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By electronic filing and by e-mail

March 2, 2010

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th floor
Toronto, ON M4P 1E4

Dear Ms Walli,

Enbridge Gas Distribution Inc. ("EGD") 2010 Rates
ROE Issue
Board File No.: EB-2009-0172
Our File No.: 339583-000054

Please find enclosed the Submissions of our client, Canadian Manufacturers & Exporters ("CME") with respect to the ROE Issue in this proceeding.

Please contact me if you require any further information.

Yours very truly,

Peter C.P. Thompson, Q.C.

\slc
enclosure
c. Norm Ryckman (EGD)
Fred Cass (Aird & Berlis)
Intervenors EB-2009-0172
Paul Clipsham (CME)

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EB-2009-0172

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 CANADIAN MANUFACTURERS & EXPORTERS ("CME")

A. Overview

1. As a result of a dispute over the interpretation of Section 10.1 of the Settlement Agreement between Enbridge Gas Distribution Inc. ("EGD") and other parties in the EB-2007-0615 proceedings (the "IRM Agreement"), the Board's Procedural Order No. 5 dated February 10, 2010 listed the following question for determination in this proceeding:

> *"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? (the "ROE Issue")"*

2. The three (3) provisions of EGD's IRM Agreement that, together, establish the manner in which the parties addressed the ROE Issue are Sections 2.4, 6.1 and 10.1.

3. Section 2.4 specifies that the ROE policy upon which the IRM Agreement is to be based for its five (5) year duration is the policy that existed at the time the parties finalized that IRM Agreement.

4. Section 6.1 deals with Z factors and applies to all aspects of the IRM Agreement. With respect to ROE, Section 6.1 explicitly confirms that the result from applying the ROE policy that existed at the time the parties finalized that IRM Agreement for determining 2007 base rates is to remain unadjusted for the duration of the IRM Agreement, except as otherwise provided. With respect to cost of capital policy changes occurring during

the term of the IRM Agreement, the section provides EGD and intervenors with the option of applying to the Board for a determination as to whether such a policy should be applied during its remaining duration. The section operates to re-open all aspects of the IRM Agreement for further off-setting adjustments if the option is exercised.

5. Section 10.1 establishes, firstly, that the cost of capital policy upon which the IRM Agreement is based, will be applied annually to determine the ROE threshold above which earnings will be shared with ratepayers. The second and third parts of Section 10.1 have nothing to do with this threshold calculation. They pertain to a determination of the earnings that precede a calculation of the threshold above which earnings are to be shared.

6. Taken together, the provisions of Sections 2.1, 6.1 and 10.1 reflect the agreement that EGD has no automatic right to apply the Board's new cost of capital policy when determining earnings sharing for 2009 and beyond. Rather, EGD has the option to apply for a Board determination as to if and when the new guidelines should apply. An exercise of that option effectively operates as an off-ramp. Since EGD concedes that it will not be exercising this option, the ROE policy that continues to apply to all aspects of the IRM Agreement is the policy in effect when the contract was finalized. Accordingly, the phrase "the Board's ROE formula" and words to a similar effect, wherever they appear in the IRM Agreement, refer to the cost of capital policy in existence at the outset.

7. The parties agreed that the cost of capital policy in existence when the IRM Agreement was finalized would be applied to determine the return component of base 2007 rates, and the portion of annual normalized utility earnings that would be shared with ratepayers during the five (5) year term between 2008 and 2012.

8. The parties also considered the possibility that the cost of capital policy in existence when the IRM Agreement was finalized might change before the five (5) year term of the IRM Agreement expired. The agreement with respect to this contingency was that any party would be free to apply to have the Board determine whether a new cost of capital policy should be applied for any purpose under the IRM Agreement for the balance of its duration. Absent such an application and a Board determination to that effect, the

agreement was that the cost of capital policy in existence at the outset would continue to apply until rates were re-based in 2013.

9. The parties never agreed to a scenario where the cost of capital policy used to determine the return component of base rates would remain unchanged but a new cost of capital policy would automatically be applied to determine the portion of annual utility earnings, if any, that would be shared with ratepayers. That imbalanced and distorted concept was never raised, nor proposed by anyone as a basis for the IRM Agreement. The notion, now argued by EGD, to the effect that the IRM Agreement provides it with an automatic entitlement to apply the new cost of capital policy to determine the share of annual utility earnings, if any, to be shared with ratepayers, emerged in comments made by EGD towards the end of the Board's Cost of Capital Consultative. This notion is being advocated by counsel for EGD who did not participate in the Settlement Conferences that lead to EGD's IRM Agreement.

10. The arguments EGD advances to support its contention that the provisions of the IRM Agreement provide it with an automatic entitlement to apply the new cost of capital policy for earnings sharing purposes in 2009 to 2012 inclusive are untenable and without merit. They are incompatible with all of the IRM Agreement provisions relating to the ROE Issue and the sequence of events that lead to that Agreement. Moreover, the position of automatic entitlement EGD now advocates disregards the transition provisions of the Board's December 11, 2009 Cost of Capital Report (the "Report"). The transition provisions of the Report preclude utilities operating under the auspices of unexpired IRM Agreements from applying the Report until their next Cost of Service application.

11. Both the provisions of the IRM Agreement and the transition provisions of the Report lead to the same conclusion. Separately and together, they require the cost of capital policy in effect at the time the IRM Agreement was entered into to be applied to determine, annually, the portion of EGD's normalized utility earnings, if any, that is to be shared with its ratepayers.

B. Background

12. The circumstances that are relevant to a determination of the question the Board poses in the ROE Issue include those set forth in the paragraphs that follow.

The Combined Union and EGD Incentive Regulation Mechanism ("IRM") Proceeding

13. After completing a consultative with respect to incentive regulation plans for gas utilities, the Board directed Union Gas Limited ("Union") and EGD to submit their multi-year IRM plans to the Board for approval. Union submitted a five-year price cap IRM proposal. EGD submitted a five-year revenue per customer cap proposal. Following completion of the discovery phase of the process, interested parties proceeded to enter into separate negotiations with each utility in an attempt to resolve matters in issue. The parties negotiated a Settlement Agreement with respect to Union's Application first. EGD was a party in Union's IRM proceeding. During the IRM proceedings of Union and EGD, EGD was represented by counsel other than its current counsel.

The Settlement Conference Negotiating Process

14. For the purpose of discussing and negotiating the possible settlement of matters in issue, the process that the parties followed in this case is the same type of process they have followed in many prior proceedings before the Board. The first step in the process involves establishing a framework in which meaningful settlement discussions can take place. At the outset of a Settlement Conference, intervenors generally meet to develop their proposed settlement framework. In most cases, this exercise involves bundling issues into sets or sub-sets that are capable of being negotiated as a package. Once the framework for settlement discussions is established, usually by reference to a flipchart summary of topics of matters in dispute, the negotiations with the utility commence.

15. Proposals and counter-proposals are generally made orally by reference to the elements of the settlement framework that have been established. Apart from flipcharts prepared by intervenors, any written materials pertaining to proposals and counter-proposals presented during the Settlement Conference are normally prepared by representatives of the utility. Any written summaries of proposals and counter-proposals made during the Conference operate to clarify what the parties intend. The face-to-face Settlement Conference normally concludes with the parties verbally reaching a consensus on the topics reflected in the settlement framework. Utility representatives then prepare and circulate an initial draft of the Settlement Agreement upon which other parties provide their comments. The comments exchanged with respect to the text of the draft

Settlement Agreement prepared by utility representatives operate to clarify what the parties intend. Once a consensus is reached on its text, the written Settlement Agreement is presented for approval to the Board by counsel for the utility. Comments made by counsel during that presentation help to clarify what the parties intend in the Settlement Agreement.

Settlement Agreements and Their Finalization

16. A verbal settlement of issues with Union was reached in or about mid-December 2007. Union circulated its initial draft of its IRM Agreement on or about December 18, 2007. Comments thereon were exchanged and the finalized. Union's final IRM Agreement bears a date of January 4, 2008. Counsel for Union presented its IRM Agreement to the Board for approval on January 8, 2008. EGD was a party throughout the process that lead to the finalization of Union's IRM Agreement and its approval by the Board on January 17, 2008.

17. After reaching a verbal settlement with Union in mid-December, parties proceeded to negotiate an IRM Agreement with EGD. During the course of these negotiations, documents were prepared by EGD in the format of the settlement framework that had been established for the purposes of discussing and negotiating a settlement. These documents are relevant to a determination of what the parties intended by the provisions in EGD's IRM Agreement pertaining to the question posed in the ROE Issue.

18. A verbal agreement with EGD on matters in issue was reached during the third week of January 2008. EGD circulated its initial draft IRM Agreement on or about January 21, 2008. Comments on the provisions of EGD's initial draft were exchanged and the final text of the Settlement Agreement was filed on January 29, 2008, and presented to the Board for approval on January 31, 2008.

Presentation of Settlement Agreement for Board approval

19. In presenting EGD's IRM Agreement to the Board for approval on January 31 and February 1, 2008, counsel for EGD confirmed the intent to have the provisions of EGD's IRM Agreement with respect to the ROE Issue mirror the provisions to the same effect in Union's IRM Agreement. After providing a high level outline of the Agreement, counsel for EGD stated as follows:

> *" That sort of is the high-level presentation. I think it is sufficient to advise you, with respect to the other features of the agreement, that with two exceptions the balance of the terms are similar, if not identical, to the terms of the Union Gas settlement agreement, which you have approved. When I say "you", I mean this Board Panel.*
>
> *In fact, it was the intent of the parties to the agreement to use, where possible, identical language. This is the case for the terms of the agreement with respect to offramps, reporting requirements, rebasing, risk management, and, with two exceptions, X factors and Z factors.*
>
> *…*
>
> *With respect to Z factors, the difference with Union – here if you turn to page 22, as you can see, there are Z factors, there's Z factor criteria, ROE methodology, NGEIR, and changes in tax rules and rates. So there is – those are the four components, if I can, of the Z factor issue 6.1.*
>
> *The criteria are identical with Union. The ROE methodology is identical to Union but I will come back to that in a minute.*
>
> *…*
>
> *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."* (emphasis added)

20. This presentation confirms that, upon an application made by a party for such relief, the Board would determine whether or not a change in cost of capital policy occurring during the term of the IRM Agreement should be implemented before it expires.

Agreement Provisions Relating to the ROE Issue

21. Provisions in Union's IRM Agreement that were incorporated into EGD's IRM Agreement that are relevant to the question the Board poses in the ROE Issue are Sections 2.3, 6.1 and 10.1. These sections provide as follows:

> *"**2.3 Should the gas utilities ROE be adjusted in each year of the incentive regulation (IR) plan using the Board's approved ROE Guidelines?***
>
> *The parties agree that, except as otherwise provided in this agreement, the percentage return on equity already included in Union's rates of 8.54% for 2007 will not be adjusted under the Board's formula for setting ROE during the term of the incentive regulation (IR) mechanism.*
>
> ***6.1 What are the criteria for establishing Z factors that should be included in the IR plan?***
>
> *[…] If a proceeding is instituted before the Board, before the term of this IR plan expires, in which changes to the methodology for determining return on equity is requested, then all parties including Union will be free to take such positions as they consider appropriate with respect to that proceeding. Union 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, then Union or any other intervenor in this proceeding may apply for determination of whether that change should be applied to Union during the term of this Agreement. All parties including Union would be free to take any position on that application, including without limitation; a) opposing the application of the change to Union during the IR period, b) proposing offsetting or complementary adjustments to Union's IR plan, revenue requirement or rates that the party considers appropriate to the circumstances, and c) taking any other positions as the party may consider relevant and the Board agrees to hear. If the Board determines after hearing such application that such ROE methodology change should be treated as Z factor, it will operate on a prospective basis only.*
>
> ***10.1 Should an ESM be included in the IR plan?***
>
> *The parties agree that there will be an earnings sharing mechanism, based on actual, utility earnings. If in any calendar year Union's actual utility return on equity is more than 200 basis points over the amount calculated annually by the application of the Board's ROE formula in any year of the IR plan, then such excess earnings will be shared 50/50 between Union and its customers. For the purposes of the earnings sharing mechanism, Union 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. All revenues that would be included in revenues in a cost of service application shall be included in the earnings calculation and only those expenses (whether operating or capital) that would be allowable as deductions from earnings in a cost of service application shall be included in the earnings calculation."*

22. Provisions in EGD's IRM Agreement relevant to the question the Board poses in the ROE Issue, that were taken from the Union IRM Agreement and are essentially identical thereto, are Sections 2.4, 6.1 and 10.1. These sections provide as follows:

*"**2.4 Should the gas utilities ROE be adjusted in each year of the incentive regulation (IR) plan using the Board's approved ROE guidelines?***

- ***Complete Settlement:** The Parties agree that, except as otherwise provided in this Agreement, the percentage rate of return on equity ("ROE") of 8.39% that is already included in the Company's rates for 2007 will not be adjusted under the Board's formula for setting the ROE ("ROE Formula") during the term of the IR Plan.*

6.1 What are the criteria for establishing Z factors that should be included in the IR plan?

- ***Complete Settlement:***

  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.

10.1 Should an ESM be included in the IR plan?

- ***Complete Settlement:*** *The Parties agree that the IR Plan shall include an earnings sharing mechanism ("ESM") that shall be used to calculate an earning sharing amount, as follows:*

  (i) if in any calendar year, Enbridge's actual utility ROE, calculated on a weather normalized basis, is more than 100 basis points over the amount calculated annually by the application of the Board's ROE Formula in any year of the IR Plan, then the resultant amount shall be shared equally (i.e. 50/50) between Enbridge and its ratepayers;

  (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;

  (iii) all revenues that would otherwise be included in revenue in a cost of service application shall be included in revenues in the calculation of the earnings calculation and only those expenses (whether operating or capital) that would be otherwise allowable as deductions from earnings in a cost of service application, shall be included in the earnings calculation."

Admissibility of Confidential Settlement Conference Documents

23. Under Union's IRM Agreement, documents exchanged during the Settlement Conference that are relevant to the resolution of a dispute with respect to the interpretation of any agreement provision are admissible in evidence without a Board order. The preamble to Union's Settlement Agreement provides as follows:

> *"The parties agree that all positions, negotiations and discussion of any kind whatsoever which took place during the Settlement Conference and all documents exchanged during the conference which were prepared to facilitate settlement discussions are strictly confidential and without prejudice, and inadmissible unless relevant to the resolution of any ambiguity that subsequently arises with respect to the interpretation of any provision of this Agreement."*

24. With respect to the admissibility of documents exchanged during the Settlement Conference, the preamble to EGD's IRM Agreement reads differently from that in the Union Agreement. It states as follows:

> *"The Parties agree that any and all (i) information, documents and electronic data, including computer software and/or models (collectively, the "Confidential Documents"); and (ii) positions, negotiations and discussions of any kind whatsoever (collectively, the "Confidential*

> *Discussions"), which were, respectively, (i) produced or exchanged; or (ii) advanced or conducted during and in furtherance of the Settlement Conference, shall remain strictly confidential.*
>
> *The Parties expressly acknowledge, covenant and represent to one another that each of the Parties and their agents, including without limitation, lawyers and external experts, are under a continuing duty of confidentiality to one another, under the laws of Ontario, not to use, for any reason whatsoever, any Confidential Document or any information obtained from, during or as a consequence of the Confidential Discussions for any purposes.*
>
> *… The prohibitions set forth in this paragraph shall be strictly enforced, unless the Company has expressly waived its rights by having agreed in writing to the inclusion of any Confidential Document in this Settlement Agreement, in the form originally provided by the Company to the other Parties."*

Latent emergence of EGD's "Automatic Entitlement" Position

25. In comments submitted by EGD on September 9, 2009, in the Board's Cost of Capital Consultative EB-2009-0084, EGD argued as follows:

> *"Given Enbridge's position that the existing ROE formula is not producing fair returns, Enbridge does not believe that use of the existing formula for the ESM calculation is appropriate. Instead, the ESM calculation should be based on the going-forward ROE formula – this is consistent with the wording of Enbridge's IR Settlement Agreement, which says that, for the purpose of the ESM, Enbridge shall calculate its earnings using the regulatory rules prescribed by the Board from time to time."* (emphasis added)

26. In final comments submitted by EGD on October 26, 2009 in EB-2009-0084, its September 9, 2009 beliefs and submissions had become bald assertions of entitlement as follows:

> *"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." (*emphasis added)

27. Issues listed for the Board's consideration during the Board's Cost of Capital Consultative did not include any questions pertaining to the interpretation of EGD's IRM Agreement, and no Intervenors responded to the assertions EGD made on this point in their September 9, 2009 and October 26, 2009 comments.

The Board's December 11, 2009 Cost of Capital Report (the "Report")

28. The Report indicates that, for utilities operating under the auspices of previously approved multi-year IRM Agreements, its application will be considered in the next cost of service application brought by such utilities.[1] The Report also indicates that its application is not automatic. Parties questioning the applicability of the Report to a particular utility can test the applicant's evidence and/or lead their own evidence pertaining to the matter in that utility's next cost of service rate case.[2]

The Emergence of the ROE Issue

29. In its pre-filed evidence in this proceeding at Exhibit 3, Tab 3, Schedule 1, updated, EGD acknowledges that it will not be exercising its option under Article 6.1 of the IRM Agreement to request a reconsideration of ROE during the term of the IR plan. EGD, nevertheless, disregards the transition provisions of the Report and reiterates the assertion made in its October 26, 2009 comments in EB-2009-0084 about its alleged entitlement to use the Board's new cost of capital policy for the purposes of determining earnings sharing in years 2009 to 2012, inclusive.

30. By letter dated January 27, 2010, counsel for Industrial Gas Users Association ("IGUA") challenged EGD's assertion that the provisions of its IRM Agreement entitles it to apply the Board's new cost of capital policy for the purposes of determining earnings sharing.

31. Counsel for EGD responded by letter dated February 1, 2010, implying that the failure of anyone to respond to the comments EGD filed on September 9, 2009 and October 26, 2009, pertaining to the ROE Issue, supports the interpretation it postulates.

32. Counsel for IGUA replied on February 3, 2010, and, by Procedural Order No. 5 dated February 10, 2010, the Board added the ROE Issue to the list of matters to be determined in this proceeding.

33. On February 22, 2010, counsel for EGD delivered Submissions-in-Chief pertaining to the question the Board poses in the ROE Issue.

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1 Report of the Board on the Cost of Capital for Ontario's Regulated Utilities (EB-2009-0084), pages (iii) and 61.
2 Report of the Board on the Cost of Capital for Ontario's Regulated Utilities (EB-2009-0084), page 13.

The Confidential Documents Issue

34. On February 24, 2010, counsel for IGUA wrote to counsel for EGD seeking EGD's consent to refer to certain confidential documents that were tabled during the course of the EGD Settlement Conference. These confidential documents are relevant to the dispute over the question posed in the ROE Issue. Counsel for EGD responded by e-mail on February 26, 2010, refusing to provide the requested consent.

35. By Notice of Motion dated February 26, 2010, a number of parties to EGD's IRM Agreement seek the issuance of a Board Order permitting reference to certain confidential Settlement Conference documents and materials on the grounds that the documents are relevant to the dispute that has arisen over the question Board poses in the ROE Issue. An oral hearing of the Motion is scheduled for later this week.

Union's Silence on the ROE Issue

36. Union has never asserted that it is automatically entitled to use the Board's new cost of Service capital policy when calculating the share of annual earnings, if any, to which its ratepayers are entitled under its IRM Agreement.

C. Points of Argument

37. In their written submissions, counsel for EGD rely on three (3) points of argument to support the contention that EGD is automatically entitled to apply the new cost of capital policy to determine the portion of its annual utility earnings, if any, to be shared with ratepayers in 2009 to 2012 inclusive. Each of these untenable arguments is addressed below.

The new cost of capital policy does not apply because the result from applying the ROE Formula under Section 10.1(i) of the IRM Agreement is not static

38. EGD's first point of argument is that the phrase "ROE formula" in Section 10.1(i) refers to the Board's new cost of capital policy because the numeric result from applying the ROE formula annually is not static. This argument fails to distinguish between the words of the cost of capital policy, in existence when the agreement was finalized, and the numerical result from adhering to and applying these words in each of the five (5) years of the IRM Agreement. The words of the policy are static. They remain unchanged from

year to year. The numeric result of applying these static words varies from year to year because the forecasts of long Canada and other interest rates to which the static words refer change from year to year. For 2008, an application of the static words produced a threshold ROE of 8.66%[3], being a number different from the numeric result of applying the static words to determine the ROE in base rates of 8.39%. EGD's argument is an untenable non-sequitur.

39. Further, this point of argument is incompatible with the Z factor provision in Section 6.1 that covers, for all purposes, the contingency that the cost of capital policy might change during the five-year term of the IRM Agreement. The parties agreed that until any party successfully applied for relief under Section 6.1, the "ROE formula" referred to in Sections 2.4 and 10.1(i) of the Agreement, refers to the Board's cost of capital policy that existed on the date of the IRM Agreement. Together, these three (3) sections of the IRM Agreement reflect the "freedom to apply" concept to which counsel for EGD referred to when presenting EGD's IRM Agreement for Board approval.

Regulatory Decisions issued after the Approval of the IRM Agreement cannot assist the Board's determination of what the parties intended in the IRM Agreement

40. EGD's second point of argument relies on observations in the Report and in decisions of other Canadian regulators rendered subsequent to the finalization of EGD's IRM Agreement. Statements made in the report and these other decisions are not evidence that assists in interpreting what the parties intended.

41. Moreover, and quite apart from the wording in the IRM Agreement, the transition provisions in the Report preclude EGD and other utilities operating under the auspices of unexpired IRM Agreements from implementing the Board's new cost of capital policy before their next cost of service application. The annual proceeding in which EGD's normalized earnings for the prior year are determined for earnings sharing purposes is not a cost of service application.

42. Since EGD acknowledges that its next cost of service application will be made for the 2013 test year, the transition provisions of the Report preclude an automatic entitlement to apply the new cost of capital policy before the five-year term of the IRM Agreement expires. The right EGD says it has under the IRM Agreement is incompatible and

[3] EB-2009-0055, Exhibit B, Tab 1, Schedule 1, page 3 of 5.

inconsistent with the transition provisions of the Report. Accordingly, the argument that statements in the Report support the interpretation EGD urges is without merit and untenable.

Section 10.1 (ii) does not automatically incorporate the new cost of capital policy into the calculation of the earnings sharing threshold

43. EGD's third point of argument is based on the provisions of Section 10.1 (ii) of the IRM Agreement. The relevant portion of Paragraph (ii) of Section 10.1 states as follows:

> *"[…] for the purposes of the ESM, Enbridge shall calculate its earnings using the regulatory rules prescribed by the Board, from time to time […]"* (emphasis added)

Paragraph (iii) of Section 10.1 also pertains to the calculation of earnings. That subsection provides as follows:

> *(iii) all revenues that would otherwise be included in revenue in a cost of service application shall be included in revenues in the calculation of the earnings calculation and only those expenses (whether operating or capital) that would be otherwise allowable as deductions from earnings in a cost of service application, shall be included in the earnings calculation."* (emphasis added)

44. Sections 10.1 (ii) and (iii) of EGD's IRM Agreement were extracted verbatim from Union's IRM Agreement. As is evident from a plain reading of the sentences, their focus is the earnings calculation that precedes a determination of the extent to which any of those earnings are to be shared. Section 10.1 (ii) has nothing to do with a determination of the threshold above which total earnings will be shared with ratepayers. The sentence of the Agreement that establishes that threshold is Section 10.1 (i) and only Section 10.1 (i). The ROE formula is not used to establish total earnings described in Sections 10.1.1 (ii) and (iii). The provisions of Section 10.1 (ii) and (iii) have nothing to do with establishing the threshold above which the amount of EGD earnings, if any, is to be shared 50/50 with its ratepayers.

Lack of Intervenor response to EGD's latent assertions of automatic entitlement is irrelevant

45. The fact that Intervenors did not respond to EGD's September 9, 2009 arguments and October 26, 2009 assertions pertaining to the interpretation it now ascribes to the IRM Agreement is irrelevant to the Board's determination of the ROE Issue in this case.

Questions pertaining to the interpretation of the ESM provisions of EGD's IRM Agreement were not an issue in the Cost of Capital Consultative.

46. Moreover, the fact that between September 9 and October 26, 2009, EGD's position changed from one of argument to a bald assertion of automatic entitlement demonstrates that this automatic entitlement concept emerged long after the IRM Agreement had been finalized.

47. By asserting that it is automatically entitled to apply the Board's new cost of capital policy when determining 2009 to 2012 earnings sharing, EGD is effectively contending that parties agreed to a scenario where one cost of capital policy could apply to the determination of rates and another to the determination of earnings sharing. Such a distorted result was never proposed, nor agreed upon, and the clear and unequivocal language that is needed to establish such an agreement is lacking.

EGD's current reading of the IRM Agreement is not straightforward but is selective, incomplete and misleading

48. Counsel for EGD argues that the Company's position on the ROE Issue is based on a straightforward reading of Section 10.1 of the IRM Agreement. We disagree.

49. As already noted, EGD misreads Section 10.1 (i) by failing to distinguish between the static words of the ROE formula, upon which the agreement is based, and the different numeric results that ensue from applying those static words annually during each year of the IRM Agreement. As well, we reiterate that EGD incorrectly reads Section 10.1 (ii) that applies to the calculation of earnings and not to a determination of the threshold above which earnings are to be shared with ratepayers. In its selective, misleading and incorrect reading of portions of the agreement, EGD disregards the Z factor provisions of Section 6.1 that apply to the agreement as a whole, and the sequence of events that gave rise to Sections 2.4, 6.1 and 10.1 that must be read together to determine the parties intent.

50. CME believes that EGD's misinterpretation of the relevant provisions of the IRM Agreement is corroborated by the confidential documents that are the subject of the Notice of Motion dated February 26, 2010. These are the confidential documents that EGD has refused to put before the Board on a consent-basis.

Admissibility of Confidential Settlement Documents

51. In presenting the IRM Agreement for approval, counsel for EGD confirmed that it was deliberately drafted to mirror the provisions of the previously consummated Union IRM Agreement. There is at least one (1) confidential document, provided during the course of Union's Settlement Conference, that corroborates the meaning to be ascribed to Sections 10.1 (ii) and (iii) of EGD's IRM Agreement.

52. Under Union's IRM Agreement, a Board order is not required to permit this document from being considered to help resolve an issue of interpretation pertaining to that agreement. Accordingly, we submit that the document should be admissible without a Board order to assist in interpreting the identical provisions in EGD's IRM Agreement. This document is not caught by the admissibility prohibition in EGD's IRM Agreement because it was created and distributed prior to the commencement of EGD's Settlement Conference.

53. There are at least three (3) confidential documents exchanged during the EGD Settlement Conference that are relevant to a determination of the disputed ROE issue.

54. CME submits that the trust that EGD and intervenor groups have built up over many years is essential to achieving settlements in the Board facilitated ADR process. Without a Board order permitting parties opposite in interest to EGD to refer to the confidential documents, when a question of contract interpretation is in dispute, the integrity of the Board's Settlement Conference process will be materially compromised. The benefit of obtaining clarity on the intention of the parties far outweighs any benefit of maintaining settlement confidentiality. The success of future settlement negotiations between EGD and intervenor groups that regularly participate in settlement proceedings will be undermined if the Board fails to take all steps necessary to ensure that this Settlement Agreement is interpreted in a manner consistent with the intention of all parties at the time the Settlement Agreement was negotiated.

D. Conclusion

55. For the foregoing reasons, we urge the Board to find that the calculation of the portion of EGD earnings to be shared with its ratepayers under Section 10.1 of the IRM Agreement requires the use of an ROE based on the Board's cost of capital policy in effect at the time the parties entered into the IRM Agreement.

ALL OF WHICH is respectfully submitted this 2nd day of March, 2010.

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Counsel for CME

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