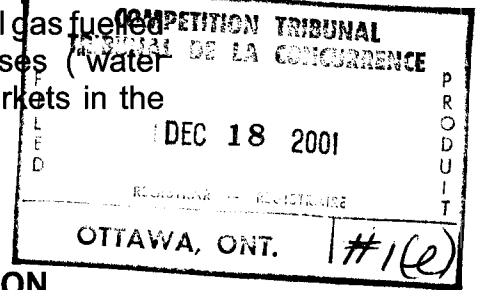


**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** an application by the Commissioner of Competition for a Consent Order pursuant to sections 79 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34 as amended;

**AND IN THE MATTER OF** certain practices of anti-competitive acts by Enbridge Services Inc. ("ESI") within certain markets in the province of Ontario;

**AND IN THE MATTER OF** an abuse of dominant position in the supply of conventional or power vented natural gas fuelled water heaters not used for commercial purposes ("water heaters") and related services within certain markets in the province of Ontario.



**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

**- AND -**

**ENBRIDGE SERVICES INC.**

**Respondent**

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**CONSENT ORDER IMPACT STATEMENT**

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**I INTRODUCTION**

1. The Commissioner of Competition (the "Commissioner") files this Consent Order Impact Statement ( the "COIS") pursuant to section 77 of the *Competition Tribunal Rules*. The COIS describes the circumstances surrounding the Draft Consent Order ("DCO") and its anticipated effects on competition.

*Rules.* The COIS describes the circumstances surrounding the Draft Consent Order (“DCO”) and its anticipated effects on competition.

2. The DCO is submitted by the Commissioner with the consent of Enbridge Services Inc. (“ESI”) (the “Respondent”). The Respondent does not agree with all of the facts as alleged in this matter by the Commissioner. However, the Respondent does not contest the COIS for the purposes of this application or for any proceeding relating to the DCO, including an application to vary or rescind the order pursuant to section 106 of the *Competition Act*, R.S.C. 1985, c-34 (the “*Competition Act*”).

## **II NATURE AND PURPOSE OF THE PROCEEDING**

3. The Commissioner files with this COIS, a Notice of Application with a Statement of Grounds and Material Facts (the “Statement”), a DCO, the Affidavit of Mark Ronayne and the required Consents of Parties, and makes this application pursuant to sections 79 and 105 of the *Competition Act*.
4. The DCO reached between the Commissioner and the Respondent is designed to eliminate the substantial lessening or prevention of competition that arises in certain markets in the province of Ontario for the supply of conventional or power vented natural gas fuelled water heaters not used for commercial purposes (“water heaters”) and related services. The Commissioner respectfully requests that the Competition Tribunal (the “Tribunal”) approve the terms of the DCO pursuant to sections 79 and 105 of the *Competition Act* which will thereby eliminate the substantial lessening or prevention of competition within the relevant markets.

## **III CIRCUMSTANCES AND PRACTICES GIVING RISE TO THE IMPACT ON COMPETITION**

5. In January 2000, ESI amended its rental water heater terms and conditions for its new and existing customers. Industry participants expressed concerns to the Competition Bureau (the “Bureau”) regarding the implications of the amended terms and conditions for competition in the markets affected. As a result of the investigation of these concerns, the Commissioner, on May 9, 2001, initiated an inquiry into the activities of ESI in relation to its rental, sales and servicing of water heaters.
6. Based upon the facts outlined in the Statement, the Commissioner has determined that ESI has substantial control over markets for the supply of water heaters and related services in the gas distribution franchise territory of its affiliate company, The Consumers’ Gas Company Ltd. operating as Enbridge Consumers’ Gas (“ECG”).
7. The Commissioner has further determined that ESI has engaged in a practice of anti-competitive acts in relation to its water heater supply and servicing activities in the relevant markets. The anti-competitive acts include charges and conditions for ESI water heater rental program customers (“ESI customers”) to exit the ESI water heater rental program. The relevant charges and conditions are as follows: (1) ESI prevents competitors from disconnecting and removing its functioning rental water heaters and charges its customers \$75.00 dollars in order to perform this service; and (2) ESI customers are required to pay an installation cost recovery charge for an eleven (11) year period following the installation of their ESI rental water heaters.
8. The anti-competitive acts also include the ESI rental water heater buy-out plan (the “Buy-Out Plan”) and the ESI rental water heater price match guarantee (the “Price Match Guarantee”). Under the Buy-Out Plan, ESI customers can exit the ESI water heater rental program by purchasing their ESI rental water heater at a buy-out price as determined by ESI. The ESI rental water heater buy-out price (the “Buy-Out Price”) is based on the current installed price of a comparable new ESI rental water



heater and is discounted according to the age of the ESI rental water heater already installed. Under the Price Match Guarantee, the discounted Buy-Out Price is adjusted to reflect an ESI competitor's lower advertised price for a comparable water heater.

9. The Commissioner has concluded that the above anti-competitive activities have resulted in a substantial lessening or prevention of competition in the relevant markets.

#### **IV DESCRIPTION OF THE DCO**

10. The DCO provides for changes to be made to the manner in which ESI conducts its water heater business in order to eliminate the substantial lessening or prevention of competition described in the Statement.

11. The required changes to ESI's water heater business can be classified into four categories pertaining to the: (1) disconnection and return of ESI rental water heaters; (2) water heater rental program exit charges; (3) Buy-Out Plan and Price Match Guarantee; and (4) other water heater terms, conditions and operations.

##### **A. THE DISCONNECTION AND RETURN OF ESI RENTAL WATER HEATERS**

12. The DCO provides that ESI shall not prevent others from returning nor qualified persons from disconnecting ESI rental water heaters. The DCO also contains a list of related drop-off sites for the return of ESI rental water heaters by others. If a drop-off site is within 20 miles (32 km) of an ESI customer's location and the ESI customer requests ESI to disconnect and pick-up or pick-up an ESI rental water heater, ESI may charge the ESI customer a disconnection and pick-up fee of \$75.00 dollars. ESI may also

provide the option to the ESI customer to independently dispose of the ESI rental water heater rather than return it to ESI.

13. Where return locations are not within 20 miles of an ESI customer's location, ESI, upon request by ESI customers, is required to disconnect and pick-up or pick-up the disconnected ESI rental water heater free of charge to the ESI customer. ESI may also provide the option to the ESI customer to independently dispose of the ESI rental water heater rather than return it to ESI.
14. ESI is required to perform the disconnection and pick-up service of an ESI rental water heater within a two (2) week period of a related request and shall not assess ESI customers any additional rental charges after the month during which pick-up occurs. Where the pick-up service is not conducted within the two (2) week period, ESI shall not impose a disconnection or pick-up charge or further rental charges.

**B. WATER HEATER RENTAL PROGRAM EXIT CHARGES**

15. Pursuant to the terms of the DCO, ESI shall no longer be permitted to impose rental water heater exit charges, fees or penalties (collectively "exit charges") on its customers beyond an initial period of five (5) years after installation of a new ESI rental water heater.
16. Where such exit charges are permitted, namely, in the initial five (5) year period following installation of a new ESI rental water heater, the exit charges shall be commercially reasonable and non-discriminatory. More specifically, such charges shall not exceed \$125.00 dollars for any ESI rental water heater during year one, and are to be reduced by \$10.00 dollars per year until exit charges shall no longer apply.

17. During the period when any existing ESI customer is subject to exit charges, ESI shall not increase the ESI customer's water heater rental rate by more than the inflation rate. ESI contracts with any new customers shall contain pre-stated rental rates for the initial five (5) year period or less during which exit charges may apply. Alternatively, the water heater rental rate may be permitted to increase to reflect inflation.

**C. THE RENTAL WATER HEATER BUY-OUT PLAN AND PRICE MATCH GUARANTEE**

18. Pursuant to the terms of the DCO, ESI shall provide all of its ESI customers with a fixed price Buy-Out Price Schedule (the "Schedule") for their ESI rental water heaters. For existing ESI customers, the Buy-Out Prices included in the Schedule will be based on current ESI prices for the equivalent ESI rental water heater less inflation since the time of installation. For new ESI customers, the Buy-Out Prices included in the Schedule will be based on the installed prices of the water heaters. In both cases, the Buy-Out Prices shall decline over time according to a specified schedule.
19. ESI shall not offer different rental rates or Buy-Out Prices to ESI customers whose ESI rental water heaters are of a similar model and age, other than to reflect the cost of supplying water heaters and related services to different groups of ESI customers as outlined in paragraph 35 herein.

**D. OTHER WATER HEATER TERMS, CONDITIONS AND OPERATIONS**

20. The DCO provides that ESI's other terms, conditions and operations with respect to its water heater activities shall not result in artificial barriers to entry and competition in the relevant markets. Without limiting the generality of the foregoing, ESI shall ensure that its practices, with respect to the assessment and recovery of damage to returned ESI rental water heaters, and the limitation of its liability with respect to the

disconnection or the return of ESI rental water heaters by others, do not have the above-mentioned effects.

**V IMPACT OF PROPOSED REMEDY**

21. The Commissioner believes that changes to ESI's water heater activities as stipulated in the DCO will eliminate the substantial lessening or prevention of competition with respect to the supply of water heaters in the relevant markets caused by the anti-competitive acts engaged in by ESI as described in subsections V(B)-(C) of the Statement. More specifically, the implementation of the DCO will have the following effects.

**A. IMPACT OF THE DCO PROVISIONS REGARDING THE DISCONNECTION AND RETURN OF THE ESI RENTAL WATER HEATERS**

22. The disconnection and return provisions of the DCO will eliminate the anti-competitive effects, as described in subparagraph V(B)(a)(i) of the Statement created by the requirement that only ESI personnel disconnect and return ESI rental water heaters at a cost of \$75.00 dollars to ESI customers. These effects pertain to the additional costs that this requirement imposes on ESI customers to switch to ESI competitors. The additional switching costs are due to the need, under the requirement, for ESI customers to have ESI disconnect and pick-up their water heaters and for ESI competitors to deliver and install their water heaters. They include both the additional direct costs of paying for and the indirect time and inconvenience costs of arranging separate service calls.



23. The DCO directly addresses the above-noted anti-competitive effects by allowing parties other than ESI to disconnect and return ESI rental water heaters. As a consequence, ESI customers will have several competitive options for the removal and return of their ESI rental water heaters. These options include:

- disconnection and return of the ESI rental water heater by the properly licensed on-site contractor installing the competitor's water heater;
- pick-up and return by a third party, such as a handyman;
- return by the homeowner; and
- disconnection and pick-up by ESI.

In addition, where permitted by ESI, the ESI customer may choose to dispose of the ESI rental water heater rather than return it.

24. The availability of the above options will allow the disconnection and return of ESI rental water heaters to be done in an efficient manner. To further ensure that this results in lower switching costs to ESI customers and hence lower barriers to entry and expansion in the relevant markets, the DCO also provides either for the existence of accessible sites for the return of ESI rental water heaters or for ESI to pick-up its rental water heaters free of charge to the customer. In this regard, the DCO lists specific sites where water heaters may be dropped off. These return locations include ESI district offices, ESI franchisees and a location of Enbridge Business Services which is owned by a wholly-owned subsidiary of ESI.

25. In cases where a drop-off site is not within 20 miles (32 km) of an ESI customer's residence, ESI is required to pick-up the customer's rental water heater free of charge. In such cases, ESI is further required to pick-up its rental water heaters within two (2) weeks of any request by the customers. This will ensure timely performance of the pick-up service and will avoid undue switching costs and delays.
26. Accordingly, the DCO ensures that no ESI customer will be required to return his or her rental water heater by a travel distance in excess of 20 mile (32 km). The average travel distance required to return a water heater will be much less as a result of the following considerations:
- In any relevant area there will be persons living within the 20 mile (32 km) travel distance of the ESI drop-off sites.
  - For example, in the Greater Toronto Area and Ottawa, drop-off centres have overlapping 20 mile (32 km) travel distances. As a consequence, the maximum as well as the average travel distance for return of a water heater will be less than is indicated by a 20 mile (32 km) radius around an individual drop-off site.
  - The additional travel to return a water heater may be reduced by contractors and others returning the water heater combining this activity with other activities.
27. The DCO also indirectly addresses anti-competitive effects of the ESI rental water heater disconnection and return provisions through the changes being made to the above-noted Buy-Out Plan and Price Match Guarantee. These changes are likely to result in more ESI customers buying their ESI rental water heaters thereby eliminating the requirement to return these water heaters to ESI.

**B. IMPACT OF THE DCO PROVISIONS REGARDING THE WATER HEATER RENTAL PROGRAM EXIT CHARGES**

28. The anti-competitive effects of the exit charges, as described in subparagraph V(B)(a)(i) of the Statement, include the creation of an extended period, namely, eleven (11) years, during which further significant costs apply for ESI customers to switch to an ESI competitor.
29. The DCO removes the anti-competitive effects of the exit charges by limiting the period during which any such exit charges may be levied and by ensuring that ESI customers are protected against the exercise of market power during the period in which any exit charges may apply.
30. More specifically, the DCO provides that ESI will no longer apply installation or other exit charges to its ESI customers to exit their ESI rental water heater program if the ESI rental water heaters are five (5) years old or more. It is estimated that implementation of this provision of the DCO will reduce the percentage of ESI's installed customer base subject to exit charges from in excess of 70% to under 35%. Considering this anticipated result, in relation to the total number of households in the relevant markets, whereas currently over 60% of these households are estimated to be subject to ESI rental program exit charges, under the terms of the DCO this proportion is anticipated to decline to under 30%. This percentage share is expected to further decrease as a result of : (1) ESI competitors being provided the opportunity to compete effectively in the relevant markets; and (2) more customers exercising their option to buy-out their installed water heaters as a consequence of the changes being made by ESI to its Buy-Out Plan.

31. During the period in which ESI customers may be subject to exit charges (namely, during the initial five (5) year period of installation of a new ESI rental water heater), the DCO requires that, the exit charges imposed on the ESI customers, be commercially reasonable. More specifically, the DCO provides that the exit charges be set at a maximum of \$125.00 dollars during year one and subsequently decline by \$10.00 dollars per year until the exit charges no longer apply. This charge reflects ESI's sunk costs of installing its rental water heaters and is consistent with installation costs of ESI competitors.
32. The DCO further ensures that ESI customers are price-protected during the period that exit charges apply. This protection shall be in the form of one of the following: i) a rental rate increase that is communicated to a consumer before entering a water heater rental arrangement; or ii) a cap on rental rate increases equal to the rate of inflation. These provisions are designed to protect against the possible exercise of market power over that part of ESI's installed rental water heater customer base that is subject to exit charges at any point in time.

**C. IMPACT OF THE DCO PROVISIONS ON THE ESI RENTAL WATER HEATER PRICE BUY-OUT PLAN AND PRICE MATCH GUARANTEE**

33. The anti-competitive effects of the ESI rental water heater Buy-Out Plan and Price Match provisions, as described in subparagraph V(B)(a)(ii) of the Statement, pertain to the exclusion of ESI competitors in the supply of water heaters. The provisions allow ESI to exclude competitors and raise rivals' costs by discounting selectively its Buy-Out Price to prevent ESI customers from switching in order to take advantage of a preferred competing offer.

34. The DCO will eliminate these effects by preventing ESI from offering different rental rates or Buy-Out Prices to ESI customers who are renting ESI rental water heaters of a similar model and age. As a consequence, ESI will be required to reduce its Buy-Out Price to all such customers as a means to prevent switching to competitors, rather than selectively providing discounts to match competing offers.
35. In order to ensure that the above restriction does not prevent efficient pricing, the DCO provides for a limited exception. Specifically, it allows different rental rates and buy-out prices to be established where they can be justified on the basis of legitimate cost differences. For instance, rental rates for an area may be altered to reflect higher costs in providing rental water heaters as a result of local water conditions thereby resulting in water heaters having a shortened life expectancy.
36. ESI customers will no longer have to make a special call to ESI in order to ascertain their Buy-Out Prices. The DCO further ensures that ESI customers will be provided with a clear Buy-Out Price which is designed to reflect the price of their ESI rental water heaters at the time of installation. This will provide ESI customers with a clear indicator for determining: (1) whether to remain in the rental program; (2) whether to purchase their existing ESI rental water heater; or (3) whether to have a water heater supplied by a competitor of ESI.

**D. IMPACT OF THE DCO PERTAINING TO ESI'S OTHER WATER HEATER AND RELATED SERVICE SUPPLY ACTIVITIES**

37. The DCO prevents ESI from making any changes to its operations that would be contrary to the purpose of the DCO namely, to promote and protect competition in the relevant markets. More specifically, the DCO prevents ESI from effectively increasing customer switching costs and thereby discouraging ESI customers from switching from

ESI rental water heaters by, in essence, imposing excessive damage or third party liability costs on the return of ESI rental water heaters.

38. For all of the above reasons, the DCO eliminates the anti-competitive effects of the above-noted practices.

## **VI ALTERNATIVE TO SETTLEMENT**

39. As an alternative to the settlement proposed through the DCO, the Commissioner considered contested litigation seeking prohibition of the anti-competitive activities of ESI in the water heater business. The Commissioner has accepted the DCO for a number of reasons. First, the proposed remedies will, in the Commissioner's view, eliminate the substantial prevention or lessening of competition arising from the activities of ESI in the water heater business. Second, the DCO provides a more timely and certain outcome for Ontario competitors in the water heater business and Ontario customers within certain markets in the province of Ontario than litigated proceedings. Third, the DCO provides a more timely and certain outcome for ESI.

## **VII CONCLUSION**

40. For the reasons set forth above, the Commissioner recommends the settlement found in the DCO and respectfully requests that the Tribunal approve the DCO.

CT-01/

**THE COMPETITION TRIBUNAL**

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**B E T W E E N:**

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**Applicant**

**- and -**

**ENBRIDGE SERVICES INC.**

**Respondent**

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**CONSENT ORDER IMPACT STATEMENT**

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