RP-1999-0001

IN THE MATTER OF the *Ontario Energy Board Act, 1998;*

AND IN THE MATTER OF an Application by The Consumers' Gas Company Ltd., carrying on business as Enbridge Consumers Gas, for an Order or Orders approving or fixing rates for the sale, distribution, transmission, and storage of gas;

AND IN THE MATTER OF a Motion for Review and Variance by the Industrial Gas Users Association, the Consumers' Association of Canada, and the Vulnerable Energy Consumers Coalition.

BEFORE: Sheila K. Halladay
Presiding Member

Paul Vlahos
Member and Vice-Chair

DECISION WITH REASONS

June 29, 2000

1 THE MOTION

1.1 In its E.B.R.O. 497-01 Decision (the "PBR Decision"), dated April 22, 1999, the Board approved a three year Targeted Performance Based Regulation Plan relating to the operating and maintenance expenditures ("Targeted O&M PBR Plan") of The Consumers' Gas Company Ltd. (the "Company"). As part of that decision the Board determined that the base on which the PBR formula would be applied would be the 1999 O&M expense budget, approved by the Board in the E.B.R.O. 497 main rates case as adjusted for unbundling expenditures. The Board also indicated that it would monitor the results of the Company's Service Quality Indicators and directed the Company to continue its existing process of filing reports with the Board's Energy Returns Officer on a quarterly basis.

1.2 The Targeted O&M PBR Plan, accepted by the Board, dealt only with O&M expenditures and the Board determined that all other aspects of setting rates would continue to be reviewed under the traditional cost of service analysis.

1.3 In June 1999, the Industrial Gas Users Association ("IGUA"), the Consumers' Association of Canada ("CAC"), and the Ontario Coalition Against Poverty (the predecessor of the Vulnerable Energy Consumers Coalition ("VECC") (collectively, the "moving parties")

brought a motion requesting the Board to rescind or vary those portions of the PBR Decision approving the Company's PBR mechanism and to require the Company to submit a detailed O&M expense estimate for the Company's fiscal 1999 year based on available actual expenditures. The moving parties also requested that a detailed review of O&M expenditures for the fiscal 2000 year should be undertaken in the Company's next rates case. The Board found that there was no new evidence that the O&M component of the Company's fiscal 2000 rates, based on the application of the PBR formula to the 1999 O&M expense base, would not be "just and reasonable" and therefore the Board dismissed that motion.

1.4 During the main RP-1999-0001 proceeding, the Board once again dealt with intervenors' concerns about the Targeted O&M PBR Plan. Some intervenors perceived that the information to be filed in rates cases was inadequate and sought to expand the monitoring and reporting requirements of the Company. The Board expressed concern that acceptance of the intervenors' suggestions would compromise the PBR process before it had a chance to begin, and would inevitably result in a line by line scrutiny of the O&M budget as if it were under cost of service regulation. The Board concluded that it expected the financial monitoring issue relating to the O&M expenses would not be revisited for the duration of the Company's current Targeted O&M PBR Plan.

1.5 In the RP-1999-0001 proceeding the Board determined the utility's return on capital, rate base, capital structure, income, and revenue deficiency. The Board also dealt with the appropriate adjustments to be made to rate base, cost of service, and the O&M expense base, to reflect the removal of certain ancillary programs from the utility.

1.6 Effective January 1, 2000, the Company implemented an outsourcing plan (the "Outsourcing

Plan"), whereby the Company agreed to procure customer care services, information technology, and fleet management services from an affiliate, Enbridge Commercial Services Inc. ("ECS"). The Company transferred 1,100 employees to ECS resulting in approximately a 40% decrease of full time positions in the utility.

1.7 On March 16, 2000, IGUA, CAC, and VECC filed a motion requesting the Board to review and vary the Board's RP-1999-0001 Phase 1 Decision, dealing with setting rates for the Company's 2000 fiscal year, commencing October 31, 1999. The motion requested that the Board review and vary those portions of the Board's Decision relating to the Board's determination of the Company's O&M expenses, rate base, depreciation and amortization expenses, return on rate base, income taxes, and gross revenue deficiency for the Company's 2000 fiscal year.

1.8 The moving parties also requested that the Board issue a procedural order:

> declaring the 2000 rates interim, pending the final disposition of the request for review and variance;
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> directing the Company to make full and complete disclosure of the particulars of the Outsourcing Plan which it implemented on January 1, 2000 with ECS, including directing the Company to record all payments made in appropriate deferral accounts;
>
> providing for directions for a hearing and a determination by the Board of the extent to which the 2000 rates ought to be adjusted as a result of the

Outsourcing Plan; and

directing the Company to file rate base and other cost of service information for the 2000 bridge year and the 2001 test year in the traditional cost of service format in its next rates application.

1.9 The Board held an oral hearing of the motion on May 29, 2000.

1.10 The Heating, Ventilation and Air Conditioning Coalition ("HVAC"), the Alliance of Manufacturers & Exporters Canada (the "Alliance") and Union Gas Limited ("Union") also participated in the hearing of the motion.

2 GROUNDS FOR THE MOTION

2.1 Section 21.2 of the *Statutory Powers Procedure Act* provides that a tribunal may, if it considers it advisable and if its rules deal with the matter, review all or part of its own decision or order and may confirm, vary, suspend or cancel the decision or order. Rule 62 of the Board's *Rules of Practice and Procedure* (the "Rules") provides that a person may bring a motion before the Board to ask the Board to review or rehear any matter or to rescind or vary any order.

2.2 Rule 64.01 provides that in respect of a motion brought under Rule 62 the Board shall determine the "threshold" question of whether the matter should be reheard or reviewed or whether there is reason to believe the order should be rescinded or varied. If the Board finds that the matter should be reheard or reviewed or that there is reason to believe the order should be rescinded or varied, the Board may, in its discretion, either dispose of the motion or issue procedural orders with respect to the conducting of the rehearing or review on the merits.

2.3 Rule 64.01 grants the Board wide powers to adopt whatever procedures it deems to be just and expeditious in the individual circumstances of each motion, including providing for

combining the consideration of the threshold question with the rehearing or review of the matter on its merits.

2.4 The Rules do not expressly state the grounds that the Board should consider in determining "whether the matter should be reheard or reviewed or whether there is reason to believe the order should be rescinded or varied". Rule 63.01 merely states that the notice of motion must "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".

2.5 The grounds listed in Rule 63.01(a) include: error of law or jurisdiction, including a breach of natural justice; error in fact; a change in circumstances; new facts that have arisen; facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and an important matter of principle that has been raised by the order or decision.

3 POSITIONS OF THE PARTIES

3.1 The moving parties indicated that they were not made aware of the Outsourcing Plan until the Company filed an affidavit of Mr. Stephen McGill, dated January 17, 2000, in connection with an application by the Company requesting certain exemptions from the *Affiliate Relationships Code for Gas Utilities* (the "Code") and a related complaint filed by HVAC that the Company had breached the Code.

3.2 The moving parties noted that for the purposes of this motion the Company did not submit responding affidavit material and did not make Mr. McGill available for cross examination by the parties. The moving parties claimed that this was significant when the Board was considering the threshold question and that therefore the evidence before the Board was that there was no denial of the inference that the Company's plan to outsource all customer care functions was being formulated when Mr. McGill and Mr. Kent testified before the Board in the RP 1999-0001 proceeding on September 2, 1999. The moving parties stressed that there was an obligation on the Company to disclose the plans it was considering implementing.

3.3 The moving parties argued that they had met the "threshold test". They contended that the outsourcing of customer care services, information technology and fleet management services

amounts to new facts that have arisen and a change in circumstance. As a result the Board's findings pertaining to O&M expenses, rate base, depreciation and amortization, rate of return, taxes, revenue requirement and revenue deficiency, and the resulting rates for the 2000 the year, should be reviewed and varied.

3.4 The moving parties also pointed out that the list of grounds contained in Rule 63.01(a) is not exhaustive and that other grounds can be raised in support of a motion to review. The moving parties contended that an additional ground for review is the Company's breach of its obligation to make full, complete and timely disclosure of the Outsourcing Plan before the RP-1999-0001 decision was rendered.

3.5 The moving parties submitted that the prospective test year rate making process allows the utility to have its rates determined on the basis of forecasts and therefore it is central to the integrity of the process that the Company make full and timely disclosures of the plans it will be following in the test year. The moving parties argued that prospective rate- making is not intended to provide the Company with an opportunity to seek approval for rates based on a plan which may not be followed at all because it is only one of several options under consideration and may not be the preferred option. The moving parties submitted that if plans change before the Board's decision is rendered, there is an obligation on the Company to make full, plain and timely disclosure of the changed plans and their impact for rate-making purposes.

3.6 The moving parties argued that the Company's failure to disclose its Outsourcing Plan undermines the integrity of the prospective test year rate-making process and has led to a Board decision based on a forecast of an outsourcing plan to which the Company has made

substantial, material and radical changes. Therefore the resulting rate order is neither just nor reasonable.

3.7 The moving parties contended that they are not seeking a PBR reopening nor are they trying to rewrite the monitoring and review process. What they are seeking is a review of all aspects of the revenue requirement because the implementation of the Outsourcing Plan has implications for cost of service components beyond O&M expenses.

3.8 HVAC noted that when the rental program ancillary businesses were transferred to an affiliate there was an extensive review. The impacts of that transfer on the cost of service, involved only 573 people or about 17% of the then utility work force. VECC argued that it is difficult to believe that an outsourcing of this magnitude would not impact upon some of the adjustments made in the RP-1999-0001 case.

3.9 HVAC also submitted that the Outsourcing Plan amounted to a "disposition out of the ordinary course of business" that satisfies both the Rule 63.01 threshold in respect to a change in circumstance and the PBR off-ramp concept.

3.10 Some parties also argued that the Outsourcing Plan constituted "an important matter of principle that had been raised by the order or decision" and therefore the RP-1999-0001 proceeding should be reviewed pursuant to Rule 63.01 (a)(vi). The Alliance submitted that the important matter of principle is that the utility has an obligation to disclose all material information on which PBR is based and that they have failed to do so.

3.11 The Company argued that there had been full disclosure to the Board. The Company's

position was that the Company's witnesses, Mr. Kent and Mr. McGill, indicated in the oral phase of the RP-1999-0001 proceeding that the Company was considering a variety of outsourcing options. When asked for a list of the functions that the Company was contemplating outsourcing, the Company's witnesses replied that the most significant function being considered for outsourcing was the printing, inserting and mailing of bills; however there were other things that could be outsourced and added that there was "an almost unimaginable spectrum of variations on this." The Company also pointed out that at no time during the hearing was there a suggestion that the responses of Company witnesses were inadequate or incomplete.

3.12 The Company also argued that rate decisions, in particular, typically result from a lengthy process and it would be inappropriate to suggest that such decisions can be indiscriminately re-opened for every new fact or changed circumstance, regardless of relevance or materiality.

3.13 The Company pointed out that the O&M component of the Company's Outsourcing Plan is not relevant to rate-making at this time, because the Targeted O&M PBR Plan, approved by the Board, is now in effect.

3.14 The Company submitted that even aside from the existence of the Targeted O&M PBR Plan, management of a regulated utility should not be paralyzed and unable to act decisively during the period between rate cases. The fact that initiatives are pursued between rate cases does not mean that the decision in the preceding case should be re-opened.

3.15 Union argued that a productivity initiative, depending on its timing, size or nature, should not be the basis upon which the Board should reopen a matter during the term of the PBR plan.

This would defeat the purposes of PBR, which, Union submitted, include: allowing utilities to operate with flexibility, in an efficient manner; not committing Board resources to the extent that is necessary in a cost of service regime; and providing utilities with incentives to pursue productivity gains.

4 BOARD'S RULING ON THE MOTION

4.1 In E.B.R.O. 452 the Board considered the problem that arose when utility income was substantially different than that which had been forecasted in the previous rates case. In paragraph 6.5 of the decision the Board noted:

> Regulation is intended to be a surrogate for competition in the marketplace and the legislation intended that the Company has the opportunity to recover its costs and to earn a fair rate of return on its shareholders' equity. In recent years, the prospective test year was adopted because inflationary circumstances placed the shareholders' return at risk. The Board believes that this continues to be an acceptable system, when viewed overall. It enables the utility to reflect changing costs (up or down) in its rates without undue regulatory lag. The system requires the regulator to act on faith with the utility, bearing in mind the prospective nature of the evidence. **The regulator expects the utility, in return, to provide the best possible forecast data that can be made available, on a timely basis.** (emphasis added)

4.2 The Board appreciates that business plans are not carved in stone and the utility must have flexibility to meet ongoing demands of the marketplace; however, this flexibility must be balanced against the utility's obligations as a regulated entity. This is particularly true when the Company is not responding to exogenous events, beyond the Company's control, but is

implementing its own initiatives.

4.3 The Board notes that 1,100 employees, or approximately 40% of the utility's staff, were transferred from the utility to ECS as a result of implementing the Outsourcing Plan. The moving parties describe the Outsourcing Plan as "massive". Given the significant nature of the Outsourcing Plan, the Board concludes that the Outsourcing Plan would have been well known to the Company by the conclusion of the RP-1999-0001 proceeding.

4.4 The Board is not convinced that the Company adequately disclosed its Outsourcing Plan to the Board. Merely stating that the Company is considering a "range of options" and that "there are an almost unimaginable spectrum of variations on this", does not, in the Board view, constitute full, true and plain disclosure of the planned outsourcing of customer care, information technology and fleet management services. This is particularly true given that the Company's witnesses specifically mentioned the possibility of outsourcing other functions such as printing, inserting and mailing of bills as being the "closest on the horizon".

4.5 The Company has an affirmative obligation to provide the Board with the best possible evidence and it is not incumbent on the intervenors to ensure, through cross examination of the Company's witnesses, that the record is adequate and complete. The Company cannot shirk its responsibilities as a regulated entity by submitting evidence that is vague and incomplete.

4.6 However, the mere existence of new facts, change of circumstance or inadequately disclosed information is not alone sufficient to warrant a reopening of the proceeding. The matter must be relevant and material; minor or inconsequential changes to the proposed business plans of

the utility are not sufficient to justify a review.

4.7 The Board notes that customer care, information technology and fleet management functions must still be performed for the efficient operation of the utility. Utility customers should be indifferent as to whether these services are performed within the utility by utility employees or by a third party affiliate, as long as they are performed to the requisite standard.

4.8 In this case, complications in ordering a review arise from two areas: first, the regulatory model that applies to the Company is a hybrid one. The Company is not operating under a comprehensive PBR regulation scheme. Only the O&M expense component is under the PBR model and all other cost of service components are subject to scrutiny by the Board.

4.9 Mr. Thompson, counsel for IGUA, admitted that if the Company's rates were subject to a comprehensive PBR plan, including a price cap, the measures taken by the Company would not be subject to reopening and would have to wait for the monitoring process and rebasing at the end of the term of the plan.

4.10 The Board has repeatedly indicated its reluctance to reopen the Targeted O&M PBR Plan. The performance based regulation regime is new and must be given a chance to work. The Board is concerned that if it were to order the extensive review of the Outsourcing Plan, as requested by the moving parties, this would in effect constitute an off ramp, or a review for an off ramp, merely a few months into the three year Targeted O&M PBR term.

4.11 The second complication is that there is little evidence as to the direction and magnitude of the Outsourcing Plan on the Company's overall cost of service. The Board notes that the

implementation of the Outsourcing Plan does not require the pre-approval of the Board; therefore the Company has not disclosed the impact of the Outsourcing Plan on the utility's cost of service.

4.12 However, the Outsourcing Plan is significant and may have an overall impact on cost of service components other than O&M expenses. The Board agrees with the moving parties that to the extent there are assets involved with the implementation of the Outsourcing Plan, there could be material impact on, for example, rate base and depreciation expense. The Company cannot avoid scrutiny of these items by choosing to implement the Outsourcing Plan during the test year after the conclusion of the rates proceeding.

4.13 The Board agrees with the Company that ordering a review or rehearing is an extraordinary remedy and should not be undertaken lightly. On the basis of the submissions, the Board is not convinced that the extensive review requested by the moving parties is necessary. This is especially true where there may be other remedies available.

4.14 In that regard, the Board orders the Company to establish a deferral account, effective January 1, 2000, to record the impact of the Outsourcing Plan on all items supporting the determination of the revenue requirement, except operating and maintenance expenses. The Board expects the Company to discuss the specific line items and the method of calculation of the amount for each line item with the Board's Energy Returns Officer.

4.15 In the interest of regulatory efficiency, the Board is not prepared, at this time, to issue a procedural order directing a hearing of this matter alone. The Board expects that this issue shall be addressed in the next proceeding dealing with the Company's distribution rates. The

challenge for the Company in that proceeding will be to satisfy the requirement for testing the non-O&M cost of service components, such as rate base and depreciation expense, while staying within the framework of the Targeted O&M PBR Plan.

5 COSTS

5.1 The moving parties asked for their costs of bringing the Motion, regardless of the success of the motion or lack thereof. This is consistent with the position taken by the parties in the preceding Motion for Review in E.B.R.O. 497-01. HVAC and the Alliance also asked for their costs. The parties submitted that essentially the motion arises from the main rates case and the parties were found to have qualified for, and were in fact awarded, costs in that case. They have made every effort to be an of assistance to the Board and cost effective as possible.

5.2 The Company pointed out that in the E.B.R.O. 497-01 Motion for Review the moving parties only received 90% of their costs. The Company also submitted that the costs considerations where the moving parties initiate their own proceedings are different than where the parties are intervening in the Company's application.

5.3 The Board agrees that merely because the moving parties have been awarded costs in the main rates case does not necessarily mean that they should be awarded all of their costs in a subsequent proceeding that they may initiate. The Board is concerned that one of the purposes of this motion was, in essence, another attempt by the moving parties to require a

review of the Company's Targeted PBR Plan. The Board is not convinced that the moving parties and other intervenors are entitled to all of their costs.

5.4 The Board awards the moving parties (IGUA, CAC and VECC) and the intervenors (HVAC and the Alliance) 90% of their reasonably incurred costs.

5.5 The Board's costs shall be paid by the Company upon receipt of the Board's invoice.

DATED at Toronto, June 29, 2000

Sheila K. Halladay
Presiding Member

Paul Vlahos
Member and Vice-Chair