., for an order or orders approving or fixing rates for the sale, distribution, transmission and storage of gas for its 2002 fiscal year;

AND IN THE MATTER OF a motion by Enbridge Gas Distribution Inc., for review and variance of the decision of the Board as set out in its RP-2001-0032 Decision with Reasons dated December 13, 2002.

BEFORE: Bob Betts
Presiding Member

George Dominy
Member

A. Catherina Spoel
Member

DECISION WITH REASONS ON MOTION

On January 7, 2003, Enbridge Gas Distribution Inc. ("EGDI") filed a notice of motion, pursuant to Part VII of the Board's Rules of Practice and Procedure (the "Motion"),

asking the Board to review and vary its decision in the RP-2001-0032 proceeding ("Decision"). During the RP-2001-0032 proceeding, EGDI was carrying on business under the name Enbridge Consumers Gas.

By letter dated January 9, 2003, the Board directed EGDI to file, by January 17, 2003, all of the supporting documentation EGDI intended to rely on, including its submissions on the merits of its motion, which EGDI subsequently did.

In its Motion, EGDI asks the Board to review and vary its decision with respect to two issues. EGDI asked for the following relief:

(a) a review and variance of the Board's finding that the Alliance 1 and Alliance 2 contracts were not prudent;
(b) a review and variance of the direction to Enbridge Gas Distribution Inc. to credit $11.0 million to the 2002 Purchase Gas Variance Account ("PGVA") and provide the Board with sufficient evidence of this credit when dealing with the clearance of the 2002 PGVA in the 2003 rates proceeding;
(c) a review and variance of the Board's comments and findings in secion 5.11 of the Decision to confirm that:
    (i) the duty of Enbridge Gas Distribution Inc.'s management to act in the best interests of the corporation equates to a duty to act in the best interests of the shareholder, and not in the best interests of the ratepayers;
    (ii) the shareholder of Enbridge Gas Distribution Inc. has the right to not only earn a fair return on its invested capital, but to undertake commercial transactions, and reorganize assets and services, in furtherance of

corporate business interests, provided the ratepayers of the regulated utility are held harmless from the consequences of such transactions; and

(iii) the Board (and not Enbridge Gas Distribution Inc.) has an obligation to balance the interests of the utility shareholders and utility ratepayers;

and conversely, that Enbridge Gas Distribution Inc. has no obligation

(iv) to bring critical operational issues to the Board's attention; or

(v) to act in the best interests of the ratepayers, thereby conferring upon them a benefit, significant or otherwise;

(d) a generic hearing to examine the issues fully in the event that the Board decides to change its policies on the application of the "no harm" test, or decides to make changes to the *Affiliate Relationships Code for Gas Utilities*;

(e) an order of the Board itemizing all directives to Enbridge Gas Distribution Inc. (the "Directives") that arise from the Decision and stating the statutory authority pursuant to which these Directives are issued;

(f) a stay of the Directives in paragraph (e) above, pending a final determination of this motion; and

(g) such further and other relief as the Board may deem just.

In support of the Motion, EGDI filed the affidavits of Rudy Riedl, Janet Holder and Marika Oksanna Hare, along with its submissions.

Section 44.01 of the Rules of Practice and Procedure states:

44.01 Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to Rule 42, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

In effect, EGDI is asking for relief on two issues. The first issue relates to the Board's finding that EGDI had not proven the prudence of its decision to enter into the Alliance contracts and the Board's disallowance of $11.0 million in relation to those contracts. The second issue is the Board's expectations regarding the evidence to be filed by EGDI in relation to its outsourcing arrangements, in the upcoming rates case, the RP-2002-0133 proceeding.

Having considered the Motion and the supporting material filed by EGDI, the Board finds that EDGI has not established that there are errors in fact, changed circumstances, new facts, or evidence that was not reasonably available at the time of the hearing which would raise a question as to the correctness of the Board's Decision.

Therefore the Board finds that it is not necessary to hear from the intervenors on this Motion, and that the Motion should be dismissed.

The Alliance Contracts Issue

There are two aspects to this issue. The first is the prudence of the decision to enter into the Alliance contracts. The second is the Board's disallowance of $11.0 million in relation to the contracts.

(1) The prudence of the decision to enter into the Alliance contracts

The onus to establish the prudence of the Alliance contracts was on EGDI. In its Decision, the Board concluded that EGDI had not discharged this onus. In support of the Motion, EGDI filed the affidavits of Janet Holder and Rudy Riedl. Janet Holder had already testified during the course of the hearing. It was always open to EGDI to file additional evidence or call Rudy Riedl or others as witnesses. (See, for example, UNDERTAKING NO. G.3.14: to provide any internal documents, memos, or other materials as well as minute action items from board of directors' meetings which would assist in confirming that Enbridge Consumers Gas acted prudently when entering into these various contracts.) Having reviewed the material filed by EGDI, the Board is of the view that there is nothing new in the two affidavits that could not have been put on the record during the course of the hearing and therefore EGDI has not met the test under Rule 44.01.

(2) The Board's disallowance of $11.0 million

The Board is not convinced that the amount of the disallowance should be changed. The usual consequence for a utility that has not proven the prudence of a decision it has made is that all of the costs associated with that decision will be disallowed. In this particular case, the Board did not apply the usual consequence. Rather, the

Board disallowed, on a one-time basis, $11.0 million of the costs incurred in connection with the contracts.

The issue of prudence and potential disallowance was first addressed in the Settlement Proposal (Gas Costs) dated September 1, 2000 filed in RP-2000-0040 (EB-2000-0234), Exhibit N1,Tab 1, Schedule 1, Page 5 of 8, which states:

- ECG concurs with the other parties that ECG's proposal to include the entire cost consequences of ECG's agreements for transportation services on the Alliance, the Link, and the Vector Pipelines is in issue for examination during, or settlement prior to, the Board's oral hearing in the main RP-2000-0040 proceeding; and
- ECG's gas cost forecast or its revenue requirement, as the case may be, will be adjusted as required by the Board's decision on, or the settlement of, this issue in the main RP-2000-0040 proceeding.

The issue was next addressed in much the same way in the Settlement Proposal (Gas Costs) dated November 28, 2000 filed in RP-2000-0040 (EB-2000-0317), Exhibit N1,Tab 2, Schedule 1, Pages 4 and 5 of 7, where EGDI's cost recovery on the Alliance, the Link and the Vector Pipelines was acknowledged as an outstanding issue.

In the RP-2000-0040 main rates proceeding, EGDI and the other parties agreed that the prudence and any potential disallowance would be deferred and that it would be open to any party to raise these issues in a subsequent rates case. In the Settlement Proposal (Main Case) dated May 11, 2000, Exhibit N2, Tab 1, Schedule 1, the parties further agreed as follows:

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> ECG and the other parties concur that an examination of this issue would be facilitated by quantifying, during the Test Year, the cost differential between the two transportation paths [EGDI's traditional transportation path and the new path involving the Alliance and the Vector pipelines] by means of a notional deferral account. The resultant entries in this account, together with the other information ECG will provide as a condition of this settlement, would provide an evidentiary basis for a thorough examination of this issue in ECG's next rates case. [context added]

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> The cost differential recorded in the notional deferral account for the Test Year will be examined in the context of ECG's next rates case as a means, among others, of ascertaining whether the entire cost differential should be allowed for rate-making purposes and, if not, the amount that should be disallowed. Any such disallowance would not be retroactive, however, but rather any amount disallowed would be applied prospectively as a credit to ECG's revenue requirement for Fiscal 2002.

In determining that it was appropriate to disallow $11.0 million, the Board made use of the notional deferral account, as was contemplated in the settlement proposal. EGDI submissions to the Board on the Motion have not convinced the Board that the $11.0 million disallowance should be reviewed or varied. While EGDI still has the obligation to manage the contracts prudently over the life of the contracts there will be no further disallowance in relation to the prudence of the decision to enter into those contracts.

There is nothing in the Motion to convince the Board that it has made an error that needs to be corrected. Therefore, EGDI has not met the test under Rule 44.01.

The Board's expectations regarding the evidence to be filed by EGDI in relation to its outsourcing arrangements, in the upcoming rates case, RP-2002-0133

EGDI provides a monopoly service and the Legislature has established the Board as a regulator with a mandate to balance the various aspects of the public interest, including the interests of the corporation and the interests of ratepayers. The corporation wants to maximize its returns; the ratepayer wants to minimize rates. In the context of the interests of the corporation, the Business Corporations Act, R.S.O. 1990, c. B. 16, as amended ("OBCA"), provides as follows:

> 115. (1) Subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the business and affairs of a corporation.
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> 134. (1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall,
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> (a) act honestly and in good faith with a view to the best interests of the corporation; and
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> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
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> (2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.

Pursuant to section 36 of the Ontario Energy Board Act ("OEBA"), rates must be "just and reasonable" and the applicant bears the burden of proof. The Board's focus is, and always has been, to ensure that costs are reasonable and prudently incurred before allowing recovery of those costs through rates. In the context of EGDI's outsourcing arrangements, the Board has stated its expectations that EGDI will file evidence that will allow the Board to understand the basis for the cost of the outsourced services. The Board requires this evidence in order to decide whether

to allow those costs to be recovered in rates. Ultimately, the burden of proof lies with EGDI. If the Board is not satisfied that the rates applied for are just and reasonable, the Board may fix such other rates as it finds to be just and reasonable.

The Board has not yet commenced the fiscal 2003 rates hearing and has made no findings with respect to what costs may be recovered in rates. All the Board has done is state its expectations with respect to the evidence to be filed in the next rates proceeding. While section 21 (1) of the OEBA gives the Board clear jurisdiction to, "at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act", the Board is of the view that it is not necessary to issue such directions at this time and that it is sufficient for the Board to have clearly stated its expectations, as set out in its Decision.

On this issue, EGDI has not met the test for review under Rule 44.01.

The Motion is dismissed.

DATED at Toronto, February 10, 2003.

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Bob Betts
Presiding Member

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George Dominy
Member

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A. Catherina Spoel
Member