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

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

SUBMISSIONS OF THE CONSUMERS COUNCIL OF CANADA ON THE RETURN ON EQUITY IN THE CALCULATION OF EARNINGS SHARING

INTRODUCTION

1. Enbridge Gas Distribution Inc. ("EGD") has applied for approval of rates for the distribution, transmission and storage of natural gas, effective January 1, 2010.

2. Included in the application is a request that, in the calculation of the earnings sharing mechanism ("ESM") , the return on equity ("ROE"") used be that derived from the Ontario Energy Board's ("Board") 2009 Cost of Capital Report.

3. In the Procedural Order No. 5, the Board asked the parties to make submissions on the following question:

> 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 the earnings sharing calculation will be performed? (the "ROE Issue").

4. These are the submissions of the Consumer's Council of Canada ("CCC") on that question.

BACKGROUND

5. The IRM Settlement Agreement contains three references to ROE. They are:

(a) In section 2.4, 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 time of the IR Plan."

(b) In section 10.1 it is stated that, "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 (ie. 50/50) between Enbridge and its ratepayers";

(c) In Section 6.1, the following statement appears:

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, than 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 Enbridge 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 complementary adjustments to Enbridge's IR Plan, revenue or rates that the party considers appropriate to the circumstances;

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

(iv) If, after 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 in "submitting three submissions".

SUBMISSIONS

6. The CCC submits that the question posed by the Board is to be resolved on the basis of four considerations, as follows:

(i) The proper interpretation of the IRM Settlement Agreement;

(ii) The interpretation, if necessary, of the 2009 Cost of Capital Report;

(iii) The application of Section 36 of the *Ontario Energy Board Act* ("OEB Act");

(iv) The rules of natural justice

THE PROPER INTERPRETATION OF THE IRM SETTLEMENT AGREEMENT

7. The CCC submits that the ROE Formula, referred to in section 10.1 of the IRM Settlement Agreement, is the one in existence at the time the Settlement Agreement was signed. That that is the case is confirmed by section 6.1 of the Settlement Agreement, which provides a detailed mechanism for changing the way the ROE is calculated.

8. Section 6.1 of the IRM Settlement provides a mechanism for changing the ROE, as it applies to EGD during the term of the IRM Plan. Unless and until that mechanism is employed, the ROE is to be derived from the cost of capital policy in existence at the time the Settlement Agreement was signed. EGD has not engaged that mechanism. Accordingly, the CCC submits that the ROE for purposes of calculation of the ESM is that derived by the application of the cost of capital policy in effect at the time that the Settlement Agreement was signed.

THE INTERPRETATION OF THE COST OF CAPITAL REPORT

9. The CCC submits the terms of the IRM Settlement Agreement are clear and that there is, accordingly, no need to refer to the 2009 Cost of Capital Report in order to resolve the question the Board has posed.

10. If, however, reference has to be made to the 2009 Cost of Capital Report, the CCC submits that the ROE cannot be changed, until EGD's next cost of service application, and then only after a hearing.

11. In Section 5.1 of the 2009 Cost of Capital Report, the Board states that "the policy set out in Chapter 4 of this report will come into effect for the setting of rates beginning in 2010 by way of a cost of service application". EGD's application herein does not meet that criterion.

12. Beyond that, the CCC submits that the 2009 Cost of Report contemplates that, before the adjusted ROE formula is applied to any utility, that utility must supply evidence that the application of the formula is warranted. In support of that proposition, the CCC refers to the following statements that appear in the 2009 Cost of Capital Report:

(a) "The actual effect, if any, on specific utilities' revenue requirements as a result of any updated policies arising from this consultation and the determination of adjusted reasonable rates, would not be addressed in this process, but in future rate proceedings" (EB-2009-0084, Report of the Board, p. 8);

(b) "The onus is on an applicant to adequately support its proposed Cost of Capital, including the treatment of and appropriate rates for debt instruments. The Board notes that this is being done in cost of service applications. However, the Board wishes to point out the increased emphasis that it is placing on applicants to support their existing and forecasted debt and the treatment of these in accordance with the guidelines, or to support any proposed different treatment." (EB-2009-0084. Report of the Board, p. 61)

THE ONTARIO ENERGY BOARD ACT

13. EGD's Application is under Section 36 of the OEB Act. That section requires that rates must be set following a hearing. The use an IRM formula deviates from that strict requirement, but only to the extent that all affected parties have agreed to the application of the formula. However, any material changes in the formula, such as that now proposed by EGD with respect to the use a different ROE for calculation of the ESM, is a deviation from the IRM formula and requires a hearing.

14. CCC submits that the Board cannot make material changes, of the kind contemplated by EGD, without a hearing. Were the Board to do so, the CCC submits that it would be acting without jurisdiction.

THE RULES OF NATURAL JUSTICE

15. As a corollary of the preceding point, CCC submits that those affected by a material change in the IRM formula have a right to examine the evidence in support of that proposed change and, if appropriate, submit their own evidence.

16. In this context, the CCC refers again to Section 6.1 of the IRM Settlement Agreement, which provides that, among other things, an application is required before any change in the ROE during the course of the IRM plan.

EGD'S POSITION

17. In his letter to the Board of February 1, 2010, Mr. Cass states that EGD advised parties, during the course of the 2009 Cost of Capital proceeding, that any change in the ROE formula would be applied in the calculation of the ESM.

18. The CCC submits that the 2009 Cost of Capital proceeding was not a "hearing". There was no "evidence". There was no cross-examination on the material filed by various parties. The CCC further submits that the 2009 Cost of Capital proceeding did not deal with rate making for individual utilities.

19. Accordingly, the CCC submits that EGD cannot rely on any statements made in the 2009 Cost of Capital proceeding as the basis for a decision affecting its rates. EGD has provided no evidentiary basis for a change in the ROE. Even if it had,

the affected parties have had no opportunity to examine that evidence, and submit evidence of their own.

20. Accordingly, the CCC submits that neither EGD nor the Board can rely on what EGD said during the Cost of Capital Proceedings as the basis for a change in the ROE.

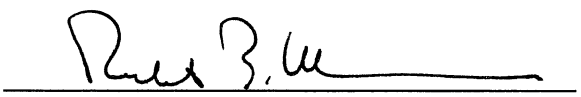
21. EGD argues, in effect, that the 2009 Cost of Capital proceeding was a substitute for the mechanism agreed to in s. 6.1 of the IRM Settlement Agreement. Section 6.1 sets out procedural protections which were completely absent from the 2009 Cost of Capital proceeding. In addition, the IRM Settlement Agreement constitutes a contract among the parties. To change the terms of the contract would require the consent of the parties. No such consent was sought, and no such consent was given.

22. The CCC further submits that there is no evidence in support of EGD's contention that the fair return standard requires a change in the ROE. There is no evidence on which that the Board can conclude that the ROE established in the IRM Settlement Agreement does not meet the fair return standard. Even if there were such evidence, the CCC submits that the parties have not had an opportunity to examine that evidence, and submit evidence of their own.

CONCLUSION

23. For the reasons set out above, the CCC submits that the answer to the question posed by the Board is that the calculation of the earnings sharing referred to in section 10.1 of the IRM Settlement Agreement requires the use of a ROE based on the Board's cost of capital policy in effect that the time the IRM Settlement Agreement was entered into.

All of which is respectively submitted this 3rd day of March, 2010.



Robert Warren, WeirFoulds LLP
Counsel to Consumers Council of Canada