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March 2, 2010

VIA E-MAIL AND COURIER

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto, ON
M4P 1E4

Dear Ms. Walli

Re: EB-2009-0172
Enbridge Gas Distribution Inc. 2010 Rates
Vulnerable Energy Consumers Coalition (VECC)

Please find enclosed the submissions of VECC with respect to Issue 17.

Yours truly,

Original signed

Michael Buonaguro
Counsel for VECC
Encl.

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

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, 2010.

SUBMISSIONS ON BEHALF OF VECC

1. These are the submissions of VECC with respect to Issue 17 which asks the following:

> *Does the calculation of the earnings sharing referred to in Section 10.1 of the IRM Settlement Agreement* ***require*** *the use of an ROE based on the Board's cost of capital policy in effect at the time the IRM Settlement Agreement was entered into, or the 2009 Cost of Capital Report, which is in effect at the time of the earnings sharing calculation will be performed?*[1]

2. VECC has been in consultation with the Canadian Manufacturers & Exporters with respect to their argument on this issue and generally agrees with and adopts CME's position, with the following additional submissions.

THERE IS NO EFFECTIVE CHANGE IN ROE METHODOLOGY IN RELATION TO EGD

3. VECC does not accept that, for EGD, the Board's 2009 Cost of Capital Report (the "2009 Report") in EB-2009-0084 is in effect at all such that the Settlement Agreement (the "Agreement") can require the use of that Report in the calculation of the earnings sharing in Section 10.1.

[1] EB-2009-0172, procedural order 5

4. VECC submits that EGD's insistence that the 2009 Cost of Capital Report could be incorporated automatically into its IRM structure is based on the mistaken belief that the 2009 Report is a simple change in ROE methodology that, upon the release of the report, was in effect for all LDCs.

5. VECC submits that EGD's simple view of the 2009 Report is contradicted by the terms of the 2009 Report itself, which make it clear that the proposed changes to the ROE methodology are not in effect for any utility simply as a result of the report's release on December 11, 2009. The Report specifically limits the manner in which the results of the 2009 Report become effective for any utility:

> *The final "product" of this process, of course, is a Board policy. This was not a hearing process, and it does not - indeed cannot - set rates. The Board's refreshed cost of capital policies will be considered through rate hearings for the individual utilities, at which it is possible that specific evidence may be proffered and tested before the Board. Board panels assigned to these cases will look to the report for guidance in how the cost of capital should be determined. Board panels considering individual rate applications, however, are not bound by the Board's policy, and where justified by specific circumstances, may choose not to apply the policy (or a part of the policy).*[2]

6. Accordingly, until the results of the Board's 2009 Report are incorporated into an LDC's rates as result of a cost of service hearing, wherein specific evidence may be proffered and tested before the Board, it is inaccurate to describe the ROE methodology within the 2009 Report as being in effect for any particular utility. This is why, for example, the new ROE methodology is not in effect for any of the electricity distributors whose 2010 rates were determined through the use of the 3rd Generation Incentive Regulation Mechanism and not through a cost of service proceeding.

7. As such, VECC submits, it is incorrect for EGD to assert that the 2009 Report constitutes a change in ROE methodology which should automatically be applied to EGD, when the 2009 Report itself states that it is not in effect for any LDC until incorporated by way of a cost of service hearing for that LDC. As a result, VECC submits that the Board must find that for EGD the only effective ROE methodology remains the methodology that existed at the time the Agreement was approved by the Board.

[2] EB-2009-0084, Report of the Board on the Cost of Capital for Ontario's Regulated Utilities, page 13.

EGD'S REVIEW OF THE AGREEMENT OMITS CONSIDERATION OF ISSUE 6.1

8. VECC notes that EGD makes its submissions without any reference to the resolution of issue 6.1.

9. If one were to read only those parts of the Agreement that are referenced by EGD in its submissions, one would conclude that the Agreement was silent on whether future possible changes to the ROE methodology could be incorporated into the IRM, and if so, how such incorporation could be pursued.

10. In the face of such apparent silence, the Board could have become legitimately engaged in the review of the Agreement's terms to determine what was implicitly required in terms of automatic incorporation of changes to the Board's ROE methodology.

11. However the Agreement is not, of course, silent on the issue of future possible changes to the ROE methodology, addressing the issue specifically and comprehensively in the resolution of issue 6.1 as follows:

> ***ROE Methodology***
>
> *If a proceeding is instituted before the Board, before the term of this IR Plan expires, in which changes to the methodology for determining the ROE is requested, then all Parties, including Enbridge, will be free to take such positions as they consider appropriate with respect to that proceeding. Enbridge may apply to the Board to institute such a proceeding should a change in the methodology for determining return on equity be approved or adopted by the Board. If the Board determines that a change in methodology is appropriate, Enbridge or any other Party in this proceeding, may apply for determination of whether or not that change should be applied to Enbridge during the term of the IR Plan. All Parties, including Enbridge, would be free to take any position on that application, including without limitation:*
>
> *(i) opposing the application of the change in methodology to Enbridge during the IR Plan;*
>
> *(ii) proposing offsetting or complimentary adjustments to Enbridge's IR Plan, revenue or rates that the Party considers appropriate to the circumstances; and*

(iii) taking any other positions as the Party may consider relevant and the Board agrees to hear.

If, after hearing such application, the Board determines that such methodology change should be treated as a Z factor, the Parties agree that such decision will operate on a prospective basis only.[3]

12. Mr. Farrell, counsel for EGD at the time the Agreement was presented to the Board, provided some clarifying comments on the intent of issue 6.1:

> *Now, I said that the language for the ROE methodology is the same as Union, and that's why parties in the Enbridge settlement conference agreed to use it, but as there's an ambiguity that Mr. Shepherd has pointed out to us, and while we don't want to just change the text, we want to clarify what it means. If you look at the third sentence on the bottom of page 22, it's not clear -- issue 6.1 on page 22. So what we are saying is this, the third sentence states that:*
>
> *"Enbridge may apply to the Board to institute a proceeding to change the ROE methodology should a change in methodology be approved by the Board."*
>
> *I think the intent, though, is that Enbridge would be free to apply to the Board to have a change made by the Board in another proceeding made applicable to Enbridge.*[4]

13. VECC submits that the resolution of issue 6.1 with respect to ROE methodology, as the only part of the Agreement that specifically addresses the protocol that follows a change in ROE methodology by the Board, should be the starting point in addressing whether the Agreement requires a change in ROE methodology to be automatically applied in any other part of the Settlement Agreement.

14. In VECC's view issue 6.1 is clear on its face; if the Board changes the existing ROE methodology during the IRM change, any party can institute a proceeding asking the Board to consider incorporating that change into the IRM going forward.

15. VECC notes that there are three areas in the Agreement where a change in ROE methodology could have an impact; issue 2.4, issue 9.1, and issue 10.1.

[3] EB-2007-0615, Exhibit N1, Tab 1, Schedule 1, pages 21-22
[4] EB-2007-0606_0615, Transcript, Volume 1, pages 122-123

16. VECC notes none of these three issues are specifically identified and either included or excluded in the resolution of issue 6.1 as it relates to changes in ROE methodology

17. In the absence of any language that limits the operation of issue 6.1 to only certain areas wherein a change in ROE methodology may have an effect, VECC respectfully submits that the Agreement cannot be read to exclude the operation of Issue 6.1 in relation to any aspect of the Agreement.

18. Accordingly VECC submits that the Agreement requires the use of the Board's cost of capital policy in effect at the time the Agreement was entered into; any changes to that methodology can be considered in relation to the IRM structure as a result of a proceeding commenced in accordance with issue 6.1, but such changes are not automatically imported into the IRM structure.

EGD'S INTERPRETATION OF PARAGRAPH 10.1 ii) IS SIMPLY WRONG

19. EGD claims support for its interpretation of the Agreement from the existence of paragraph ii) of section 10.1, asserting that it requires the current "regulatory rules" in respect of ROE.[5] With respect, EGD has grossly misinterpreted that section of Issue 10.1. The clear language of the section is as follows:

> *ii) for the purpose of the ESM, Enbridge shall calculate its earnings using the regulatory rules prescribed by the Board, from time to time, and shall not make any material changes in accounting practices that have the effect of reducing utility earnings; (emphasis added)*[6]

20. The cited paragraph specifically and solely relates to the manner in which EGD is required to calculate its earnings, which calculation is entirely independent of the Board's ROE formula. While the paragraph would restrict, for example, EGD from unilaterally changing its capitalization policies in order to reduce its reported earnings within the IRM, the paragraph does not speak to how EGD calculates the allowed ROE against which its earnings are to be compared for the purposes of the ESM.

[5] EB-2009-0172, EGD AIC dated February 22, 2010, pages 3, 5.

MUCH OF EGD'S ARGUMENT IS IRRELEVANT TO THE ISSUE OF THE INTERPRETATION OF THE AGREEMENT

21. VECC notes that much of EGD's rationale for requiring the application of the Board's new ROE methodology as set out in EB-2009-0084 relies not on the reading of the Agreement, but rather on its reading of the Board's new policy and the actions of other regulators with respect to the establishment of the Fair Return Standard ("FRS").[7]

22. VECC respectfully submits that the information and submissions that EGD advances with respect to the FRS are not arguments responsive to the issue at hand; rather, they constitute information and submissions that EGD can (and presumably would) make in support of an application under Issue 6.1 to have the Board's new ROE applied to its ESM calculation. Accordingly it is VECC's submission that the Board should ignore all such information and submissions by EGD in support of its interpretation of the Agreement.

23. VECC submits that EGD's reliance on such information and arguments highlights why EGD's interpretation of section 10.1 is incorrect. Even when claiming that the Agreement obviates the discretion of the Board over the application of the Board's 2009 Report, EGD is compelled to make arguments and rely on information external to the Agreement itself to justify why, despite what the Agreement may or may not require, allowing the application of the new ROE methodology in calculating the ESM may be appropriate.

24. VECC respectfully submits that reliance on such information and argument demonstrates that EGD, at some level, acknowledges that it makes sense that the Board should be concerned with the appropriateness of the requested relief, and should review the circumstances around such changes to the IRM structure before allowing them to impact on rates.

[6] EB-2007-0615, Exhibit N1, Tab 1, Schedule 1, page 27.
[7] EB-2009-0172, EGD AIC dated February 22, 2010, pages 3-5.

25. Issue 6.1 provides EGD with the appropriate forum for providing such information and arguments for the Board's consideration, but does so in a procedurally fair way, by allowing other parties to respond.

EGD'S ARGUMENT IS CONTRARY TO THE INTENT OF THE PARTIES IN ENTERING INTO THE AGREEMENT

26. The Board will be aware that a group of intervenors, including VECC, have sought leave of the Board to file material that was distributed during the course of the settlement negotiations that, in the intervenors' view, demonstrate the intent of the parties with respect to the protocol to be followed in the event the Board changes the ROE methodology within the IRM term. It is VECC's view that a review of those documents demonstrates that EGD's interpretation of the Agreement is contrary to the intent of the parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF MARCH 2010