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February 15, 2007

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2700
Toronto, ON M4P 1E4

Dear Ms Walli:

**Re: EB-2005-0551,EB-2006-0322, EB-2006-0338 and EB-2006-0340:**

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In response to Procedural Order No. 1 in this proceeding, attached is an original and ten copies of the factum of Enbridge Gas Distribution. Also attached are copies of two letters referred to in the factum.

In order to assist the Board at the hearing on March 5, 2007, the Company will provide document books containing all of the documents referred to in its factum. These will be filed shortly.

Yours very truly,

AIRD & BERLIS LLP

David Stevens

cc. Patrick Hoey
All parties in EB-2005-0551

**EB-2005-0551**
**EB-2006-0322**
**EB-2006-0338**
**EB-2006-0340**

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

AND IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's Rules of Practice and Procedure

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# FACTUM OF ENBRIDGE GAS DISTRIBUTION

## (MOTION RETURNABLE: MARCH 5, 2007)

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**EB-2005-0551**
**EB-2006-0322**
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IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

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# FACTUM OF ENBRIDGE GAS DISTRIBUTION

## PART I – BACKGROUND AND OVERVIEW

1. The Ontario Energy Board (the "Board") heard the Natural Gas Electricity Interface Review proceeding ("NGEIR") in June and July 2006, over the course of fourteen hearing days. On August 11th, Enbridge Gas Distribution Inc. ("Enbridge" or the "Company"), Enbridge Inc., Union Gas Limited ("Union") and Market Hub Partners Canada LP ("MHP") presented written argument in chief. Over the course of two days, August 28 and 29, some other parties presented their responding argument orally and other parties presented written argument. Finally, on September 7, oral reply arguments were presented to the Board.

2. On November 7, 2006, the Board issued its Decision with Reasons (the "Decision").

3. In December 2006, certain parties filed Notices of Motion under Rule 42 of the Board's *Rules of Practice and Procedure*, seeking review of the Decision. These Motions were brought by Consumers Council of Canada ("CCC") and Vulnerable Energy Consumers Coalition ("VECC"), Industrial Gas Users' Association ("IGUA"), the Association of Power Producers of Ontario ("APPrO") and the Corporation of the City of Kitchener ("Kitchener"). No affidavit evidence was provided in support of any of these Motions.

4. On January 25, 2007, the Board issued Procedural Order No. 1 in respect of the Motions. In that Procedural Order, the Board indicated that it would convene on March 5, 2007 to consider the threshold issue under Rule 45.01 of the Board's *Rules of Practice and Procedure*, namely, whether each of the Motions should proceed to be heard on its merits. The Board directed parties to file facta addressing: (i) the threshold questions that the Board should apply in determining whether it should review the NGEIR Decision; and (ii) whether the moving parties have met the test or tests.

5. On February 8, 2007 facta were filed on behalf of each of the moving parties. Each factum addressed only briefly the threshold test to be applied. None of the parties paid appropriate heed to the list of potential grounds for review set out in Rule 44.01. Instead, IGUA, CCC and VECC assert that the only threshold test to be met is whether there are alleged errors that raise doubts about the correctness of the Decision. Kitchener appears to take a similar view. APPrO goes even further and suggests that it is only review motions that are frivolous or outside the jurisdiction of the tribunal that would fail the threshold test.

6. As set out below, Enbridge submits that the Board ought to give meaning to Rule 45.01, which expressly permits the Board to determine, with or without a hearing, "a threshold question of whether the matter should be reviewed before conducting any review on the merits". Adoption of the tests advocated by the moving parties would mean that virtually every review motion would pass the threshold test. In the result, there would be little or no finality to Board decisions, because any party could bring a review motion at any time for any decision to be re-heard, even if all that party proposed to do was to make the same arguments for a second time.

7. In other circumstances, both the Board, and parties such as IGUA, have taken a very different approach to the threshold issue for a review motion than that now advocated by the moving parties.

8. Enbridge notes that certain parties, including IGUA, have previously endorsed a "due diligence" rule as a threshold test to be applied on a review motion. This "due diligence" rule would require an applicant for a review to demonstrate that the evidence and arguments it is advancing in support of a request for a review could not, with reasonable diligence, have been provided to the tribunal prior to its decision. An applicant who cannot demonstrate that its arguments on a review motion are different from those already advanced would not meet this threshold test.

9. The Notices of Motion and facta filed by the moving parties demonstrate that these Motions do not meet the threshold test. While it may be that the moving parties are dissatisfied with the Decision, that in itself does not justify a review hearing. The review Motions simply re-state arguments that were, or could have been, made through the fourteen days of hearing, and two days of argument. In these circumstances, it is appropriate that the Board exercise its discretion under Rule 45.01 to dismiss these Motions at the threshold stage.

## PART II - THE ISSUES

10. Procedural Order No. 1 makes clear that there are two issues to be addressed at this time:

    A. What is the threshold question or questions that the Board should apply in determining whether it should review the NGEIR Decision ?

    B. Have the moving parties met the test or tests ?

## PART III – ARGUMENT

### (A) <u>The Threshold Test</u>

#### *(i) The Board's Rules of Practice and Procedure*

11. Rule 42.01 provides the right, subject to other Rules, for any person to bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision. Rule 44.01(a) requires that the corresponding Notice of Motion:

> [S]et 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.

12. Once a review motion is filed, Rule 45.01 provides the Board with the discretion to "determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits." The Board's Rules do not expressly set out the "threshold question", or threshold test, to be applied.

### *(ii) Previous cases dealing with the Threshold Test*

13. The Board has, on a number of occasions, considered the threshold test for a review motion. While past Board decisions, as well as the positions taken by parties on this question in previous cases, are not determinative, they are instructive and worthy of consideration in the present context.

14. The issue of whether a review motion should proceed beyond the threshold question to a full hearing was the subject of a motion in August 1999 in the E.B.O. 179-14/15 case involving Enbridge Consumers Gas (as it then was). In that case, it was Enbridge, not Intervenors, which had initiated the motion for review. In that case, Enbridge requested that the Board review or rehear portions of its decision relating to deferred taxes associated with the Company's water heater rental program.

15. IGUA and Consumers' Association of Canada ("CAC") argued that Enbridge's motion did not meet the threshold test, as seen by the transcript from the hearing of that motion.

16. IGUA's position on that motion in the E.B.O. 179-14/15 case was that:

> [T]he threshold test … has not been met. It's not really whether the decision raises important questions of principle. The threshold … is whether those principles were raised in the proceeding and decided and whether there is anything new that was not considered or available at the time those principles were fully argued.[1]

17. CAC adopted the submissions already made by IGUA[2], and then made lengthy submissions about the threshold test to be applied on a review motion. The following are excerpts from CAC's submissions:

> Rule 64.01 of your Rules of Practice and Procedure requires the Board to determine the threshold issue of whether the matter should be reheard or reviewed. I think it is important that we return to first principles and ask why that requirement is there. In my respectful submission, the reason the requirement is there is that the Board cannot and should not rehear or review every decision. There are important considerations of finality to the Board's decision. There are important considerations of predictability, that the

[1] E.B.O 179-14/15, August 10, 1999 Transcript, at p. 65

[2] *Ibid*., at p. 88

> parties and indeed the public can know that when the Board reaches a decision, except in very unusual circumstances, that decision will stand. Those are important issues of public policy.[3]
>
> …..
>
> In my respectful submission, [the list of criteria in section 63 of the Rules], which is a helpful guideline to the parties coming before the Board, doesn't and shouldn't change the longstanding view that the review power should be considered restrictively in requiring something new.[4]
>
> …..
>
> If a party argued [a point] and lost, then they should not be entitled to a rehearing on the very point. If the party could have argued it and elected for whatever reason not to, then in like fashion it should not, in my respectful submission, be entitled to raise it under the guise of an important matter of principle.[5]
>
> …..
>
> [I]n conclusion, Enbridge Gas Distribution has not met the threshold test. It just disagrees with the Board's decision. … they don't meet what I say is the critical threshold consideration: Is there anything new that the Board hasn't considered before or couldn't if the parties wished to put it before it ?[6]

18. The Board's decision on the review motion in E.B.O. 179-14/15 recited the relevant provisions of the *Statutory Powers Procedure Act* (the same provisions as are relied upon by Kitchener and APPrO in this case), and the Board's *Rules of Practice and Procedure*, and concluded that:

> [T]he 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.[7]

19. The issue of whether a review motion should proceed beyond the threshold question to a full hearing was also the subject of a motion in the RP-2001-0032 case involving Enbridge Consumers Gas (as it then was). Again, in that case it was Enbridge, not Intervenors, which brought the motion for review. In its Notice of Motion, Enbridge asked the Board to review and vary aspects of the 2002 rate case decision. Unlike the present situation, where none of the moving parties have filed any supporting evidence, Enbridge filed three Affidavits in support of its position in the RP-2001-0032 case.

20. Intervenors were blunt in their responses to the Board in the RP-2001-0032 case, urging that Enbridge's motion should be dismissed for failing to satisfy the threshold test.

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[3] *Ibid*., at p. 89

[4] Ibid., at p. 94

[5] *Ibid*., at p. 95

[6] *Ibid*., at p. 105

[7] Oral Ruling on Motion by Enbridge Consumers Gas in E.B.O. 179-14/15, August 10, 1999, at para. 15

21. In its written submissions, dated January 28, 2003, CAC stated:

> As the Board will be aware, there are a number of basic rules, followed by the Board and other senior regulatory agencies in Ontario, for dealing with motions for review. One of those rules might be described as the "due diligence" rule, which requires that an applicant for a review demonstrate that the evidence and arguments it is advancing in support of a request for a review could not, with reasonable diligence, have been provided to the tribunal prior to its decision. It fundamentally undermines the integrity of the original hearing process if a decision can be reviewed on the basis of further and better evidence and argument, on the basis, in other words, of an attempt to "cooper up" the original case.
>
> …..
>
> The Board, and other senior regulatory agencies in Ontario, have, historically, refused to consider motions for review that represent nothing more than an attempt to re-argue a case that has already been disposed of. That practice has been universally followed in order that there might be finality to the decision-making processes of regulatory agencies.
>
> …..
>
> As the Board is aware, it has a broad discretion to dispose of a motion for review at any time. That discretion is reflected in section 43 of the Board's Rules.

22. In its written submissions, also dated January 28, 2003, IGUA stated that, in considering a review motion, the Board ought to consider the nature of the grounds on which a review motion can be based, including those listed in Rule 44, and then asserted that:

> Errors in fact or new facts that satisfy the "due diligence" test which Mr. Warren describes in his letter are required. A repetition of arguments previously made or modified arguments which were or could have been based on facts established during the course of the hearing which led to the RP-2001-0032 Decision, cannot be relied upon to justify the hearing of the Review and Variance Motion.
>
> ….
>
> In a case such as this, where there are:
>
> > (a) Clearly no errors of fact or new facts to justify the relief requested; and,
> > (b) The arguments relied upon were either made or could have been made previously and are manifestly devoid of merit,
>
> there is no need for either a written or oral hearing of the "threshold" issue. In the circumstances of this particular case, the Board can and should exercise its discretion to reject the Motion without scheduling either a written or oral hearing with respect to the "threshold" issue.

23. Ultimately, the Board dismissed Enbridge's review motion in the RP-2001-0032 case, holding that:

> Having considered the Motion, and the supporting material filed by EGDI, the Board finds that EGDI has not established that there are errors in fact, changed circumstances, new facts, or evidence that was not reasonably available at the time of 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 this Motion should be dismissed.[8]

[8] Decision with Reasons on Motion, RP-2001-0032, February 10, 2003, at p. 4

While it was not a decision on the threshold question *per se*, this decision which effectively dismissed Enbridge's motion at the threshold question stage is instructive in setting out what a moving party must establish in order to succeed in a review motion.

24. Finally, in a recent case involving proposed changes to a Board decision regarding Toronto Hydro's CDM program, under the heading "The Threshold Question", the Board commented that:

> A motion to vary a decision of the Board … is usually based on some showing that there is new evidence or changed circumstances that warrant the decision being reviewed. The courts in both Ontario and Alberta have held that it is not necessary that new evidence be demonstrated before the Board can exercise its power to review or vary a decision. However, the general practice is that applicants are asked to justify a variance.[9]

### *(iii) The Threshold Test*

25. Enbridge submits that the threshold test to be applied in determining whether the Board should exercise its discretion and allow a review motion to proceed to a full hearing is not met when the moving party simply seeks to re-argue the case that has already been determined by the Board. Otherwise, there would never be any finality to Board decisions.

26. The idea that any Board decision is open to be relitigated, on grounds that were raised and considered in the first instance, undermines the authority and credibility of the Board's processes. APPrO and others mischaracterize the impact of placing limitations on the Board's power of review when they assert that giving any real meaning to the Board's discretion under Rule 45.01 would be an improper narrowing or reading down of the Board's review powers. Enbridge submits that the opposite is true. The effect of allowing review motions to proceed in circumstances where they amount to nothing more than re-argument would be to "read down" all of the decision-making powers of the Board, such that any decision would be open to attack and no decision of the first instance could be viewed as final.

27. The illustrative examples of the types of grounds that the Board would expect to see in a review motion, as seen in Rule 44.01(a) and the Board's decisions discussed above, make clear that something new is expected and required before the Board will exercise its discretion and allow a review motion to proceed. It is in that regard that CAC and IGUA

[9] Decision and Order, RP-2004-0203, June 28, 2006, at p. 4

relied on a "due diligence" rule, which would require an applicant for a review to demonstrate that the evidence and arguments it is advancing in support of a request for a review could not, with reasonable diligence, have been provided to the tribunal prior to its decision.

## (B) The Moving Parties have not met the Threshold Test

### *(i) Overview*

28. The Notices of Motion and facta filed by the moving parties make clear that none of the Motions meet the threshold test. Nowhere in their materials do any of the moving parties make any attempt to delineate which of their positions or arguments are different from what was already presented to the Board in pre-filed evidence, fourteen days of hearing, lengthy written argument and two days of oral argument. The moving parties do not seek to rely on any new facts (no Affidavits or new evidence have been filed) and instead have simply re-cast (or repeated) the arguments that each of them, and others, have already made at length over the course of the NGEIR proceeding.

### *(ii) The moving parties have not shown how they meet the CAC/IGUA threshold test*

29. As described above, the due diligence test advocated by CAC and IGUA requires a moving party on a review motion to set out arguments or evidence not previously presented to the Board and the reasons why the arguments or evidence could not, with reasonable diligence, have been provided to the tribunal prior to its decision.

30. None of the Notices of Motion or facta filed by the moving parties identify which of their arguments are new, nor which of their arguments could not have been provided to the Board prior to the Decision. Fundamentally, this means that when one applies the test previously advocated by CAC and IGUA, none of the moving parties have provided the Board with any basis to justify a review of the Decision.

### *(iii) The moving parties cannot meet the threshold test*

31. In Enbridge's submission, it is instructive to go one step further, and examine whether the arguments and positions advanced by the moving parties could satisfy the due diligence test advocated by CAC and IGUA.

32. The question is whether the moving parties are now advancing arguments and positions, beyond those already presented (or those that could have been presented) to the Board, that could be used to justify a variance from the Decision already made. This is done by considering the issues and grounds for review relied upon by each of the moving parties in their respective facta. As noted above, none of the moving parties rely on any new evidence to support their Motions.

33. At paragraph 33 of their factum, CCC and VECC set out the five issues that would be the subject of review if their Motion was to proceed: (i) and (ii) the interpretation and legislative intention of section 29 of the *OEB Act, 1998*[10]; (iii) the impact of the objectives set out at section 2 of the *OEB Act, 1998*[11]; (iv) the question of who bears the onus of proof in this case[12]; and (v) the question of whether the status quo would achieve the benefits that would flow from forbearance[13]. These issues were the subject of substantial attention during the argument phase of the proceeding. As identified in the footnoted references attached to each of the issues listed above, CCC and VECC specifically addressed each of these issues in the written arguments (totalling 71 pages) that they filed. In addition, other parties also addressed each of these issues in their written or oral arguments.

34. At paragraph 84 of its factum, IGUA sets out the ten errors of fact and law that it alleges raise doubts about the correctness of the Decision. The first two of these alleged errors go to the jurisdiction of the Board and allege that the NGEIR proceeding was somehow an improper public inquiry. With respect, Enbridge submits that these allegations are without merit and ought to be summarily dismissed. The Board convened a proceeding on its own motion, as it is entitled to do, and gave all parties an opportunity to present their case on the stated question of whether to refrain, in whole or in part, from regulating the rates charged for the storage of gas in Ontario. IGUA took full advantage of this opportunity, sponsoring two different experts and putting up its own witness panel. In addition, IGUA was more active than any other party in taking full advantage of the opportunity to cross-examine all opposing parties and witnesses. The balance of the issues raised by IGUA relate to: (i) the

[10] Written Argument of CCC ("CCC Argument"), at paras. 6-15 and 105-110; and Written Argument of VECC ("VECC Argument") at pp. 25-37

[11] CCC Argument, at paras. 15 and 33;and VECC Argument at pp. 39-41

[12] CCC Argument, at paras. 6-15

[13] CCC Argument, at para. 27 to 29 and 79;and VECC Argument at pp. 10-12

Board's alleged failure to consider the status quo as an option[14]; (ii) the issue of whether the onus of proof should rest with the utilities[15]; (iii) the Board's interpretation of the evidence related to the level of storage competition in and around Ontario[16]; (iv) and (v) the Board's interpretation of section 29 of the *OEB Act, 1998*[17]; (vi) the Board's interpretation of the statutory obligation to serve[18]; (vii) the Board's decision to refrain from regulating new storage offerings by the Ontario utilities[19]; and (viii) whether the Board erred in issuing directions that override the storage services provisions of existing contracts between Union and its T1 customers. As identified in the footnoted references attached to each of the issues above, each of the first seven issues listed above was fully canvassed at the hearing by IGUA, in its lengthy oral argument that was presented over parts of two days. The last of these issues relates solely to Union Gas, and not to Enbridge; hence, Enbridge has no specific submissions on that issue.[20]

35. Unlike the other moving parties, IGUA also advances allegations of bias. These are not new; they were raised during the hearing.[21]

36. APPrO's factum, which fails to note that Enbridge has made a firm commitment to provide high deliverability storage to gas-fired generators, makes clear that notwithstanding its attempts to broaden the issues, APPrO's real issue continues to be whether high deliverability storage should be provided at cost-based rates. This is no different from the issue that APPrO, as well as the GTA Generators, pursued in oral argument.[22] Moreover, the written argument filed by the GTA Generators in addition to oral submissions, makes the

[14] IGUA Argument Outline, at Issue III; 15 Tr. 97-98 and 110

[15] IGUA Argument Outline, at item V(h); 16 Tr. 36

[16] IGUA Argument Outline, at items IV and VI; 15 Tr. 101-108 and 139-146; 16 Tr. 25-36

[17] IGUA Argument Outline, at item V; 15 Tr. 122-126 and 16 Tr. 9 and 13-25

[18] IGUA Argument Outline, at item V(e); 16 Tr. 4-5 and 10-12

[19] IGUA Argument Outline, at item VI(g) and (i); 15 Tr. 116-118 and 16 Tr. 51-54

[20] Enbridge notes that this topic appears to have been addressed by IGUA at 16 Tr. 49-51

[21] 13 Tr. 1-10

[22] 15 Tr. 55-90 (APPrO oral argument) – see, for example, p. 57 where APPrO's counsel stated "APPrO takes the position that the short-notice high deliverability service should be provided at cost-based rates. When I talk about the services that are in play, I'm talking about the high deliverability storage …"; and 16 Tr. 65-82 (GTA Generators oral argument)

same points (over the course of approximately 20 pages) as are now raised in APPrO's factum.[23]

37. Kitchener's factum makes clear that its issue is with the portions of the Board's decision that relate to the aggregate excess methodology. This was the main focus of Kitchener's participation and argument in the NGEIR proceeding.[24] Kitchener also takes issue with that aspect of the Board's Decision which freezes the level of cost based storage in Ontario. Kitchener addressed and argued against this possibility in oral argument.[25] In any event, as with the last of the issues raised by IGUA, Enbridge notes that Kitchener's issues relate primarily to Union Gas.

38. Kitchener's factum also raises the spectre that the record, and any decision, from its review Motion may be used to supplement the record from the NGEIR proceeding for an appeal to the Divisional Court, or for a petition to the Lieutenant Governor in Council. Enbridge submits that this suggestion is irrelevant to the matters related to the threshold issue and notes that, in any event, the time for appeal or petition from the Board's Orders arising from the Decision has now expired.[26]

39. In sum, it is apparent that the arguments raised by the moving parties in support of their Motions for review do little or nothing more than repeat and recast arguments that each of these parties already made, before the Board rendered the Decision. In these circumstances, if these parties are now able to proceed to full review motions, then no meaning will have been given to the Board's power to determine a threshold issue of whether a review motion should proceed. Indeed, if parties are able to proceed to full review motions, it will call into question whether the finality of Board decisions can be relied upon.

40. Finally, although this may not bear on the threshold questions under consideration, Enbridge believes that it is important to emphasize its position that the Board's Decision related to the issues being raised by the moving parties was correct, in fact and law. The Board is provided with great flexibility and responsibility to ensure that it has a complete

[23] Written Argument of GTA Generators which (contrary to the protestations of APPrO at this time) deals exclusively with "HDS" (high deliverability storage"); see especially pp. 12 and 16-17

[24] This is the theme of Kitchener's entire 25 page written argument, which was filed on August 11, 2007

[25] 16 Tr. 162-164 and 169-172

[26] *OEB Act, 1998*, ss. 33(2) and 34(1)

record on which to base a decision. Looking at the totality of the evidence in this case, any panel of the Board would have reached the same conclusions on the questions which framed the NGEIR proceeding.

41. In light of the questions set out in Procedural Order No. 1, the Company has not provided detailed responses to the substantive issues raised by the moving parties. Of course, that should not be taken to mean that the Company agrees with any of the positions taken by those parties. The arguments now being advanced by the moving parties were previously made to the Board and were fully answered in the submissions filed by the Company, Union Gas and MHP on August 1, 2007, as well as the oral reply argument presented on September 7, 2007.

**PART IV – RELIEF SOUGHT**

42. For the reasons set out above, Enbridge submits that it is appropriate for the Board to exercise its discretion under Rule 45.01 to dismiss each of the review Motions at this threshold question stage.

43. In the alternative, should the Board disagree with Enbridge's primary position, as set out above, then Enbridge asserts that it is appropriate, consistent with IGUA's suggestion at paragraph 86 of its factum, that the review Motions proceed only as a review of those specific and particular questions or issues which pass the threshold test.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 15th DAY OF FEBRUARY 2007**

Fred Cass per DS

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BORDEN LADNER GERVAIS

By Facsimile

January 28, 2003

Mr. Paul Pudge
Board Secretary
Ontario Energy Board
2300 Yonge Street
Toronto, ON M4P 1E4

Dear Mr. Pudge

**Enbridge Gas Distribution Inc. ("EGD") Rates/RP-2001-0032**
**EGD's Motion of December 7, 2002, Amended January 13, 2003,**
**for Review and Variance of the Board's RP-2001-0032 Decision**
**Our File: 302701-000342**

We are the solicitors for the Industrial Gas Users Association ("IGUA"). The purpose of this letter is to supplement the points that Mr. Warren makes in his letter to you earlier today pertaining to the process options that are available to the Board in dealing with the Motion for Review and Variance filed by EGD. We agree with Mr. Warren that, in an exercise of its discretion under its Rules of Practice and Procedure, the Board can and should reject EGD's Motion for Review and Variance. For reasons which follow, we submit that such an order can be made, in this particular case, without a hearing.

IGUA submits that when exercising its discretion under Rule 45.01 pertaining to a determination, with or without a hearing, of the "threshold question" of whether the RP-2001-0032 Decision ought to be reviewed, the Board ought to consider the nature of the grounds on which a Motion for Review can be based. These grounds, specified in Rule 44.01(a) of the Board's Rules, include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen; and,

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

Errors in fact or new facts that satisfy the "due diligence" test which Mr. Warren describes in his letter are required. A repetition of arguments previously made or modified arguments which were or could have been based on facts established during the course of the hearing which led to the

BORDEN LADNER GERVAIS

RP-2001-0032 Decision, cannot be relied upon to justify the hearing of the Review and Variance Motion

We agree with Mr. Warren that the evidence which EGD has adduced in support of its Motion does not meet the "due diligence" test and is either inadmissible or of no weight for the reasons which Mr. Warren articulates in his letter. All of the information contained in Mr. Riedl's Affidavit pertaining to circumstances surrounding the Alliance and Vector contracts could have been presented at the hearing. The contents of the Affidavits of Ms. Holder and Ms. Hare are primarily argument. As Mr. Warren notes, the complaints contained in the Affidavits which EGD has filed about the effects of the Decision are not grounds for having the Decision reviewed. There are clearly no errors of fact or new facts to justify a Motion for Review and Variance.

The arguments on which EGD bases its Motion for Review and Variance were either made or could have been made during the written argument process which followed the ten days of hearing of evidence. Further, in IGUA's submission, there are a number of specific points of argument on which EGD relies to support its Motion for Review and Variance which are manifestly devoid of merit. These include the following:

(a) The contention that the outsourcing and restructuring arrangements which were made during the three year term of the Targeted Performance Based Regulation ("TPBR") regime, were analogous to utility diversification activities is manifestly devoid of merit. The outsourcing and restructuring actions taken by EGD and its parent were clearly not a diversification into business activities not then being carried out by the utility, but were a subdivision of utility resources into separate services businesses in order to transfer efficiency gains to EGD's parent and to permanently deprive ratepayers of most of the benefits which the TPBR regime was intended to eventually provide.

(b) EGD's contention that the "no harm to ratepayers" principle, applicable diversification activities, applies to actions taken by EGD during the term of an Incentive Regulation regime is manifestly devoid of merit. The principle that applies under Incentive Regulation is that both ratepayers and shareholders are to benefit.

(c) EGD's contention that the Board's Decision creates an imbalance by favouring the interests of EGD's ratepayers and ignoring the interests of EGD's shareholder is manifestly devoid of merit. The Decision restores the balance between ratepayers and shareholders that is intended to prevail under Incentive Regulation and imposes measures which will prevent EGD's parent from permanently appropriating a disproportionate share of the benefits realized under the TPBR regime.

(d) EGD's contention that those managing the utility are obliged by statute to treat the interests of the utility's shareholders in priority to the interests of the utility's ratepayers is manifestly devoid of merit. The contention is inconsistent with the well established principle that a corporation that is a public utility has an obligation to balance the interests of its ratepayers and shareholders. A number of the authorities upon which EGD relies in its Motion for Review and Variance express this principle.

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IGUA submits that, in its totality, the material which EGD has filed is inadequate to discharge the heavy onus that rests with EGD to convincingly demonstrate that the Motion raises a question as to the correctness of the Board's Decision. All facets of the Board's Decision were amply supported by the evidence and the range of policy options presented to the Board for its consideration in the extensive written arguments that the Board received from EGD and those opposite in interest to EGD.

In a case such as this, where there are:

(a) Clearly no errors of fact or new facts to justify the relief requested; and,

(b) The arguments relied upon were either made or could have been made previously and are manifestly devoid of merit,

there is no need for either a written or oral hearing of the "threshold" issue. In the circumstances of this particular case, the Board can and should exercise its discretion to reject the Motion without scheduling either a written or oral hearing with respect to the "threshold" issue.

Based on the foregoing, IGUA submits that it is open to the Board, in an exercise of its discretion, to determine that EGD's Motion for Review and Variance is inadequate to raise a question as to the correctness of the Board's RP-2001-0029 Decision. Like Mr. Warren, we urge the Board to dismiss the Motion for Review and Variance as soon as possible so that EGD can no longer rely on the delivery of the Motion as a basis for refusing to provide information that is critical to a determination of its 2003 revenue requirement.

Yours truly,

Peter C.P. Thompson, Q.C.
PCT/dto

c Richard King *(by facsimile)*
c Marika Hare *(by facsimile)*
c Peter Fournier *(by facsimile)*
c All Intervenors in RP-2001-0032 *(by facsimile)*

Robert B. Warren

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WeirFoulds LLP
BARRISTERS & SOLICITORS

Tuesday, January 28, 2003

Ontario Energy Board
26th Floor 2300 Yonge Street
Toronto, ON M4P 1E4

Attention: Paul B. Pudge, Board Secretary

Dear Sirs:

**Re: Motion for Review and Variance/**
**Your File No. RP 2001-0032**

We are counsel to the Consumers' Association of Canada in this matter. This letter sets out our client's concern with the Motion for Review and Variance ("Motion") which has been filed on behalf of Enbridge Gas Distribution Inc. ("EGD") in this matter.

We have reviewed the Motion Record of Enbridge Gas Distribution Inc. filed in its Motion for Review and Variance. We understand the Board's desire to make a threshold decision on whether EGD's Motion requires a response from intervenors before inviting intervenors to make submissions on the Motion. We feel it incumbent on us, however, to express our concern that the Motion does not meet the basic requirements for a rehearing and to express our view that it should be dismissed without delay. The urgency in expressing these views arises, in part, because of the risk that consideration of the Motion will delay, and perhaps prejudice, the proceedings in EGD's pending rate case, which bears Board file number RP 2002-0133.

We have two basic concerns with the Motion. The first deals with the nature of the material filed in support of the Motion. The second deals with the nature of the argument in the Motion. We will deal with them separately, below.

## I The Nature of the Material Filed in Support of the Motion

As the Board will be aware, there are a number of basic rules, followed by the Board and other senior regulatory agencies in Ontario, for dealing with motions for review. One of those rules might be described as the "due diligence rule", which requires that an applicant for a review demonstrate that the evidence and arguments it is advancing in support of a request for a review could not, with reasonable diligence, have been provided to the tribunal prior to its decision. It fundamentally undermines the integrity of the original hearing process if a decision

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can be reviewed on the basis of further and better evidence and argument, on the basis, in other words, of an attempt to "cooper up" the original case.

The materials filed by EGD in support of its Motion violate that basic rule, as follows:

1. The affidavit of Rudi Riedl (the "Riedl Affidavit") merely repeats the evidence which was given by Ms Holder at the hearing. Mr. Riedl describes the purpose of his evidence, in paragraph 3 of his affidavit, as providing "clarity regarding the circumstances that existed at the time the decisions were made by Enbridge Gas Distribution Inc. to enter into the Alliance and Vector contracts". Mr. Riedl nowhere asserts that the information contained in his affidavit could not have been presented at the time of the hearing. Mr. Riedl nowhere suggests that the information that is contained in his affidavit was unknown to Ms Holder. There is no suggestion in Mr. Riedl's affidavit that Ms Holder was unaware at the time she gave her testimony of any of the information set out in his affidavits. The Riedl Affidavit is no more than an attempt to add to the weight of Ms Holder's evidence the *gravitas* of Mr. Riedl's seniority;

2. In addition to providing information that was either known to Ms Holder at the time of her testimony, or could with reasonable diligence have been obtained by Ms Holder from Mr. Riedl, the Riedl Affidavit contains pure argument. For example, Mr. Riedl asserts, in paragraph 21 of his affidavit, that "in my view, the Board seems to have over-emphasized the Otsason Memo in its Decision". Aside from the obvious point, namely that it is entirely inappropriate to include arguments in an affidavit, the arguments in the Riedl Affidavit are all ones which were, or could, with reasonable diligence, have been, made by counsel to EGD in its argument at the conclusion of the hearing;

3. The affidavit of Janet Holder offers no new information, but rather consists of arguments about the Board's assessment of the evidence. We again make the point that it is inappropriate to make arguments in an affidavit. More importantly, the argument about how the evidence should be interpreted could have been made at the time of the hearing;

4. The affidavit of Marika Oksanna Hare (the "Hare affidavit") also contains arguments. Beyond that, the Hare affidavit deposes to the alleged harm that has befallen EGD as a result of the Board's decision. We will leave aside the obvious point, namely that the alleged harm is unproven and that the effects of the decision are, for better or ill, the natural incident of being

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a regulated entity. The effects of a decision are not a ground for having the decision reviewed. The important point, however, is that a possible adverse impact of a Board decision on outsourcing is a matter which could have been argued by EGD at the conclusion of the hearing.

In sum, we submit that material filed by EGD in support of its Motion for review consists of nothing more than information and argument that could have been made at the time of the hearing. All of the material violates the "due diligence rule".

The dangers of relying on the kind of material which EGD filed in support of its Motion are several. A disappointed party can seek a review of a decision by putting the same evidence in the mouth of another, more senior, person. The Board could never rely on the witnesses before it, fearing that someone more senior might have either better evidence or the same evidence from a different perspective.

## II The Nature of the Argument in the Motion

We have noted, above, that portions of the Riedl and Holder affidavits consist of arguments. We have also noted that the arguments in the Riedl, Holder and Hare affidavits are ones which would, or could, with reasonable diligence have been made by counsel to EGD in its argument at the conclusion of the hearing.

The same observation can be made of the Motion as a whole. In our view it consists entirely of argument that could have been made at the time of the hearing. To put the matter another way, the Motion is nothing more than a thinly-disguised attempt to re-argue the case that the Board has already disposed of.

The Board, and other senior regulatory agencies in the province, have, historically, refused to consider motions for review that represent nothing more than an attempt to re-argue a case that has already been disposed of. That practice has been universally followed in order that there be finality to the decision-making processes of regulatory agencies. If, for example, the Board had to review its decisions on the basis of the alleged adverse impact of the decisions, when the possibility of that adverse impact had not been brought to its attention, then, not only would there be no finality to the Board's decision-making process, but there would be a chill on that process. The Board, intervenors, and the public are entitled to rely on the utilities, and their counsel, to lead whatever evidence they feel is appropriate, and make all of the arguments they feel are necessary to protect their interests.

As the Board is aware, it has a broad discretion to dispose of a motion for review at any time. That discretion is reflected in section 43 of the Board's Rules. In our view, the

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Board should exercise that discretion, at this point, to dismiss EGD's Motion for Review because it is, on its face, devoid of merit.

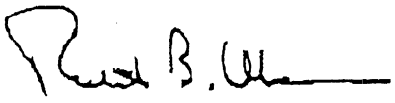
We will not, herein, respond to the specific arguments in EGD's Motion, given that they were made, or could have been made, at the time of the hearing. We will confine ourselves to this one point. Underlying EGD's Motion is a fundamentally flawed view of regulation. According to EGD, the Board must anticipate all of the possible arrangements a utility might enter into and make rules governing them. That is impossible. A utility must always bear the risk that the Board will find its actions violate the utility's obligations as a regulated entity. To accept EGD's underlying premise would be to undermine fundamentally the integrity of the Board's decision-making process.

The CAC would not, ordinarily, urge the Board to dismiss a Motion for Review without giving the applicant for review a full opportunity to argue its case orally. However, the unusual circumstances of this case dictate otherwise. EGD has been given the opportunity to argue its case, in full, in writing. In addition, there is some urgency in the Board disposing of the Motion for a Review quickly. EGD is using the existence of the Motion as an excuse to avoid answering certain interrogatories in its pending rates case. The existence of the Motion for a review carries with it the risk of not only delaying the processing of that pending rates case, but prejudicing the substantive considerations within it. To avoid that delay and possible prejudice, we urge the Board to dismiss the Motion for Review which, we have noted above, is, on its face, devoid of merit.

The submissions in this letter have been prepared in collaboration with counsel for the Industrial Gas Users' Association, Mr. Thompson. We understand that Mr. Thompson will be sending a separate letter in support of the positions set out in this letter.

Yours very truly,

WeirFoulds LLP



Robert B. Warren

RBW/dlh
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