



RP-2003-0203

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

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, distri-
bution, transmission and storage of gas commencing October
1, 2004.

BEFORE:

Bob Betts
Presiding Member

Paul Sommerville
Member

Pamela Nowina
Member

DECISION ON MOTION

On May 7, 2004, Ontario Energy Savings Corp. and Superior Energy Management, collectively referred to as the "Moving Parties" filed a motion to have evidence filed by Enbridge Gas Distribution Inc. ("EGDI") with respect to Issue 5.5 on the Issues List removed from the record of the proceeding. Specifically, the Moving Parties asked for a Board Order striking the evidence set out in Exhibits A3, Tab 5, Schedule 5 and Schedule 2, and all related Interrogatories and Interrogatory Responses. These schedules consisted of a policy paper entitled "The Role of the Utility in System Supply" and a document which outlined EGDI's intention to change its customer communications respecting the role of system supply in the marketplace.

TransCanada Pipelines and the Vulnerable Energy Consumers Coalition provided written submissions to the Board opposing the Motion. TransCanada Pipelines, the Schools Coalition, Energy Probe, Direct Energy and the Moving Parties attended and presented oral submissions. Schools and Energy Probe were not opposed to the granting of the Motion.

On the eve of the hearing EGDI wrote to the Board withdrawing the evidence that was the subject matter of the Motion. While EGDI stated their belief in the continuing importance of the issue, they indicated that the timing of their activities would not allow them to bring concrete evidence to this proceeding to fit the regulatory timetable. They indicated that it was this unavailability of additional evidence that caused them to withdraw the evidence they had already filed. This position was offered as an explanation for EGDI not making submissions in opposition to the motion to strike the evidence.

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Some parties indicated that EGDI's decision to withdraw the contentious evidence, combined with their admission that they intended to proceed with changes to the communications regarding promoting system gas, gave rise to concerns that EGDI might act outside of the Board objective described in section 2, paragraph 1 of the *Ontario Energy Board Act, 1998*: To facilitate competition in the sale of gas to users. The parties submitted that the Board should provide direction to EGDI regarding communication to customers, to prevent potential damage to the competitive balance in gas sales, by taking advantage of their dominant communication role.

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This series of events presented the Board Panel with several questions to consider:

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- 1 Should we be passive in the applicant's decision to withdraw evidence supporting an issue that had been presented as important to their future activities?
- 2 Should Issue 5.5 remain on the Issue List or should it be removed?
- 3 How should we decide on the Motion regarding the evidence?
- 4 Depending upon the decisions with respect to 1, 2 and 3, should the evidence filed by other parties on Issue 5.5 remain on the record?
- 5 How should we handle the sub-issue of communications to customers promoting system gas, and should we accept the request to provide EGDI with direction on this matter?

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On the first question, we note that no party made any request of the Board to restrict or impair EGDI's right to withdraw the contentious evidence; however, TransCanada did submit that it should be retained. We note that EGDI originally supported Issue 5.5 on the basis that they needed guidance from the Board regarding future, long term contractual supply commitments. EGDI also recognized on several occasions the need to provide open and timely disclosure of their plans for change to avoid misunderstandings, and a repetition of past feelings of mistrust and scepticism. The Board Panel offered this opportunity and regrets that EGDI has not been able to take advantage of it.

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A preview of the long term supply commitments which EGDI described on Issues Day may well have strengthened the evidence in a future proceeding that these commitments have been entered into prudently, and may also have provided additional comfort in entering into the agreements now.

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Considerable time was spent in considering the second question as to whether Issue 5.5 should be deleted from the Issues list, given EGDI's withdrawal of the evidence attaching to it. On this question, we take the view that EGDI's withdrawal of the evidence does not dictate the removal of the issue.

The Motion did not seek the deletion of Issue 5.5, it was argued, correctly in our view, that a amendment of an Issue on the Issues list should only be effected after a motion properly served and directed to that purpose has been argued and granted. If amendment of an Issue requires such a process, deletion must also. We are not prepared to delete Issue 5.5 without appropriate notice and the opportunity for further arguments.

There is no question that these developments may have implications for the depth and scope of argument on the subject matters comprising Issue 5.5. Parties are reminded that Issue 5.5 was intended to canvas a limited proposal when it was adopted. With respect to supply issues, it was specifically intended to deal only with EGDI's emergent plans for long term supply which required it to make commitments prior to its next anticipated rate case. With respect to other ancillary issues, it was intended to deal only with changes contemplated to mitigate risks associated with these long term supply commitments. Discussion on the evidence filed on Issue 5.5 will be very limited, since there is no evidence describing long term supply commitments, and we do not intend to allow the discussion to deal with broader, hypothetical issues. The Board fully intends to consider the global, generic issues related to these questions in a broader policy review, such as the Gas Forum.

EGDI has implied that there is no evidence they have available to file that falls within the scope of Issue 5.5. We are somewhat concerned with EGDI's apparent interpretation of Issue 5.5. In its submissions to the Board, EGDI seemed to suggest that Issue 5.5 requires detailed and concrete arrangements giving rise to commitments for long term supply. That is not the interpretation which we hold, nor is it an interpretation which follows easily from a plain reading of the Issue as it stands on the Issues List. We note that it was our intent that the EGDI proposals to be submitted as evidence could be high level and directional in nature. They could be, for example, business or strategic plans, or approved proposals. The key test is whether or not it is the intent of the plans and the likely outcome of them that commitments will be made before the next planned rate case.

While, in the absence of further evidence from EGDI, the discussion contemplated by Issue 5.5 for this proceeding is necessarily impoverished, we find that the circumstances causing the acceptance of Issue 5.5 on the Issue List have not changed. We therefore find that it shall remain on the list.

The third consideration relates to the specific ruling on the Motion. In this matter, we find that to the extent the Motion seeks to strike the evidence filed by EGDI with respect to Issue 5.5, which has now been voluntarily withdrawn, the question it poses is moot. If EGDI desired to re-file the subject evidence, with or without the additional concrete evidence that it identified as missing at this time, the Board would invite submissions from parties prior to admitting it in the proceeding.

The fourth question before the Board relates to the disposition of the evidence filed by intervenors relating to Issue 5.5. We do not construe the Motion to be directed to any evidence other than that filed by EGDI. Both Energy Probe and TransCanada filed and received material related to Issue 5.5

in good faith, and we make no order with respect to the materials filed and received by these parties. While the withdrawal of the EGDI filed evidence will curtail the degree of examination of Issue 5.5, the Energy Probe and TransCanada materials will continue to be part of the record in this proceeding.

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Finally, we must address the concerns raised by parties with respect to the change in emphasis in customer communications signalled by EGDI in this proceeding. Some parties expressed serious concern respecting the change in messaging to natural gas customers, which they felt may have the effect of presenting a more favourable view of system supply over other market alternatives. Some went so far as to request that the Board issue a direction to EGDI to require it to make any such customer communications available for prior review and approval. The Motion before us sought no such ruling, and we will not issue a direction on this subject. We are reluctant to establish processes which add unnecessary regulatory burden, and assume that EGDI will provide appropriate oversight of its own communications, to stay within the spirit of their role in the market place and the Board's objectives in regulating natural gas.

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The question of customer communications is an important one in light of the objective reflected in section 2, paragraph 1. In addition, in this proceeding, the Board is being asked to approve costs related to the development and dissemination of existing and new messages to EGDI's ratepayers. In the course of its submissions, and in response to questions from the Board and other parties, EGDI indicated that it would be prepared to provide in advance of distribution, refocused customer communications to the intervenors of record in the proceeding. While we have decided not to direct EGDI to do so, we regard such a courtesy to be prudent. We are particularly concerned that no customer communication be issued which would have the effect of creating confusion in the market, or which would use EGDI's market position as distributor to unreasonably skew the market toward system supply, and away from the competitive environment as addressed by section 2, paragraph 1 of the Act. Should complaints be substantiated in this connection, whether from consumers or other market participants, the Board would consider appropriate action.

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There will be no specific order at this time respecting the costs of this motion.

ISSUED at Toronto, May 27, 2004

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ONTARIO ENERGY BOARD

Bob Betts
Presiding Member

Paul Sommerville
Member

Pamela Nowina
Member