EB-2009-0172

IN THE MATTER of the *Ontario Energy Board Act 1998,* S.O. 1998, c.15, Sch. B;

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an Order or Orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas commencing January 1, 2010.

SUBMISSIONS

OF THE

SCHOOL ENERGY COALITION

1. These are the submissions of the School Energy Coalition relating to Issue #17, as required by the Board in Procedural Order #5.

2. The question is the interpretation of Section 10.1 of the Settlement Agreement dated February 4, 2008, and in particular whether by its terms the Settlement Agreement tests earnings sharing against a threshold of an ROE calculated using the 2008 rules (with updated inputs but the same formula), or the new rules announced on December 11, 2009 in the Board's Cost of Capital Report (with a different starting point and a new formula).

The Concepts Used in the Document

3. Enbridge, in their Argument in Chief on this point, focuses on the wording of Section 10.1 of the Settlement Agreement.

4. The concepts underlying Section 10.1 are twofold:

(a) First, earnings are to be calculated using regulatory rules, not accounting rules, and the earnings calculation rules cannot change except as the Board changes them. For example, the utility cannot change its capitalization policies or depreciation rates if the result would be to reduce earnings for these purposes. However, if the Board changes the rules about how regulatory earnings are to be calculated, that change would be applied. All of this is limited to calculating earnings, and by its terms has nothing to do with the ROE threshold against which earnings are to be compared.

(b) Second, the threshold is the "ROE Formula", which is to be recalculated every year. "ROE Formula" is a defined term in the agreement, as set forth in Section 2.4 (see below), and refers to an existing formula for adjusting ROE annually. The concept here is that the threshold being used adjusts using updated inputs but the same ROE Formula.

5. This leads back to Section 2.4. In that section, the parties agree to the concept that the ROE embedded in rates for each of the five years of IRM plan will be fixed at the initial amount, 8.39%. Section 2.4 specifically notes that the ROE will not be adjusted under the "ROE Formula" each year. The reference to "ROE Formula" clearly refers to the then-current ROE Formula, as the language is grammatically about something that exists, rather than something that might exist in the future. As well, as any new ROE methodology would not necessarily be the same structure – a formula with annual mechanistic updates – the assumption of a specific structure is only consistent with the formula known to the parties at that time.

6. But the parties also considered the possibility that the Board would reconsider how it calculates ROE. In Section 6.1, the parties agreed on the application of two concepts:

(a) First, in any proceeding considering a new formula or approach to ROE, everyone is free to take whatever position they wish. In EB-2009-0084, all parties exercised this freedom.

(b) Second, the result of any new formula or approach would not automatically apply to Enbridge during its IRM plan. Rather, a "right to apply" concept was adopted, in which any party to the Agreement could <u>apply</u> to have the new formula or approach apply to Enbridge during the IRM plan.

7. It is therefore submitted that the Settlement Agreement expressly considers each aspect of ROE as it might arise during the IRM plan. The basic rule is that ROE is fixed at 8.39%. For earnings sharing, and as an express exception to the "fixed ROE" concept, the normal annual adjustments, using new inputs within the existing formula, were allowed. And, if the Board reconsidered ROE entirely, the parties could apply to the Board for a determination as to how that new ROE approach should be applied to Enbridge during the IRM plan, if at all.

8. We note that this resolution made practical sense as well, particularly in the case of a new approach to ROE. Since the parties would have no idea what the Board might do with ROE in the following five years (what if it were utility specific, or based on the utility's debt rate or credit rating, etc.?), they could not possibly agree what should be done under a new set of rules. The structure, components, and all other aspects of the ROE methodology in a new environment were completely unknown and unpredictable. Instead, the parties sensibly agreed that whoever wanted the change would go to the Board for guidance as to whether and, if so, how to make that change.

9. It is therefore submitted that, under the concepts set out in the Settlement Agreement, the 2009 Cost of Capital Report does not apply to Enbridge (even if it did otherwise, which it likely does not, as VECC correctly points out) until an application is made and the Board makes a conscious decision whether and, if so, how it should apply.

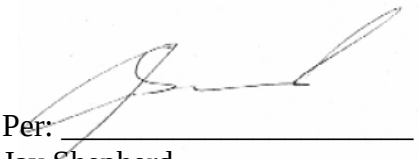
Interpreting the Agreement

10. These submissions are made more complicated, difficult and frustrating by the fact that, since the negotiations took place under the privilege of ADR, care has to be taken in what can be said about the intentions of the parties. For example, we have, above, tried to be careful to contain our submissions within the four corners of the Settlement Agreement, characterizing what it says but not referring to the context.

11. Some of the parties to this proceeding were actively involved in the negotiation and drafting of the Settlement Agreement, and so are aware of what they actually intended, and what other parties said – both orally and in writing – that they intended. In the normal course of contractual interpretation, if there really were any ambiguity in the Settlement Agreement on the ROE applicable to ESM, parol evidence could be brought forth to assist in the interpretation of its provisions.

12. The Board will be aware that there is a Motion outstanding in which several intervenors seek leave to file documentary evidence from the ADR to clarify the meaning of the Settlement Agreement. Without disclosing the contents of the documents in question, it is our submission that, if the Board has any doubt that the interpretation of the Settlement Agreement that we have set forth above is correct, the Board should defer its decision on Issue #17 in order to hear the Motion and determine whether it is appropriate to admit parol evidence to interpret the Agreement.

Respectfully submitted on behalf of the School Energy Coalition this 2nd day of March, 2010.



Per: _____
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