E.B.O. 179-14
E.B.O. 179-15

OEB RULING ON MOTION BY ENBRIDGE CONSUMERS GAS

By Notice of Motion filed on June 11, 1999, Enbridge Consumers Gas, ("the Company", "the Applicant") requested that the Board review or rehear portions of its Decision with Reasons dated March 31, 1999 in E.B.O. 179-14/15. The original application was for all necessary approvals of transactions related to the transfer of certain information systems, businesses and activities to affiliates, and included an application to retain the Company's Rental Program within the core regulated utility. The portions of the Decision with Reasons that are the subject of the request for review or rehearing are those portions that address deferred taxes associated with the Company's Rental Program. The Board determined in the Decision that distribution ratepayers were not responsible for payment of those taxes, but that the Board would allow the Company to set up a notional utility account of up to $50 million, in recognition of the benefits these ratepayers received as a result of the existence of the Rental Program, that could be drawn down as stipulated in the Decision.

Prior to filing its motion, the Company had petitioned the Lieutenant Governor in Council under section 34 of the *Ontario Energy Board Act, 1998* to require the Board to review the Decision. By letter dated July 13, 1999, the Board requested clarification from the Company of its view of the relationship between this motion and the petition to Cabinet. By letter dated July 21, 1999, the Company stated that in its view, a determination by the Board that it would hold a hearing to review portions of the Decision would render the petition moot, and it therefore requested the Board to proceed to deal with the motion.

The Board issued its Notice of Hearing of Motion on this matter on July 28, 1999, indicating that it would consider the "threshold question" beginning on August 10, 1999, and that, if appropriate, it would then proceed immediately to hear the merits of the motion.

The Company had requested that the motion be heard by "the entire panel of full time Board members, or, alternatively, by a panel which included the Chair and Vice-Chair of the Board". At the outset of the Hearing on August 10, 1999, the Board noted that the three member Panel appointed

to consider the motion was not constituted in the manner requested by the Company. It consisted of the two Board members who had heard the matter originally and a third who had not been part of the E.B.O. 179-14/15 panel. The Company and intervenors were asked whether there were objections to the composition of the Panel. None were raised.

Before hearing submissions as to whether it should review or rehear any portion of its Decision, the Board considered an application by Enbridge Inc., the parent of the Company, for intervenor status in this matter. Having heard the submissions, the Board denied the request in relation to the hearing of the threshold issue, stating that it would reconsider whether it would be assisted by the intervention of Enbridge Inc. if it were to decide to rehear the matter.

The hearing of the threshold issue was completed on August 11, 1999.

Subsection 21.2 (1) of the *Statutory Powers Procedure Act* provides:

> *A tribunal may, if it considers it advisable, review all or part of its own decision or order, in accordance with its rules made under section 25.1, and may confirm, vary, suspend or cancel the decision or order.*

As pointed out by the Applicant, the power is a broad one, subject only to the requirement that the tribunal have rules to govern the process, which the Board has. The Board's Rule 63.01(a) requires a notice of motion for a review or rehearing to

> *... set out the grounds upon which the motion is made, sufficient to justify a rehearing or review or raise a question as to the correctness of the order or decision, which grounds may include,*
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> *(i) error of law or jurisdiction, including a breach of natural justice;*
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> *(ii) error in fact;*
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> *(iii) a change in circumstances;*
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> *(iv) new facts that have arisen;*
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> *(v) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;*

(vi) an important matter of principle that has been raised by the order or decision; ….

The Applicant noted that the list of grounds set out in the rules did not appear to be exhaustive.

The Board's attention was drawn to a number of cases in which the courts have considered powers of administrative tribunals to reconsider matters that have been the subject of their decisions. Having reviewed the cases and heard submissions by the parties, the Board is of the view that the Board should not rehear matters simply because one of the parties to the original application was dissatisfied with the result or otherwise no matter might ever be finally determined.

The Applicant relied principally on subsections (a)(ii) and (a)(vi) of Rule 63.01, arguing that "brand new evidence" is not required to support a request for rehearing.

As to subsection (a)(ii), the Applicant alleged that the Board erred in fact in describing the extent to which "the deferred tax problem" was raised in earlier Board proceedings. The Company pointed to references to the subject of deferred taxes in oral testimony in earlier cases and in answers to interrogatories as evidence that the "the Company did alert the Board to the deferred tax problem".

The "deferred tax problem" at its most basic is the question of whether the deferred taxes relating to the Rental Program, when they become due, should be the responsibility of the distribution ratepayer. However, for the Company merely to mention the term "deferred taxes", or even to provide tables in an answer to an interrogatory does not, in the Board's view, cause the Board and all parties to consider the question of whether these taxes are the responsibility of the distribution ratepayer. The Board's comments in its Decision concerning the extent to which the subject of deferred taxes had been raised in earlier hearings were not in error, given that the Board was referring to a complete discussion of the issue of responsibility for the ultimate payment of the taxes.

In order to qualify under the CICA guideline allowing taxes to be collected on a flow-through basis, and thus give rise to a deferred tax liability, the Company must have

> a reasonable expectation that all taxes payable in future years will be:
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> (a) included in the approved rate or formula for reimbursement and
> (b) recoverable from the customer at that time.

If it had such an expectation, the Company may not have wished to raise the question of whether the deferred taxes relating to rental assets would be the responsibility of the distribution ratepayer rather than the Rental Program participant when these taxes became payable for the Board's consideration, as raising the question would belie its "reasonable expectation" and imply that the guideline did not apply. That the Company may have felt it could do no more without bringing into question the applicability of the guideline does not result in Board agreement that the guideline was applicable. Whatever the reasons, no complete discussion of the responsibility for payment of Rental Program taxes, currently deferred, took place. Consequently, the Board was not in error in commenting on the absence of such a discussion.

The Applicant also alleged that the Board erred in its reference in E.B.R.O. 497 to the unrecorded deferred taxes as a "cost" that was not considered when the Board was reviewing the cost allocation methodology of ancillary programs in E.B.R.O. 495, arguing that the taxes "were beyond the scope of the cost allocation [study]". The Board was not, in its comment, suggesting that the taxes ought to have been included in the technical cost allocation exercise, being, as they are, direct costs of the ancillary programs. Nor did the Board suggest that its decision in E.B.R.O. 495 on the appropriateness of fully allocated costing for the ancillary programs had an "impact on deferred taxes" or was a "watershed in relation to the deferred tax issue". The Board's reference related again to the Board's surprise that the issue of responsibility for these substantial costs was not more explicitly presented at a hearing in which costs related to ancillary programs were central.

In any case, to be grounds for a review or rehearing, the errors of fact alleged must be errors capable of affecting the outcome of a decision. The Board's comments on the extent of disclosure of the issue in earlier cases was not determinative of the issue of whether or not the Company could obtain the approval it requested to retain the Rental Program in the core utility. The Board was simply commenting on the fact that the issue had not been fully discussed previously in proceedings that dealt extensively with the costs associated with the ancillary programs.

The Company also relied on subsection (a)(vi) of Rule 63.01. It argued that the applicability of the CICA guideline to the Rental Program was a matter of principle raised by the Decision. In the Board's view, the question of the responsibility for the payment of the deferred taxes relating to the Rental Program, and therefore the applicability of the guideline to the program, was fully aired and argued in the original hearing. It is therefore not a principle "raised" by the Board's Decision, but a principle the applicability of which was at issue before the Board, and upon which the Board made a decision.

The Company also argued that the existence of a "regulatory compact" and the circumstances under which it can be changed is a matter of principle raised by the Board's Decision. The Company itself supported its original application by extensive references to earlier Board decisions. Other parties responded. The Board's conclusion that the earlier cases did not support the Company's claim that there had been a commitment on the Board's part to allow the deferred taxes relating to the Rental Program to become the responsibility of the distribution ratepayer is not a principle raised by the Board's Decision, but the outcome of the Board's consideration of the arguments of the Company and others.

The Applicant argued that a further important matter of principle is raised by the failure of the Board to give appropriate weight to changes in government and legislative policy in its Decision. The Board, in its preamble to its findings in the Decision, made explicit reference to its consideration of "the changing legislative, regulatory and market contexts". This consideration led the Board to conclude that it would be inappropriate to "just say no"(which was argued by intervenors) to the Company's proposal, and that regulatory efficiency demanded a more innovative solution. The Company's dissatisfaction with the outcome does not negate the Board's recognition of these policy changes.

With respect to the capping of the notional utility account at $50 million, in recognition of the benefits ratepayers had received as a result of the existence of the Rental Program, the Applicant argued that there are matters of principle raised by the Decision in its use of that figure, rather than either one based upon a 20 year calculation or one that is future valued. The Board does not believe that the amount at which the account is capped is, in fact, a principle but rather a conclusion reached by the Board that the Company does not agree with. The principle, in this instance, is whether or not the full amount of deferred taxes related to the Rental Program should become the responsibility of the distribution ratepayer or the shareholder – an issue, as noted previously, fully discussed in the original hearing.

The Company further submitted that the impact of a decision may be grounds for rehearing the matter. The Company had requested approval for its plans relating to the Rental Program. It had every opportunity in the original hearing to present evidence about the impact of the Board's refusing its request. In fact, the Board requested clarification from the Company during the hearing about its expectations should the request be denied. As noted in the Decision, the Company responded to the Board's request in its Argument-in-Chief, asking for "detailed guidance as to the Board's expectations...[to] enable the Company [if necessary] to design an alternative that would meet the

Board's expectations and...facilitate the regulatory process". In the interests of regulatory efficiency the Board did not accede to intervenors' requests that it refuse the Company outright. Instead, it provided what guidance it could. That the guidance was not what the Company would have wished for, and has an impact that the Company did not foresee, is not, in the Board's view, appropriate grounds for review or rehearing. In any case, the Board left it up to the Company to determine the future of the program, a determination that would affect the impact of the Board's decision.

Based on all of the above, the Board finds there are insufficient grounds for the Board to rehear or review the matter of deferred taxes related to the Rental Program as requested by the Company.

Intervenors requested to recover their reasonably incurred costs relating to this motion. The Board so finds and orders the Company to pay 100% of those costs, subject to the Board's process.

The Board's costs shall be paid by Enbridge Consumers Gas upon receipt of the Board's invoice.

DATED At Toronto August 17, 1999.

On behalf of the Board Panel - H.G. Morrison, P. Vlahos, F.A. Drozd

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Paul Vlahos