500 Consumers Road
North York, Ontario
M2J 1P8
PO Box 650
Scarborough ON M1K 5E3

Lesley Austin
Regulatory Coordinator
Regulatory Proceedings
phone: (416) 495-6505
fax: (416) 495-6072

VIA COURIER AND RESS

October 30, 2009

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

Re: Ontario Energy Board (the "Board") File No. EB-2009-0084
Consultation on Cost of Capital
Final Written Comments of Enbridge Gas Distribution Inc. ("Enbridge")

Pursuant to the Board's October 5, 2009 and October 23, 2009 letters in the above noted proceeding, please find attached the final written comments of Enbridge.

Further to the Board's direction, Enbridge has made this submission using the RESS and has sent 3 hard copies to the Board via courier.

Sincerely,

Lesley Austin
Regulatory Coordinator

Attachment

cc: Fred Cass, Aird & Berlis LLP (via email)
EB-2009-0084 Interested Parties (via email)

IN THE MATTER OF a consultation by the Ontario Energy Board on the Cost of Capital.

FINAL WRITTEN COMMENTS OF ENBRIDGE GAS DISTRIBUTION INC.

In its letter dated October 5, 2009, the Ontario Energy Board (the "Board") invited participants in this stakeholder conference to provide final written comments to the Board. The Board's letter indicated that such comments must be filed by October 26, 2009. These are the final written comments of Enbridge Gas Distribution Inc. ("Enbridge") filed in accordance with the Board's letter.

The Issues List for the stakeholder conference was attached to a Board letter dated July 30, 2009. In this letter, the Board identified three areas where further information is needed, as follows:

(1) potential adjustments to the established cost of capital methodology (i.e. based on the ERP approach) to adapt to changes in financial market and economic conditions;

(2) determination of the reasonableness of the results based on a formulaic approach for setting the cost of capital; and

(3) Board discretion to adjust those results, if appropriate.

These three areas of further information were reiterated in the Board's October 5th letter and again by the Board Chair at the outset[1] and at the conclusion[2] of the evidentiary portion of the stakeholder conference. In his concluding remarks, the Board Chair added a fourth goal or purpose for the consultative process, namely, to make the Board's draft guidelines final. In the following comments, Enbridge will address the four areas referred to by the Board Chair.

Need to Adjust the Established Methodology

Enbridge supports the use of a formulaic approach to the determination of Return on Equity ("ROE") for utilities regulated by the Board. Not only does the use of a formula

[1] Transcript, September 21, 2009, pages 5-6.
[2] Transcript, October 6, 2009, page 153.

bring greater efficiency to the regulatory process, it enables the utilities, stakeholders and others (such as capital market participants) to anticipate or assess the direction of Board-allowed returns. However, the evidence, comments and presentations in this consultation have provided a clear and convincing demonstration that the formula currently used to determine ROE is not producing results that meet the Fair Return Standard. Enbridge submits that because the results of the formula do not meet the Fair Return Standard – as elaborated on in the comments that follow - there is an immediate need to adjust the Board's established methodology.

A unique feature of this stakeholder consultative is the advantage that the Board has gained from hearing evidence that, to the best of Enbridge's knowledge, has never before been available to a Canadian public utility regulator in an ROE proceeding. Enbridge applauds the Board for seeking out this independent and objective input from a panel of witnesses who are directly involved in capital market activities and who offer expertise from four different capital market perspectives, namely, bond analyst, bond investor, equity analyst and investment banker. Together with Mr. Carmichael, an investment banker with over 30 years of experience in the Canadian capital market, the four experts were unanimous in their view that the formula is not producing fair returns for Ontario utilities. This unanimous viewpoint is apparent from comments such as the following that were made by the capital market experts:

> Mr. Akman: "…the current formula return on equity is getting very negative feedback from equity markets today. What the equity markets are saying is that the current formula across Canada that bases ROEs solely on changes in government bond yields is not working".[3]
>
> Mr. Dafoe: "And so this is the mismatch that you have. What is happening in the real world is reflected by the corporate bond yield, and what is reflected in the ROE does not reflect what is happening in the real world today."[4]
>
> Mr. Halloway: "And I can give you the context of there when I put my M&A advisory hat on and we show people opportunities in Canada, and they say: Harold, looks good. Doesn't give me enough return. I have a limited amount of capital in this environment. I'm going to invest it somewhere else".[5]

[3] Transcript, September 21, 2009, page 12.
[4] Transcript, September 21, 2009, page 94.
[5] Transcript, September 21, 2009., page 74.

> Ms. Zvarich: "And, finally, what we also worry about is, in our opinion, inadequate levels of compensation for taking on risk, meaning low ROE levels."[6]
>
> Mr. Carmichael: "Over time, the market has developed certain concerns regarding the formulaic approach. First of all, I think there are serious questions as to whether the formula is appropriate … whether it provides a reasonable ROE. Secondly, there are questions regarding how the formula is calibrated … "[7]

These comments by the capital market experts are consistent with the views expressed during the course of this proceeding by a number of other experts, including Dr. Vander Weide, Ms. McShane, Mr. Dalton and, in particular, Concentric Energy Advisors.

In addition to the evidence of the Canadian capital market experts, another important feature of this proceeding is the extensive and thorough research and analysis provided by Concentric. Concentric's work was discussed and probed at length during the oral portion of the stakeholder conference and this process served only to reinforce the validity of Concentric's findings. It is worthy of note that, with the exception of Dr. Booth, no expert challenged Concentric's detailed analysis. Dr. Booth offered only a cursory calculation, unsubstantiated by detailed evidence, and showed a willingness to move as much as 100 basis points above his recommended return, with little or no explanation for such a wide range of variability in his recommendation.[8]

On the issue of the need to adjust the existing methodology, Concentric applied alternative ROE estimation methods to test the results produced by the formula. Appendix F to Concentric's report dated September 8, 2009 on behalf of Enbridge (the "Concentric Report") contains a complete cost of capital study for the Ontario utilities. Concentric used as primary tools of analysis the Discounted Cash Flow approach and the Capital Asset Pricing Model and it used Equity Risk Premium and Comparable Returns analysis in order to benchmark the reasonableness of the results. The cost of capital study establishes that the current formula is not producing appropriate returns for Ontario utilities. As explained by Concentric, when allowed ROE is based on a formula that relies on the Canadian long bond yield, the formula has the perverse effect of reducing allowed ROE at the very time when investors are becoming more risk averse and demanding a higher return to commit capital.[9]

[6] Transcript, September 21, 2009, page 54.
[7] Transcript, September 21, 2009, page 106.
[8] Transcript, October 6, 2009, page 98.
[9] Concentric Report, page 39.

The conclusions reached by the market experts and Concentric about the results produced by the existing formula are consistent with recent decisions of the National Energy Board ("NEB"). The NEB released a decision in March, 2009 (RH-1-2008, Trans Quebec & Maritimes Pipelines Inc. ("TQM") Decision) in which it concluded that there have been significant changes since 1994, when, in RH-2-94, the NEB adopted the formulaic approach to determination of ROE. The NEB said that these changes have occurred in the financial markets, as well as in general economic conditions.[10] More specifically, the NEB said that:

> …Canadian financial markets have experienced greater globalization, the decline in the ratio of government debt to GDP has put downward pressure on Government of Canada bond yields, and the Canada/US exchange rate has appreciated and subsequently fallen. In the [NEB's] view, one of the most significant changes since 1994 is the increased globalization of financial markets which translates into a higher level of competition for capital.[11]

The NEB went on to say that changes that could potentially affect the cost of capital may not be captured by the long Canada yields and hence may not be accounted for by the results of the RH-2-94 formula.[12] The NEB decided that the formula would not be used to determined TQM's cost of capital for 2007 and 2008.

On October 8, 2009, the NEB released a decision with respect to a broader review of the RH-2-94 Decision. In this decision, the NEB again noted that there have been considerable changes in financial and economic circumstances since 1994. The NEB also noted that 15 years is a significant passage of time in the context of financial regulation and, in the result, it came to the view that there is doubt as to the ongoing correctness of the RH-2-94 Decision. The NEB said that the RH-2-94 Decision "will not continue to be in effect".[13] The NEB did, however, leave the door open to review the situation and potentially return to a multi-pipeline formulaic approach at a future time.

In the case of Ontario, Concentric has provided in this proceeding all of the tools that the Board needs to recalibrate and revise its existing formula.[14] Concentric has analyzed and tested a number of index-based solutions and it has put forward a recommended formula that is the most likely to satisfy the Fair Return Standard. Concentric has also performed a complete cost of capital study and has provided the

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[10] RH-1-2008 Reasons for Decision, page 16.
[11] RH-1-2008 Reasons for Decision, page 16.
[12] RH-1-2008 Reasons for Decision, page 17.
[13] Reasons for Decision, Review of the Multi-Pipeline Cost of Capital Decision (RH-2-94), page 2.
[14] The Concentric Report answers every issue on the Board's Issues List, both in summary fashion (at pages 7 to 12) and with detailed explanations (at pages 16 to 70) .

Board with updated ROEs for the electricity and natural gas sectors; these are set out in Table 10 of Appendix F of the Concentric Report.[15]

Concentric concluded that, in today's economic environment, an ROE estimate based on the historical relationship of government bond yields and equity returns will not provide adequate results.[16] Rather, Concentric found that corporate bond yields and corporate costs of equity have historically exhibited a strong correlation that reflects an important element missing from the current formula, namely, the market's perspective on corporate credit risk.[17] Concentric concluded that corporate bonds are more suitable as a basis for a formulaic ROE determination than government bonds, both because of a slightly stronger statistical relationship and also because of lower volatility that provides a more stable basis for determining allowed returns.[18]

Of course, due regard must be given to the comparable investment element of the Fair Return Standard. It surely is beyond contention that, as indicated by Concentric, the best means by which to ensure that the comparable investment element is met is to look to utilities that are comparable in terms of risk and operating environment, and that have ROEs determined on the basis of the Fair Return Standard applied in the context of "litigated" proceedings.[19] Concentric therefore recommends a formula that would adjust a prior year's Board-allowed ROE by an equal weighting of two factors. The two factors are an index of Canadian utility A-rated bond yields (available in the form of the Bloomberg Fair Value Canada 30-Year A-rated Utility curve) and a weighted average index of "litigated" North American ROE decisions (available through the Regulatory Research Associates database of rate case statistics).[20] This formula can be utilized in conjunction with the updated ROEs summarized in Appendix F, Table 10 of the Concentric Report. Enbridge agrees with and adopts Concentric's recommendations regarding the methodology for determining fair returns.

In order to test the outcome of various formulaic approaches to the determination of ROE, Concentric carried out a "back cast" analysis. The results of this analysis, which are depicted in Figure 12 of the Concentric Report, confirm the shortcomings of an approach based on the change in government bond yields.[21] The back cast analysis also shows that, of all the methodologies tested, Concentric's recommended formula is

[15] Concentric Report, page F-20.
[16] Concentric Report, page 51.
[17] Concentric Report, page 53.
[18] Concentric Report, page 54. The difference in volatility is attributed to the fact that Treasury bond yields tend to be more sensitive to changes in the business cycle and short term changes in monetary policy and investor sentiment, while corporate bond yields reflect the long term ability of corporations to meet their interest and debt repayment obligations.
[19] Concentric Report, page 36. As to the validity of comparisons between Canadian and U.S. utilities, see the comments made under the heading "Reasonableness of Results", below.
[20] Concentric Report, Appendix G.
[21] Concentric Report, pages 62 to 65.

the one that best meets the Fair Return Standard. This was explained during the stakeholder conference by Mr. Coyne, when he made the following observations about the "line" in Figure 12 depicting the back cast results of Concentric's recommended approach:

> Just to orient you on the chart … the dark line represents the formulaic result for the method that we have recommended that we think has the best chance of emulating what a fair return ROE should be over time.
>
> That line is represented by an index graded by Canadian bond return – utility bond yields, one-half weighted by Canadian bond yields and the other one-half is weighted by litigated returns of North American utilities.
>
> … that solution … we believe produces results that are A, reasonably consistent with our currently estimated ROEs for Ontario; B, [tracks] comparable returns reasonably well over time, although not perfectly; and C, it avoids the problems associated with the current formula.
>
> .. another reason we like these [is because] these two parameters are both are available. … So we like the fact that it is transparent.
>
> We believe that this formula brings regulatory efficiency and transparency and it is also tied to inputs that are more likely to track the cost of utility equity than what is in place today.[22]

Concentric's recommended approach also includes a periodic review of the results of the formula at intervals of three to five years.[23] This gives the Board and stakeholders an added level of confidence that the continued use of a formulaic approach will not result in a divergence from the Fair Return Standard.

In summary on this point, the information and evidence presented to the Board leave no doubt about the need to adjust the existing methodology for the determination of utility returns, yet there are undeniable benefits associated with the continued use of a formula. Concentric has carried out a comprehensive analysis and has recommended a new formula to be applied to updated ROEs. Based on Concentric's work, the Board can adjust its methodology to address the issue of current returns that do not meet the Fair Return Standard and thus avoid the uncertainty that would arise from further delay

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[22] Transcript, September 22, 2009, pages 20 to 22.
[23] Concentric Report, pages 6 and 66; Transcript, September 22, 2009, page 23.

in the determination of an appropriate methodology for ongoing determination of returns.

Reasonableness of Results

It is difficult to test the reasonableness of the results produced by the current formula, because, until recently, the same formula has been applied in most other Canadian jurisdictions. As indicated by Concentric, the key difficulty in determining whether the comparable investment standard has been met for Ontario's utilities is finding comparable companies with comparable risks, whose returns are not subject to the formula.[24] To evaluate the fairness of ROE awards by looking to other Canadian utilities subject to the same formula is a circular and meaningless exercise – differences would stem only from the timing of each respective calculation.[25]

Given that Canadian comparators do not provide a meaningful foundation upon which to test the reasonableness of the results of the formula, the obvious question is whether comparators from outside the country will serve this purpose. Concentric's earlier report for the Board found that Canadian utilities compete for capital essentially on the same basis as those in the U.S. and that there is no demonstrable difference in risk to justify the difference in returns between Canadian and U.S. utilities.[26] Concentric's conclusion that U.S. and Canadian utilities are meaningful comparators[27] is supported by the NEB's TQM Decision. With respect to U.S. transmission pipelines, the NEB expressed the view that the risks faced by TQM and those faced by U.S. pipelines are not so different as to make them inappropriate comparators.[28] Similarly, with respect to U.S. distribution companies, the NEB said that TQM and U.S. LDCs are sufficiently similar in risk so as to make comparisons meaningful.[29] The NEB went on to say

> In light of the [NEB's] views … on the integration of U.S. and Canadian financial markets, the problems with comparisons to either Canadian negotiated or litigated returns, and the [NEB's] view that risk differences between Canada and the U.S. can be understood and accounted for, the [NEB] is of the view that U.S. comparisons are very informative for determining a fair return for TQM for 2007 and 2008.[30]

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[24] Concentric Report, page 35.
[25] Concentric Report, page 36.
[26] Concentric Report, pages 31-32.
[27] Concentric Report, page 32.
[28] RH-1-2008 Reasons for Decision, page 68.
[29] RH-1-2008 Reasons for Decision, page 68.
[30] RH-1-2008 Reasons for Decision, page 71.

Further evidence of the comparability of Canadian and U.S. returns can be found in the practical market-based evidence of Mr. Akman, Mr. Dafoe, Mr. Halloway and Ms. Zvarich, who drew comparisons between investor opportunities in the Canadian and U.S. markets.

The comparable investment element of the Fair Return Standard requires a comparison of “enterprises of like risk”. In order to meet this standard, Concentric developed proxy groups of U.S. electricity and gas utilities that are suitable for comparison (Appendix C of the Concentric Report) and it carried out a detailed risk analysis of the proxy group utilities and of Ontario’s utilities (Appendix D of the Concentric Report). Concentric found no measureable differences in the level of risk between the U.S. proxy group average and Ontario utilities such as to warrant an adjustment to the U.S. comparisons.[31]

Dr. Booth agreed that global equity markets have become more integrated in recent years, that all types of investments across national boundaries are increasing, that there is growing economic integration between Canada and the U.S. and that the U.S. represents a particularly important market for Canadians because of its size and proximity.[32] On the subject of whether U.S. and Canadian utilities are of like risk, he said that the impact of regulation is the single biggest factor in the risk of a utility.[33] However, Dr. Booth indicated during his presentation that he is not an expert on U.S. regulatory matters[34] and he later confirmed that he has never been qualified as an expert in any U.S. regulatory proceedings, nor has he ever testified in any such proceedings.[35]

Dr. Booth accepted that it is possible to form samples of U.S. utilities that are equivalent to the total population in Canada.[36] Concentric completed a comprehensive risk analysis and was able to draw comparisons between an appropriate sample of U.S. utilities and Ontario utilities. By this means, Concentric, unlike Dr. Booth, gave full effect to the comparable investment element of the Fair Return Standard (as well as the other two elements, namely, financial integrity and capital attraction).

Concentric’s use of U.S. comparisons to test the reasonableness of the results of the current formula revealed three major flaws with the formula. First, when the formula came into effect, utility capital costs and government bond yields were perceived to move together, but, in recent years government bond yields have virtually “derailed” from utility bond yields. Second, the 0.75 coefficient in the current formula is overly

[31] Concentric Report, page 35.
[32] Transcript, October 6, 2009, pages 40 to 42.
[33] Comments of Dr. Booth, September, 2009, page 23.
[34] Transcript, October 6, 2009, page 21
[35] Transcript, October 6, 2009, page 29.
[36] Transcript, October 6, 2009, page 60.

sensitive to changes in interest rates, as confirmed by U.S. data showing that the relationship between bond yields and allowed returns justifies a coefficient no greater than 0.50. Third, the absence of any means of corroborating the results of the current formula has allowed those results to steadily diverge from U.S. returns.[37] Among all the methodologies tested in Concentric's back cast analysis, the current formula is the one that deviates most from comparable returns in the U.S.[38]

Conversely, Concentric's recommended approach tracks comparable returns reasonably well and the back cast analysis shows that Concentric's proposed formula is the methodology that best meets the Fair Return Standard over time.[39] In response to an issue identified by the Board, Concentric has provided a number of metrics that can be used on an ongoing basis to test the reasonableness of the results produced by the recommended approach. These include corporate and government bond yields and spreads, comparable litigated returns, equity analyst reports, credit reports, and a number of other useful reference points.[40]

Board Discretion

In its comments with respect to the Issues List for this stakeholder consultation, the Board stated that the application of the Fair Return Standard will be central to the consultation.[41] Enbridge agrees with the Board's statement that the Fair Return Standard is central to this proceeding. The Fair Return Standard is more than just an over-arching guide for the determination of utility returns by the Board; in Canada it is a legal requirement that approved rates must produce a fair return.[42] A judge of the Supreme Court of Canada has described this requirement that approved rates must produce a fair return as an "absolute" obligation.[43]

Because the Fair Return Standard is an absolute obligation or requirement, it does not involve an exercise of discretion by the Board. Nor does it involve a balancing of the interests of investors and ratepayers. This proposition has been clearly established in Canadian law for many years. In a 2004 decision, the Federal Court of Appeal accepted as "sound" the appellant's argument that impact on customers and consumers

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[37] Concentric Report, pages 5-6.
[38] Transcript, September 22, 2009, page 21.
[39] Transcript, September 22, 2009, pages 20 to 22.
[40] Concentric Report, pages 69-70;Transcript, September 22, 2009, page 23.
[41] Board letter of July 30, 2009, page 3.
[42] In *Re Union Gas Ltd. and Ontario Energy Board et al* (1983), 43 O.R. (2d) 489, at p. 502 the Ontario Divisional Court said that "the O.E.B. is under an obligation to approve rates which will produce a fair return"(per Anderson J.).
[43] *British Columbia Electric Railway Co. Ltd. v. Public Utilities Commission of British Columbia et al* [1960] S.C.R. 837, at p. 848, where Locke J. said: "The obligation to approve rates which will produce the fair return to which the utility has been found entitled is, in my opinion, absolute … ." This statement by Locke J. was relied upon by the Divisional Court in the *Re Union Gas* case referred to above.

is irrelevant when determining required return on equity.[44] The Court indicated that this proposition is in keeping with the 1929 decision of the Supreme Court of Canada in the *Northwestern Utilities* case.[45] The Federal Court of Appeal said specifically that "[t]he cost of equity capital does not change because allowing the [utility] to recover it would cause an increase in tolls" and that "the cost … of providing that rate of return … is unaffected by the impact of tolls on customers or consumers".[46]

In the same decision, the Federal Court of Appeal addressed the point at which discretion comes into play in the fixing or approval of just and reasonable rates. The Court said that, while impact on customers or consumers cannot be a factor in the determination of the cost of equity capital, any resulting increase in tolls may be a relevant factor in determining the way in which a utility should recover its costs.[47] The Court went on to say:

> It may be that an increase is so significant that it would lead to "rate shock" if implemented all at once and therefore should be phased in over time. It is quite proper for the Board to take such considerations into account, provided that there is, over a reasonable period of time, no economic loss to the utility in the process. In other words, the phased in tolls would have to compensate the utility for deferring the recovery of its costs of capital.[48]

Thus, while the Fair Return Standard is a legal requirement that must be met when the cost of equity is determined, the Board does have discretion with respect to the implementation of its fair return determination into rates. It is appropriate for the Board to take into account potential rate shock and the Board may take steps, such as a phased approach to rate increases, in order to address any such concern.

<u>Final ROE Guidelines</u>

For the reasons set out above, Enbridge submits that the Concentric Report provides everything that the Board needs to implement an enhanced formulaic approach to the determination of ROE and to develop final ROE guidelines. The key building blocks for final ROE guidelines provided by Concentric are the updated ROEs and the formula that

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[44] *TransCanada PipeLines Ltd. v. National Energy Board*, 2004 FCA 149, para. 36. TransCanada's position was that, when final tolls are being fixed, the impact on customers and consumers may be relevant, but it is irrelevant when determining the required return on equity (paragraph 35). The Federal Court of Appeal said that this argument is sound (paragraph 36).
[45] *Northwestern Utilities Ltd. v. Edmonton (City)* [1929] S.C.R. 186; referred to in the *TransCanada PipeLines* case, at paragraph 36.
[46] *TransCanada PipeLines* case, paragraph 36.
[47] *TransCanada PipeLines* case, paragraph 43.
[48] *TransCanada PipeLines* case, paragraph 43.

can be applied on an ongoing basis. Enbridge therefore supports the initiative referred to by the Board Chair as the fourth purpose of this proceeding, namely, to replace the Board's draft ROE guidelines of March 1997 with a final set of guidelines.

The draft ROE guidelines address four areas: Purpose, Initial Setup, Adjustment Mechanism and Term of the Formula. Should the Board accept Concentric's recommendations, little change to the Purpose section of the draft guidelines would be necessary.[49] For the purposes of a final set of ROE guidelines, a reset of returns to updated numbers would in fact constitute the "Initial Setup". Appendix F to the Concentric Report contains a full cost of capital study that can be drawn upon for the ROE reset approach that would constitute the Initial Setup section of a final set of guidelines based on Concentric's recommendations. Appendix G to the Concentric Report depicts in a summary form (with detailed backup information) the inputs to the proposed formula that can be drawn upon for the Adjustment Mechanism section of a final set of guidelines based on Concentric's recommendations. Lastly, Concentric recommends a periodic review (every three to five years) which, if accepted by the Board, can be reflected in the Term of the Formula section of the final guidelines.

Some may argue that the Board should hold further proceedings before reaching a decision to replace the 1997 draft guidelines with final guidelines. For all of the reasons expressed earlier in these comments, Enbridge believes that the Board has received all of the information and evidence that it needs to develop final ROE guidelines. Moreover, given that it is now broadly recognized that the current formula is not working, Enbridge submits that it is critical that the Board provide meaningful direction with regard to the ongoing methodology for determining allowed returns. Otherwise, the regulated energy industry and the capital markets will be left without any reliable mechanism to predict or anticipate returns. Revising the guidelines in accordance with the recommendations made by Concentric will provide meaningful direction to the industry and the markets.

Guiding Principles

Enbridge submits that, as the Board weighs and evaluates the evidence given during this proceeding by expert witnesses and others, it should be guided by a number of fundamental principles, as follows:

> (1) The owners of a rate-regulated business are not able to set rates without the approval of a regulator. As a result, they rely on the regulator to protect their interests by fixing or

[49] For example, with only slight changes, the first sentence of the Purpose section could read as follows: "The Ontario Energy Board ('the Board') intends to move to a new formula-based approach for determining the fair rate of return on common equity ('ROE') for Ontario electricity and natural gas utilities."

approving rates that produce a fair and reasonable allowed return. This is the very reason for the Fair Return Standard. Any watering down of fair returns caused by a "balancing" of shareholder and ratepayer interests will inevitably mean that allowed returns fall short of meeting the Fair Return Standard.

(2) There is nothing in the Fair Return Standard that guides a regulator to set returns at the lowest possible level that can be achieved. As discussed above, consideration of rate impact is a factor in relation to implementation but not in the determination of a fair return; hence, it is wrong for a regulator to set returns at the lowest possible level in order to minimize rate impact.

(3) Responsible utility owners raise capital and make investments to provide safe and reliable service to customers, both to honour the trust with their customers and to protect the value in their investments. This should not be turned into a "Regulatory Catch-22" situation in which the fact that a utility continues to raise capital and invest is given weight in the determination of a fair allowed return.

(4) The Board's allowed returns matter a great deal both to utilities and to their investors. Potential Ontario investments must compete with potential investments elsewhere in North America and reasonable investors, before committing capital to a particular jurisdiction, will look to see that there is a regulatory model in place to support an expectation of fair returns. The allowed returns established by the Board provide a signal to financial markets as to the level of support and encouragement for continued utility investment in the Province.

(5) The Fair Return Standard applies equally to natural gas utilities and electricity utilities. Investors are no less entitled to fair returns depending on whether they invest in electricity or gas utilities. Fairness dictates that the Board's review of allowed returns should encompass both gas and electricity utilities equally and in the same timeframe.

Looking Ahead

In its notice to stakeholders dated October 5, 2009, the Board indicated that it anticipates that any changes to its policy made as a result of this review will apply to the setting of rates for the 2010 rate year. During 2010, Enbridge will be in the third year of a five year Incentive Regulation plan that was the subject of a Settlement Agreement approved by the Board in EB-2007-0615. While it was not the intention of Enbridge to give up the right to request a reconsideration of ROE during the term of the IR plan, Enbridge has not sought to reopen either the plan or the Settlement Agreement and has not made any request for relief that would trigger a reopening.

Enbridge nevertheless endorses the approval by the Board of returns that meet the Fair Return Standard and that will apply in the setting of 2010 rates for appropriate utilities, as determined by the Board. At a minimum for Enbridge, any Board-approved ROE will be effective for the purposes of the Earnings Sharing Mechanism (“ESM”) described in the EB-2007-0615 Settlement Agreement, inasmuch as the Settlement Agreement provides that the ESM calculation will be based on the regulatory rules prescribed by the Board from time to time.

All of which is respectfully submitted.

October 26, 2009