



EB-2005-0001
EB-2005-0437

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, distribution,
transmission and storage of gas commencing January 1, 2006.

AND IN THE MATTER OF a motion by Direct Energy Essential
Home Services for the Board to vary its EB-2005-0001/EB-2005-
0437 Decision.

BEFORE: Pamela Nowina
Presiding Member and Vice Chair

Paul Sommerville
Member

Cynthia Chaplin
Member

DECISION ON MOTION

Enbridge Gas Distribution Inc. (“EGDI” or the “Applicant”) filed an Application, dated March 18, 2005, with the Ontario Energy Board (the “Board”) under section 36 of the *Ontario Energy Board Act 1998*, S.O. 1998, c.15, (Schedule B). The Board assigned file number EB-2005-0001 to the Application and issued a Notice of Application dated April 13, 2005.

Board issued its EB-2005-0001/EB-2005-0437 Application Decision with Reasons (the “Decision”) on February 9, 2006.

On March 1, 2006, Direct Energy Essential Home Services (“Direct Energy” or “DEEHS”) filed a Notice of Motion seeking an order varying, cancelling or suspending certain provisions of the Decision. Specifically, Direct Energy seeks a review of the decision related to third party access and a variation of the order as it relates to the date by which Enbridge must have separate billing arrangements from Direct Energy. On March 15, 2006, the Board issued Procedural Order No. 7, which made provisions for the filing of evidence and indicated that the motion would be heard orally. The motion was heard on April 4, 2006.

The February 9, 2006 Decision

In its Decision, the Board made the following findings with regard to third party access to the EGDI bill:

The Board does agree that any bill access which is provided should be on a nondiscriminatory basis, because the access is linked with the provision of a regulated service, namely, the billing of utility services. Under the current arrangements, DEEHS will continue to have effectively exclusive access. This is not appropriate, and must not continue. If Enbridge does not come forward with a comprehensive proposal regarding non-discriminatory shared bill access, then Enbridge must make arrangements for a stand-alone bill. The Board understands that if Enbridge bills on a stand-alone basis this will eliminate the cost benefit to ratepayers arising from the bill sharing, but the Board is prepared to accept this result. (par 9.5.4)

The Board also made provisions for a transition period:

In light of the Board’s findings and the current arrangements with DEEHS, the Board finds it is appropriate to make provision for an adequate transition period. The Board will not require that any change be made immediately. However, as part of its 2007 rates case Enbridge must either come forward with a complete proposal regarding third party access or it must set out how it intends to ensure that its billing is separated from the billing of DEEHS by no later than January 1, 2007. (par.9.5.5)

Relief Sought

In its Notice of Motion dated March 1, 2006, Direct Energy sought an order from the Board varying the Decision and directing as follows:

- (i) Enbridge be required to indicate on or before May 1, 2006 whether it intends to bring forward a proposal for third party access to the Enbridge bill.
- (ii) If Enbridge indicates that it does not intend to bring forward such a proposal, and if the proposal is ultimately rejected by the Board (or if the proposal is unacceptable to Direct Energy), Direct Energy will have a minimum of 16 months following such time to transition off the Enbridge bill.
- (iii) If Enbridge indicates that it does not intend to bring forward such a proposal, Direct Energy will have a minimum of 16 months following May 1, 2006 to transition off the Enbridge bill.
- (iv) If the date by which Enbridge must render a stand alone bill is less than 6 months prior to the introduction of a new CIS system, which will permit multi-party access to the Enbridge bill, Direct Energy will be permitted to continue on the Enbridge bill until the new CIS system is implemented.

The Hearing

An oral hearing was held before the Board on April 4, 2006. Direct Energy pre-filed two affidavits in support of its motion. Several parties had conducted cross examinations on these affidavits, and transcripts of these cross examinations were also filed. All materials were filed in confidence and the proceeding was held *in camera*. Direct Energy is preparing redacted versions of the confidential documents (affidavits and transcripts), and the other parties will have an opportunity to comment on the redactions. The Board will make the final determination regarding the redactions, and the redacted versions will be placed on the public record.

As directed in Procedural Order No. 9, Direct Energy provided a witness at the hearing, Mr. Rose, to answer a specific question for the Board. Mr. Rose presented evidence and was questioned by the Board panel.

The Board heard submissions on the motion from the following parties: Direct Energy, Enbridge Gas Distribution Inc. (EGDI), the Industrial Gas Users Association (IGUA), the Heating, Ventilation and Air Conditioning Coalition (HVAC), the Vulnerable Energy Consumers' Coalition (VECC), and Board Staff.

Decision

Notice

It was Direct Energy's position that it had insufficient notice of the true extent of remedies being contemplated by the intervenors. The Issues List that was accepted by the Board for the main rates case included Issue 9.19: "Third party access to customer bills including its revenue and cost impacts".

In Direct Energy's view, the wording of Issue 9.19 was vague, and Direct Energy could not have reasonably understood that a possible order from the Board would be to order EGDI to produce a stand-alone bill.

It is Direct Energy's position that the lack of clarity regarding the scope of Issue 9.19 amounts to a breach of natural justice in that it could not be reasonably expected to know the exact nature of the remedy being sought, and therefore did not know the case that it had to meet. Counsel for HVAC disputed this submission, pointing to instances in the transcript where counsel indicated that they would be seeking just such an order.

The Board is of the view that it does not need to make a decision on this point. If there were any deficiencies in the wording of Issue 9.19, then these deficiencies have been remedied through the hearing of the motion. The Board has admitted the affidavit evidence of Direct Energy and has heard submissions from all parties on this motion. In fact, counsel for Direct Energy agreed that if the Board received Direct Energy's evidence and heard the motion, there would be no prejudice to his client and his concern regarding the adequacy of the notice would be satisfied.

Fresh Evidence

In his submissions to the Board, counsel for EGDI advised the Board that EGDI would in fact be bringing forward a proposal for shared bill access in the 2007 rates case. This information, of course, was not available to either the Board or Direct Energy at the time of the Decision. It is the Board's view that this new information essentially answers Direct Energy's concerns in this motion. In the Decision, the Board directed Enbridge to implement a stand alone bill by January 1, 2007 if it did not bring forward a proposal for shared bill access as part of its 2007 rates application. EGDI has now confirmed that it will be bringing forward a proposal for shared bill access; therefore, EGDI will not be required, as a result of the current decision, to separate from the billing of DEEHS by January 1, 2007.

Direct Energy raised a concern that it is possible that the Board will not accept EGDI's proposal for shared bill access and, that if this were to occur, Direct Energy would have to make separate billing arrangements. Although it is indeed possible that the Board will ultimately reject EGDI's proposal, the Decision did not set a timetable for the provision of a stand-alone bill in the event that EGDI's proposal proves unacceptable, either to the Board or Direct Energy. If this eventuality comes to pass, it will be within the purview of the panel hearing the 2007 rates application to make a determination regarding the timing of a stand-alone bill.

The Board will therefore not vary its Decision in response to this motion. The Board will clarify its Decision by confirming that, since EGDI has stated that it will be presenting a proposal for shared bill access, EGDI will not be required to explain to the Board how it will provide a stand alone bill by January 1, 2007.

Costs

It is a common practice before the Board that eligible intervenors seek a cost award from the applicant. This case is somewhat unusual in that the party seeking a review of the Board's decision is not the applicant in the rates case (EGDI), but another party (Direct Energy). It should be noted, however, that EGDI supported Direct Energy's motion.

Three parties seek costs for their participation in this motion: HVAC, IGUA, and VECC. IGUA and VECC did not specify from whom they were seeking costs.

HVAC is specifically seeking costs against Direct Energy. HVAC has a very direct interest in the subject matter of the Motion. Its members are concerned about the exclusive access to the Enbridge bill that Direct Energy has enjoyed and want to see it ended. This Motion, if successful, threatened to extend the period of such exclusivity.

In the result, both Direct Energy and HVAC have had a measure of success in this proceeding. HVAC, because it now has a firm commitment that Enbridge will file a shared bill access proposal in connection with its 2007 rates case, and Direct Energy, because it is not facing a January 1, 2007 deadline, which it feared prejudiced its overall competitive position.

Accordingly, the Board will not make any order as to costs as between HVAC and Direct Energy.

As to the claims for costs by IGUA and VECC, the Board considers that these costs should be shared equally by Direct Energy and Enbridge, subject to the normal assessment.

Issued at Toronto, April 13, 2006.

Original signed by

Presiding Member and Vice Chair
Pamela Nowina
Signed on Behalf of the Board Panel