EB-2009-0172

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.

REPLY SUBMISSIONS OF ENBRIDGE GAS DISTRIBUTION INC.

RETURN ON EQUITY IN THE CALCULATION OF EARNINGS SHARING

The Issue

In EB-2007-0615, the Board approved a five year Incentive Regulation (IR) plan for Enbridge Gas Distribution Inc. (Enbridge). The parameters of the IR plan are set out in the Board-approved EB-2007-0615 Settlement Agreement (the IR Settlement Agreement). Section 10.1 of the IR Settlement Agreement provides for an annual earnings sharing calculation based on "the application of the Board's ROE Formula in any year of the IR Plan". The Board's ROE Formula was refreshed in the cost of capital proceeding, EB-2009-0084. In its argument in chief, Enbridge set out the wording of section 10.1 of the IR Settlement Agreement that makes clear that the calculation of earnings sharing requires the use of an ROE based on the Report of the Board on Cost of Capital for Ontario's Regulated Utilities (Cost of Capital Report).

In response to its argument in chief, Enbridge received submissions from Board Staff, the Association of Power Producers of Ontario (APPrO), the Building Owners and Managers Association of the Greater Toronto Area (BOMA), Canadian Manufacturers & Exporters (CME), the Consumers Council of Canada (CCC), Energy Probe Research Foundation (Energy Probe), the Industrial Gas Users Association (IGUA), the School Energy Coalition (SEC) and the Vulnerable Energy Consumers Coalition (VECC). Under the headings that follow, Enbridge will respond to the submissions of these parties.

Importance of the Issue

This issue is of great importance to Enbridge. As stated, the IR Settlement Agreement provides for an annual earnings sharing calculation based on "the application of the Board's ROE Formula". In the cost of capital proceeding, the Board reset and refined its ROE Formula in order to ensure that the formula meets the Fair Return Standard. It is concerning to Enbridge that parties now suggest that, for the purposes of the annual earnings sharing calculation, the Board should revert to a formulaic approach that is not supported by a full reading of the IR Settlement Agreement and that falls well short of what has been unequivocally determined by the Board to be a Fair Return Standard.

The Cost of Capital Report

Board Staff suggests that the part of the Cost of Capital Report where the Board said that its policy[1] would come into effect "for the setting of rates" beginning in 2010, by way of a cost of service application, is relevant to the calculation of earnings sharing amounts. Enbridge disagrees. On its face, this statement about the Cost of Capital Report coming into effect for the setting of rates does not apply to the use of ROE for an earnings sharing mechanism. Elsewhere in the Cost of Capital Report, Board Staff notes, the Board said that it will apply the methods set out in the report "for use in cost of service applications". To be clear, the Board's statement about what it will do in cost of service applications does not address what should be done for the purposes of an earnings sharing calculation. What the Board's statement appears to mean is that if a utility wishes to reflect the current ROE formula in its future rates, then the utility will initiate an application to do so. As it turns out, that is consistent with the approach contemplated by section 6.1 of the IR Settlement Agreement.

It is clear that, during the cost of capital proceeding, the Board was aware of Enbridge's expectation regarding the use of ROE in the calculation of earnings sharing. Enbridge was forthright in putting this forward for the Board's consideration, and no party registered any objection at that time.[2] That being so, Enbridge questions Board Staff's suggestion that the Board intended its comments about when the Cost of Capital Report would come into effect for the setting of rates to have some relevance to an earnings sharing calculation. If the passages referred to by Board Staff were intended by the Board to apply in respect of Enbridge's position on earnings sharing, surely the Board would have said so in direct language.

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[1] As set out in chapter 4 of the Cost of Capital Report.

[2] As observed by CME in its submissions, Enbridge stated its position regarding the use of ROE for the purposes of the earnings sharing calculation on two separate occasions during the cost of capital proceeding. Thus, Enbridge made clear its expectation that section 10.1 of the IR Settlement Agreement would require the use of any ROE approved in the proceeding (whether positive or negative, from its shareholder's perspective) for the purposes of earnings sharing.

In fact, the Board did use language in the Cost of Capital Report that is directly applicable to an earnings sharing calculation. As noted in Enbridge's argument in chief, the Cost of Capital Report contains the following statement:

> The Board is of the view that each time a formulaic approach is used to calculate an allowed ROE, it must generate a number that meets the FRS … .[3]

Unlike the passages from the Cost of Capital Report relied on by Board Staff, this statement is directly applicable to an earnings sharing calculation. The earnings sharing provisions in section 10.1 of the IR Settlement Agreement require the use of a formulaic approach to calculate an allowed ROE once a year during the term of the IR plan. The Cost of Capital Report indicates that, each time this is done, it must generate a number that meets the Fair Return Standard. Board Staff and others do not address this statement of policy in their submissions.

The Board's view that each formulaic calculation of ROE must meet the Fair Return Standard is of central importance to the integrity of an earnings sharing calculation under an IR plan. Otherwise, Enbridge is put at risk to share its earnings below a level that the Board has determined to be the utility's fair return.

This can be seen by tracking through the implications of the assertions made by intervenors. It has been submitted by others that the earnings sharing calculation should revert back to the 1997 Draft Guidelines for the determination of ROE[4]: this would produce an ROE for 2010 in the range of 8.37%. The threshold for earnings sharing is 100 basis points above this number, which, according to the intervenors' position, would be in the order of 9.37%. As determined by the Board, the fair rate of return for 2010 is 9.75%.[5] It is apparent that this approach puts Enbridge at risk to share earnings below the level determined by the Board to be a fair return. The risk of potential sharing of earnings below the Board-determined fair return would continue for the remaining years of the IR plan. Enbridge submits that this does not comply with the Fair Return Standard. Further, this confirms why the Board was right to say that, each time a formulaic approach is used to calculate ROE, it must produce a number that meets the Fair Return Standard. The use of a formulaic approach to calculate an ROE that does not meet the Fair Return Standard produces anomalous results: in this instance, the anomalous result is a sharing of earnings (effectively a reduction in the utility's earnings) below the level determined by the Board to be a fair return.

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[3] Cost of Capital Report, at page 31.

[4] More formally, these are the Draft Guidelines on a Formula-Based Return on Common Equity for Regulated Utilities.

[5] As of May 1, 2010, that figure is said to be 9.85% for electric LDCs:
http://www.oeb.gov.on.ca/OEB/_Documents/EB-2009-0084/Brdltr_2010CostofCapitalParameters_20100224.pdf

One final point must be made in response to submissions by Board Staff and others that the implementation of the Cost of Capital Report is confined only to cost of service proceedings, and therefore does not apply to the ESM calculations. As noted, Enbridge questions that this was actually the Board's intention. In any event, though, Enbridge's annual earnings sharing calculation is performed on a cost of service basis. Section 10.1 is explicit in stating that the earnings sharing calculation shall include all revenue that would otherwise be included in a "cost of service application" and only those expenses that would be deductions from earnings in a "cost of service application". It is hardly fair to Enbridge if, on the one hand, strict observance of cost of service treatment of revenues and expenses is required for the ESM calculation, while, on the other hand, the use of an ROE that meets the Fair Return Standard is excluded from that same calculation on the theory that implementation of the ROE can only occur in a cost of service proceeding for the setting of rates. Such an approach would upset the reasonable reading and workings of Enbridge's Board-approved IR Settlement Agreement.

Interpretation of the IR Settlement Agreement

As set out in its argument in chief, Enbridge believes that the words at the centre of the issue now before the Board are those found in section 10.1 of the IR Settlement Agreement. In particular, the key words of section 10.1 refer to an amount "calculated annually by the application of the Board's ROE Formula in any year of the IR Plan". Not only is the word "annually" used to describe the calculation, but the words "in any year of the IR Plan" are included as well, immediately after the mention of "the Board's ROE Formula". Enbridge submits that the clear meaning of these words is that an annual calculation will be performed and that the elements of the calculation will be those that are appropriate for the particular year (rather than being "frozen" as of the date of the agreement).

The primary thrust of intervenor arguments is to draw on other provisions of the IR Settlement Agreement in an attempt to give to section 10.1 a meaning that does not appear from the plain words of the section. The language of the IR Settlement Agreement primarily relied upon by intervenors in support of such arguments is found in section 6.1. Enbridge submits, though, that consideration of sections 6.1 and 10.1 out of their contractual context only serves to confuse, rather than to clarify, the interpretation of section 10.1.

Section 6.1 of the IR Settlement Agreement

Section 6 of the IR Settlement Agreement coincides with Issue 6 in the Board-approved Issues List in EB-2007-0615. The general heading for Issue 6 in the Issues List is "Z Factor" and this is the heading used for section 6 of the IR Settlement Agreement.

There are two Z Factor issues in the EB-2007-0615 Issues List and the first of these, Issue 6.1, is: "What are the criteria for establishing Z factors that should be included in the IR plan?" The heading of section 6.1 of the IR Settlement Agreement is a restatement of Issue 6.1 from the Issues List. In other words, section 6.1 of the IR Settlement Agreement addresses the criteria for establishing Z Factors included in the IR Plan.

It is in this context (criteria for Z Factors in the IR Plan), that the words of section 6.1 about "ROE Methodology" relied upon by intervenors are to be found. These words indicate that, if the Board determines that a change in ROE methodology is appropriate, Enbridge or any other party may apply for determination of whether that change should be applied to Enbridge during the IR term. The reason why a change in ROE methodology is treated as a Z Factor in section 6.1 of the agreement is because the ROE "embedded" in base rates for the IR Plan is fixed. In the event of a change in ROE methodology during the term of the IR Plan, the avenue for a change to the ROE embedded in base rates is an application for a Z Factor under section 6.1 of the IR Settlement Agreement.

At this point in time, Enbridge has not sought approval of a Z Factor in order to pass through in base rates the higher ROE that now results from application of the Board's ROE Formula.[6] Enbridge has simply made clear its position that, under section 10.1 of the IR Settlement Agreement, the earnings sharing calculation must be based on the Board's ROE Formula as reset and refined in the cost of capital proceeding.

Section 10.1 of the IR Settlement Agreement

Section 10 of the IR Settlement Agreement coincides with Issue 10 in the EB-2007-0615 Issues List. The heading for Issue 10, and for section 10, is "Earnings Sharing Mechanism (ESM)". There are two ESM issues in the Issues List, namely: 10.1 "Should an ESM be included in the IR plan"; and 10.2 "If so, what should be the parameters?". The wording of section 10.1 of the IR Settlement Agreement (Should there be an ESM?) describes the full agreement reached on the ESM issue; that is to say, section 10.2 of the agreement (parameters of the ESM) refers back to section 10.1.

Any earnings sharing amount calculated in accordance with section 10.1 of the IR Settlement Agreement does not flow through to base rates. Section 11.1 of the agreement explains that any such amount is recorded in the Earnings Sharing Mechanism Deferral Account with a view to clearance, if possible, at the time of Enbridge's July 1st Quarterly Rate Adjustment Mechanism filing. Z Factor treatment for potential changes to base rates, as discussed in section 6 of the IR Settlement

[6] Contrary to the suggestion in the Board Staff submission, at page 3, Enbridge is not seeking a "reset" of the "utility's ROE".

Agreement, is quite a different matter from potential amounts to be cleared through a Deferral Account, as discussed in section 10.1 of the agreement.

Consistent with the fact that the ESM amount does not flow through to base rates, the fixed ROE embedded in rates is not the ROE that is referred to in section 10.1. The ESM compares "actual utility ROE" calculated on a weather-normalized basis in "any calendar year" with a threshold that is 100 basis points over an ROE amount "calculated annually". Because the earnings sharing calculation is done annually, the ROE for the purposes of section 10.1 is "floating", in distinction to the fixed ROE that is embedded in base rates.

Intervenor Arguments

The distinction between "fixed" ROE that is embedded in base rates and "floating" ROE for the purposes of the earnings sharing calculation is not disputed by other parties. This can be seen, for example, from the argument of SEC.[7] SEC says that the "basic rule" of the IR Settlement Agreement is that ROE is fixed at 8.39%. SEC then recognizes that earnings sharing is an "express exception" to this "fixed ROE" concept.

Having recognized the clear distinction between fixed and floating ROE, SEC proceeds with submissions that assume there is no distinction in the event of a change to the Board's ROE formula. SEC submits that, 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. In this context, SEC makes no distinction between the fixed and the floating ROE. As is apparent, for example, from CME's argument,[8] the notion underlying this submission is that an application under section 6.1 ("fixed ROE") must be made in order for a change in the Board's ROE Formula to be reflected in the earnings sharing calculation under section 10.1 ("floating ROE").

The fundamental flaw in this argument is that it is not based on the IR Settlement Agreement. Section 10.1 is in all material respects a separate and distinct provision of the agreement from section 6.1. Section 10.1 does not cross-reference the provisions of section 6.1, nor does section 6.1 cross-reference section 10.1. There is not the slightest hint in either of the two provisions that section 10.1 is intended to be read subject to wording in section 6.1. This is made even more clear when considered in light of the fact that at least 21 of the 40 sections of the IR Settlement Agreement contain cross-references to other sections.[9] Given the extensive use of cross-referencing in the agreement, it stands out prominently that no words were used to say, or even to suggest, that section 10.1 is to be read in conjunction with section 6.1.

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[7] Paragraph 7.

[8] Paragraph 39.

[9] See sections 1.1, 2.1.1, 2.2, 2.3, 3.2, 3.3, 4.2, 4.3, 5.1, 6.2, 7.1, 8.1, 10.2, 12.1.2, 12.2.2, 12.3.2, 12.3.3, 12.4.2, 12.4.3, 12.4.4 and 13.1.

What section 6.1 does reveal clearly is that the parties to the IR Settlement Agreement were very much attuned to the possibility of a change in ROE methodology during the IR term. The potential avenue for a change in ROE methodology to flow through in base rates (i.e., a Z Factor) was explicitly addressed in section 6.1. Enbridge submits that the fact that the parties did not consider it necessary to include parallel wording in section 10.1 is a clear indication that the floating ROE calculation in section 10.1 would catch changes in methodology on its own. The possibility of changes to ROE methodology was already captured in the words "calculated annually by the application of the Board's ROE Formula in any year of the IR Plan".

On this basis, the IR Settlement Agreement as a whole makes sense. Section 6.1 deals with Z Factors and it sets out how the effect of a change in "ROE Methodology" on the "fixed ROE" that is embedded in base rates can be addressed by way of a Z Factor during the IR term. Section 10.1 contemplates, for earnings sharing purposes, a floating ROE that is not reflected in base rates and, in so doing, section 10.1 describes a calculation that is not static and that accommodates the Board's ROE Formula as it exists at the time of each annual earnings sharing calculation. This interpretation explains why the agreement contains no cross-referencing or other wording to suggest a linkage between sections 6.1 and 10.1 and it gives meaning to the agreement as a whole. It can be contrasted with the intervenors' position, which recognizes the distinction between fixed and floating ROE, but then collapses that distinction in an attempt to justify the position that section 6.1 governs the effect of changes to the Board's ROE Formula on the earnings sharing calculation.

The nub of the intervenors' position is that the Board's March 1997 Draft Guidelines must be used in the annual calculation provided for by section 10.1, unless Enbridge applies successfully to the Board under section 6.1. It does not make any sense for Enbridge to apply under the Z Factor provisions of the IR Settlement Agreement simply to clarify that the reference in section 10.1 to "the application of the Board's ROE Formula in any year of the IR Plan" means exactly what it says. If, as asserted by intervenors, Enbridge must apply under the Z Factor provisions of the IR Settlement Agreement, then clearly the point of any such application would be to seek a Z Factor that flows through to base rates (as well as use of the EB-2009-0084 formula in the earnings sharing calculation).

Intervenors rely upon "clarifying comments" made by Enbridge's counsel at the time when the IR Settlement Agreement was presented to the Board, in support of their efforts to try to create a linkage between sections 6.1 and 10.1.[10] A review of those comments makes clear, though, that they were provided to clarify the intent of section 6.1 and not to establish some link between sections 6.1 and 10.1. Consistent with the

[10] For example, VECC, at paragraph 12.

discussion above about the distinction between sections 6.1 and 10.1, nothing was said during these "clarifying comments" about the earnings sharing calculation.

Another theme in intervenor submissions arises from the wording of (the first)[11] paragraph (ii) of section 10.1. This paragraph refers to a calculation "using the regulatory rules prescribed by the Board from time to time". Intervenors argue that this means only that Enbridge's earnings should be calculated using the most up-to-date "regulatory rules" of the Board. Their contention is that ROE for the purposes of section 10.1 must not be determined using the Board's most up-to-date regulatory rules, but must be based on the Board's 1997 Draft Guidelines.

Enbridge submits that intervenors' position in this regard misses a critical point with respect to the interpretation of section 10.1. As repeated a number of times in these submissions, Enbridge believes that the words "calculated annually by the application of the Board's ROE Formula in any year of the IR Plan" make clear that the formula as it exists in 2010 must be used for a 2010 earnings sharing calculation. Intervenors submit that, notwithstanding these words, the formula from the 1997 Draft Guidelines must be used under section 10.1. The import of the intervenors' submission is that section 10.1 refers to the formula as it existed at a particular time.

The intervenors' position requires a reading of section 10.1 to determine whether the expressed intention is indeed to refer to the formula as it existed at a particular time. As set out in some detail in argument in chief, there are many indications in section 10.1 that the contractual intention is not to "freeze" elements of the earnings sharing calculation as of a certain time. These include, for example, the indication that an annual calculation is to be performed, the reference to application of the Board's Formula in any year of the IR Plan and the reference to regulatory rules prescribed by the Board from time to time. Taken as a whole, the provisions of section 10.1 indicate a contractual intention that references to elements of the calculation should not be understood to speak as of a particular time.

The submission of intervenors means, in effect, that one element of the earnings sharing calculation is frozen, but every other element is subject to change from year to year. The earnings sharing mechanism uses Enbridge's "actual utility ROE", calculated on a weather normalized basis, which obviously does not remain static for each annual calculation. In its earnings sharing calculations, Enbridge uses, for example, actual debt rates, actual operating and maintenance costs and actual capital spending amounts. Another factor in the calculation is the Board's regulatory rules and intervenors agree that regulatory rules affecting the calculation of earnings are not frozen for the purposes of the calculation. Yet another element of the calculation is the long Canada bond rate to which an Equity Risk Premium must be applied for the ROE

[11] There are three paragraphs in section 10.1 that are given the number (ii). These submissions will in all instances refer only to the first paragraph (ii).

determination. Intervenors do not dispute that the long Canada bond rate is subject to change in each annual calculation.

The result is that the intervenors would have the calculation updated for every relevant factor except one, namely, the Equity Risk Premium. This means a mis-match between a number of elements of the calculation that reflect current economic conditions and one element that is not updated to the current economic environment. It means a mis-match between a requirement that the Board's current "regulatory rules" be used for part of the calculation, while the current regulatory rule for ROE determination is overlooked in favour of Draft Guidelines from 1997. It means that a factor that is critical in determining whether or not a particular ROE meets the Fair Return Standard, the Equity Risk Premium, is based on an outdated number that is known not to meet the Fair Return Standard, while all other elements of the calculation are based on current numbers.

Fair Return Standard

VECC and CME contend that Enbridge's submissions about the Fair Return Standard are irrelevant to an interpretation of an agreement that predates the Board's Cost of Capital Report.[12] VECC, for instance, suggests that there is a weakness in the argument because Enbridge relies on information (apparently, the Fair Return Standard) that is "external to" the IR Settlement Agreement.

First, these submissions miss the point. Enbridge's point about the Fair Return Standard was not an argument about a matter "external to" the IR Settlement Agreement; it was a submission about the interpretation of the agreement itself. Specifically, Enbridge submitted that it is not reasonable to interpret section 10.1 to mean that the annual earnings sharing calculation must use a formulaic approach that has been determined by the Board to fall short of meeting the Fair Return Standard.[13]

Second, the suggestion that the Fair Return Standard is irrelevant to the interpretation of the IR Settlement Agreement essentially means that, in interpreting the agreement, the Board should not have a care for whether a particular interpretation would deny Enbridge the rights in law that are represented by the Fair Return Standard. To the contrary, Enbridge submits that, since the Fair Return Standard is a legal requirement that is well known to all of the parties to the agreement, the agreement should be interpreted in a manner that is consistent with it, unless the wording plainly and explicitly sets out some other intended result.

[12] VECC at page 7 and CME at paragraph 40.

[13] Argument in chief, page 4.

In the Cost of Capital Report, the Board discussed the Fair Return Standard at length.[14] In this context, the Board made the following statements:

> …a cost of capital determination made by a regulator that meets the FRS does not result in economic rent being earned by a utility; that is it does not represent a reward or payment in excess of the opportunity cost required to attract capital for the purpose of investing in utility works for the public interest. Further, the Board reiterates that an allowed ROE is a cost and is not the same concept as a profit, which is an accounting term for what is left from earnings after all expenses have been provided for. The Board notes that while cost of capital and profit are often used interchangeably from a managerial or operational perspective, the concepts are not interchangeable from a regulatory perspective.[15]

The parameters of Enbridge's IR plan are such that there is a fixed ROE embedded in rates that is well below the ROE that represents a fair return to the utility. Subject to a Z Factor application under section 6.1 of the IR Settlement Agreement, this means that customers are not paying the full amount of the cost of equity and, conversely, that Enbridge is absorbing a considerable amount of the cost. The perverse outcome of the intervenors' interpretation of the IR Settlement Agreement is that, not only would Enbridge absorb a considerable amount of the cost, but then, on earnings sharing, Enbridge would give back earnings due to this cost being lower than it should be based on the Fair Return Standard. Enbridge is not relying on "information external to the agreement" when it submits that the words of the IR Settlement Agreement do not support this perverse result and should not be interpreted in this manner.

Confidential Settlement Documents

Certain intervenors have brought forward a motion for an order admitting for filing in this proceeding confidential documents from the settlement negotiations that preceded the conclusion of the IR Settlement Agreement. Enbridge understands that the Board will not address the motion until it has considered the submissions called for by Procedural Order No. 6, including these Reply submissions. However, CME has made a number of arguments about the confidential documents and, in particular, has asserted that Enbridge "refused to put [the documents] before the Board on a consent-basis".[16]

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[14] Cost of Capital Report, pages 15 to 23.

[15] Cost of Capital Report, page 20.

[16] CME argument, paragraph 50.

The implication of CME's argument is that Enbridge has attempted to obscure or undermine the intention of the parties to the IR Settlement Agreement. Enbridge does not believe that the Board's consideration of the issue now before it should be coloured by the comments in CME's argument. Accordingly, Enbridge will reply to those comments, while endeavouring to avoid argument of the issues raised by the motion regarding confidential documents.

Enbridge did not consent to the disclosure of confidential documents for reasons of principle. First, the IR Settlement Agreement contains extremely detailed and explicit provisions regarding confidentiality. Among other things, the parties to the agreement "acknowledge, covenant and represent" to one another that they are under a continuing duty of confidentiality under the laws of Ontario "not to use, for any reason whatsoever" any Confidential Document "for any purpose". There is an important point of principle here about whether parties who have agreed in no uncertain terms to conduct themselves in a particular manner should be allowed to change their minds when they decide that they no longer like the agreement that they made.

Second, Enbridge is very concerned about where the consideration of settlement negotiations will take the Board's process if the door is opened to a review of communications during a settlement conference. Ultimately, should there be different views about the intention of parties to a settlement, it is the IR Settlement Agreement that sets out the final, expressed statement of the parties' agreement. If it is argued that a confidential document that preceded the IR Settlement Agreement gives a more clear indication of the intention of the parties than the agreement itself, then the obvious question that arises is why the parties would not have carried such language forward to their final agreement. There is no reason to assume that a unanimously-held answer, or a clear answer, or indeed any answer, to this question can be found. Opening the door to consideration of such matters may well throw up issues and disputes that are far more problematic than interpretation of the IR Settlement Agreement itself.

However, Enbridge does not want to stand in the way of the Board's consideration of material that the Board believes that it needs for the interpretation of the IR Settlement Agreement. Enbridge's refusal to consent to disclosure of confidential documents was in no way driven by a concern that the documents do not support its position regarding the interpretation of the IR Settlement Agreement. On the contrary, if the Board chooses to look at confidential settlement documents, Enbridge will submit that they are entirely consistent with the submissions that it has made both in this Reply and in argument in chief. For the reasons already given, Enbridge believes that the intervenors' motion raises important matters of principle, but if, notwithstanding these concerns, the Board considers that it should see the confidential settlement documents, then Enbridge would want the Board to have access to such documents.

Conclusion

It has always been and still is Enbridge's expectation that the language of section 10.1 of the IR Settlement Agreement ("calculated annually by the application of the Board's ROE Formula in any year of the IR Plan") captures changes to the Board's formulaic approach to ROE. This is the plain and straightforward meaning that flows from the words in section 10.1. The calculation described in section 10.1 is not static and the reference to "application of the Board's Formula in any year of the IR Plan" does not in any way support the view that, unlike all other elements of the earnings sharing calculation, the Equity Risk Premium is intended to remain static. The answer to Issue 17 in the Issues List for this proceeding is that ROE for the purposes of earnings sharing under section 10.1 should be based on the Cost of Capital Report.

All of which is respectfully submitted this 9th day of March 2010

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