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RP-2003-0203

EB-2004-0449

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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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AND IN THE MATTER OF an application under section 36 of the Act by Enbridge Gas Distribution Inc. for approval of an accounting order to extend the scope of the existing 2005 Class Action Suit Deferral Account to capture the costs of the counsel of the plaintiff Garland;

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AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an Order or Orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas commencing October 1, 2004.

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BEFORE:

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Bob Betts
Presiding Member

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Paul Sommerville
Member

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Pamela Nowina
Member

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DECISION AND ACCOUNTING ORDER

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Enbridge Gas Distribution Inc. ("EGDI") filed an application, dated September 28, 2004, with the Ontario Energy Board (the "Board") requesting approval for an accounting order to extend the scope of the existing 2005 Class Action Suit Deferral Account ("2005 CASDA") to capture the costs of the counsel of the plaintiff Garland.

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The Board assigned file number RP-2003-0203/EB-2004-0449 to the Application.

On October 20, 2004, the Board issued a Notice of Written Hearing and Procedural Order No. 1 which ordered that:

- Any parties who object to the approach to proceed by way of written hearing shall provide their objections in writing by Wednesday, October 27, 2004;
- Parties who wish to make submissions shall do so in writing by no later than Friday, October 29, 2004;
- EGDI may reply to the intervenor submissions in writing by no later than Friday, November 5, 2004.

On October 28, 2004, the Board issued Procedural Order No. 2 to extend the period within which interested parties could make written submissions and/or request intervenor status.

In this Application, EGDI has requested that the 2005 CASDA be expanded to include the recording of costs of the counsel of the plaintiff Garland in the amount of \$825,000. The cost settlement between EGDI and the plaintiff's counsel resulted from a Supreme Court of Canada decision, released April 22, 2004, which ordered EGDI to pay the plaintiff's costs in the proceeding up to and including the plaintiff's second appeal to the Supreme Court in October 2003.

EGDI views the settlement as satisfying the Board's criteria for further consideration of the 2005 CASDA scope as described in the Board's 2005 Test Year Partial Decision, docket number RP-2003-0203, dated August 31, 2004. EGDI noted that, although the Board did not approve the recording of costs of any judgements or awards of costs against EGDI, the Board did indicate that when the appropriate level of detail becomes available regarding the nature and quantum of judgements, it would consider a further application by EGDI.

The Board received submissions from the Vulnerable Energy Consumers Coalition ("VECC"), the School Energy Coalition ("SEC"), the Industrial Gas Users Association ("IGUA") and a reply submission from EGDI.

VECC's and IGUA's submissions took issue with EGDI's request to expand the deferral account on the grounds that:

- Expanding the 2005 CASDA prior to a full hearing implies an eventual recovery of costs from ratepayers;
- The 2005 Test Year Partial Decision precludes EGDI from obtaining an order broadening 2005 CASDA until all issues have been considered at a public hearing regarding the reasonableness and ratepayer responsibility respecting such costs;

• EGDI's current 2005 CASDA scope is consistent with that allowed for Union Gas Limited ("Union");

• EGDI's only rationale is an attempt to alleviate its concerns with the earnings impact of the amount it has agreed to pay the plaintiff's costs for counsel.

SEC's submission viewed EGDI's proposal as appropriate and consistent with the Board's 2005 Test Year Partial Decision in that it makes sense to record the claimed costs since they are now known.

In its response to the submissions, EGDI noted that the Board's 2005 Test Year Partial Decision invited EGDI to make an application when an appropriate level of detail becomes available regarding the nature and quantum of judgements, thereby suggesting that had the \$825,000 been known at the time, it would have been included in the initial 2005 CASDA. EGDI also noted that there is no reason to consider parity treatment with Union since Union is not currently subject to a similar expense.

The Board in making a determination in this matter is primarily guided by its 2005 Test Year Partial Decision. The Board, in excluding cost awards and judgement costs from the 2005 CASDA, did so on the basis that inclusion would have been premature. The Board stated that:

"The timing of the judgement and related orders and their implementation are unknown. The Board also considers that the degree of uncertainty respecting the quantum of damages, if any, and the method of arriving at them makes it inappropriate to include the judgement costs in the 2005 CASDA." (RP-2003-0203 Partial Decision, para.144)

The Board further indicated that:

"When an appropriate level of detail becomes available regarding the nature and quantum of judgements, the Board will consider a further application by the Company; ..." (RP-2003-0203 Partial Decision, para.148)

It is apparent to the Board that there is an appropriate level of detail contained in this Application regarding the timing, quantum and nature of the judgement and the \$825,000 settlement.

The Board does not view parity with Union regarding deferral account scope treatment as an issue. Both EGDI and Union, depending on their particular circumstances regarding cost award and judgement details, are afforded the opportunity to file an application for the Board's consideration.

For these reasons, the Board finds EGDI's proposal to extend the 2005 CASDA appropriate.

The Board acknowledges the expressed interest of Parties in having an opportunity to address, in a thorough manner, the disposition of amounts recorded in the deferral account. The Board emphasizes

that the inclusion of costs in the 2005 CASDA does not imply any outcome respecting disposition. Such a determination would be made in a subsequent proceeding.

Parties claiming costs for this proceeding shall submit their claims at the same time as the claims are to be submitted for the anticipated January 1, 2005 rate order and QRAM, if applicable.

THE BOARD ORDERS THAT:

The scope of the 2005 CASDA shall be extended to include the recording of the costs of the counsel of the plaintiff in the amount of \$825,000 payable by EGDI.

ISSUED at Toronto, December 3, 2004

ONTARIO ENERGY BOARD

Original Signed By

Pamela Nowina
Member
On behalf of the Panel