

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.

**MATERIALS FOR USE BY ENBRIDGE GAS
DISTRIBUTION FOR ORAL ARGUMENT
OF MOTION ON MARCH 4, 2010**

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TAB 1



ONTARIO ENERGY BOARD

SETTLEMENT CONFERENCE GUIDELINES

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Introduction

The Ontario Energy Board is committed to the settlement conference process as part of its objective of achieving greater regulatory efficiency and effectiveness. A successful settlement conference process will result in Board decisions that are in the public interest and are accepted by the parties while at the same time achieving savings in time and money to all participants.

Purpose of these Guidelines

The purpose of these Guidelines is to provide guidance on the Board's settlement conference process, including the rights and obligations of all participants, the role of the facilitator and the role of Board staff. These Guidelines also set out how the Board will deal with a settlement proposal that is filed with the Board.

This Guideline describes and supplements Rules 38 to 41 of the Board's *Rules of Practice and Procedure*. Rules 38 to 41 are attached for convenience.

Overview of Settlement Conference Process

The purpose of a settlement conference is to settle all the issues referred to the settlement conference in a proceeding or, at least, to settle as many issues as possible. The Board may exclude certain issues from a settlement conference where it is of the view that those issues should be heard in full.

Board members will not participate in a settlement conference and they will not be advised of the admissions, concessions, offers to settle and related discussions that take place in the settlement conference.

A facilitator will be appointed by the Board to chair the settlement conference and the

facilitator will attempt to achieve a settlement of all issues or a settlement of as many issues as possible.

All parties to a proceeding and their representatives are entitled to participate in a settlement conference. Settlement conferences are not open to the public unless the Board directs otherwise. In addition, settlement conferences are not transcribed and do not form part of the record of the proceeding.

Where a settlement is reached, the parties, with the assistance of the facilitator, will prepare and file with the Board a settlement proposal describing the agreement.

Applicability

The Board may direct a settlement conference to be held in any proceeding. Parties to a proceeding may also request that the Board direct the holding of a settlement conference in the proceeding and the Board will give consideration to the request.

Timing

To help ensure that there is an adequate information base for the settlement of issues, the settlement conference will usually take place only after all the evidence of the applicant and intervenors is filed and the interrogatory process has been completed. Where an issues list for a proceeding is fixed by the Board, the settlement conference will be held after the issues to be considered have been determined by the Board and the issues list has been provided to all parties.

The Board may require parties to submit a position paper prior to the holding of the settlement conference. Position papers will not form part of the public record and will, therefore, not be provided to Board members.

Issues for Settlement and Hearing

In fixing an issues list, the Board may indicate those issues which the Board considers are issues for the settlement conference and those issues which the Board regards as issues which must be heard in full in order to develop a complete evidentiary record on which the Board can base its findings.

Participants in a settlement conference should bear in mind that where an issue that may be affected by external factors remains on the list of issues for settlement, they must consider whether, in the settlement proposal filed with the Board, an appropriate adjustment mechanism should be included in relation to the settlement of that issue.

Material Changes in Prefiled Evidence

Where a participant in a settlement conference becomes aware of a material change in its prefiled evidence prior to or during a settlement conference, that participant must disclose that material change as soon as possible.

Authority To Enter Into a Settlement Proposal

A party's representative at a settlement conference must have authority to settle issues on behalf of the party at the settlement conference and must have authority to enter into a settlement proposal. If there are any limitations on the representative's authority, they must be disclosed at the outset of the settlement conference.

Role of the Facilitator

The facilitator at a settlement conference has the authority to bring about a settlement of issues by any reasonable means and, in particular:

- by clarifying and assessing a party's position;
- by clarifying differences in the positions taken by the respective parties;
- by encouraging a party to evaluate its own position in relation to other parties by introducing objective standards; and
- by identifying settlement options or approaches that have not yet been considered.

In carrying out his or her responsibilities, the facilitator will:

- help to foster an environment of cooperation and trust among participants;
- ensure that all participants have an opportunity to present their views on each issue;
- facilitate the preparation of a settlement proposal which contains all the required components; and
- facilitate the preparation of a list of outstanding issues.

The facilitator is responsible only for the settlement conference process. Parties making the settlement proposal are responsible for the appropriateness of the agreement and the adequacy of the evidence and rationale to support it. Parties are likewise responsible for the appropriateness and completeness of the list of outstanding issues referred to the settlement conference but not dealt with in the settlement proposal.

Confidentiality

Everyone who attends a settlement conference must treat admissions, concessions, offers to settle and related discussions as confidential and must not reveal any such information outside the conference. In addition, admissions, concessions, offers to settle and related discussions will not be admitted in any Board proceeding without the

consent of parties who are affected. Where necessary to support a settlement proposal, factual information and evidence should be disclosed to the Board.

Role of Board Staff

Board staff will attend the settlement conference to ensure that all relevant information is brought forward and considered in negotiations. They will present options for the consideration of the parties and will offer advice on the strengths and weaknesses of the parties' proposals. Staff will endeavour to help the parties to reach a settlement but will not sign the settlement proposal.

Board staff who participate in the settlement conference are bound by the same confidentiality standards that apply to parties to the proceeding. Staff will accordingly only be available to the Board panel hearing the case to provide factual information and to analyze certain components of the settlement proposal but will not disclose any positions, admissions, concessions or offers made during the settlement conference or any related discussions.

Board staff may, at the direction of the Board, examine on a settled issue at the hearing to provide information necessary to complete the public record.

In proceedings in which there are no or very few intervenors, the holding of a settlement conference may not be appropriate. However, in such circumstances Board staff may negotiate with the applicant on the issues.

Rights of Parties Who Disagree with the Settlement of an Issue

A party who has been identified in the settlement proposal as a party who does not agree with the settlement of an issue is entitled to offer evidence in opposition to the settlement proposal and to cross-examine the applicant on that issue at the hearing.

Where the hearing is a written hearing, the Board may give directions as to how the right of such cross-examination is to be exercised.

Withdrawal from a Settlement Proposal

If evidence is introduced at the hearing which affects the settlement proposal or the settlement of one or more issues in it, a party may, with permission of the Board, withdraw from the proposal or from its agreement to the settlement of specified issues. The withdrawing party must give notice to the Board and to the other parties of its intention to withdraw and the reasons for withdrawing. Once a party has withdrawn from a settlement proposal or from its agreement to the settlement of specified issues, it is entitled to offer evidence in opposition to the settlement proposal and to cross-examine on an issue where it does not agree with the settlement of that issue.

Filing of the Settlement Proposal

Where agreement is reached at the settlement conference on all or some of the issues, a settlement proposal describing the agreement shall be filed with the Board Secretary. The settlement proposal must identify those participants who disagree with the settlement of a particular issue and those participants who have taken no position on an issue.

It is the responsibility of the participants to ensure that the settlement proposal contains sufficient evidence to support the proposal and that the quality and detail of the

evidence and the rationale for the settlement of issues will allow the Board to make findings on the issues. To assist the Board, parties are expected to prepare a proposal that:

- presents the settled issues in an organized, concise and understandable manner;
- demonstrates a well-referenced, direct and transparent link between each settled issue and the evidence; and
- provides clear reasons to support the acceptance of each settled issue.

Parties to the settlement proposal should make it clear in the proposal whether or not they expect the Board to accept the proposal as a package, and should outline the rationale for the position taken.

Once a settlement proposal is filed, it is binding on all the parties who have agreed to it (subject to the right to withdraw described above).

Following the filing of a settlement proposal, the Board may, at the request of the parties, modify the issues list for the proceeding.

Acceptance of a Settlement Proposal

After considering the settlement proposal, the Board may, in some cases, determine that the rationale for the settlement of issues in the proposal is inadequate or that the quality and detail of the evidence in the proposal will not allow the Board to make findings on the issues. In these cases, the Board may direct the parties to make reasonable efforts to revise the settlement proposal. Where the Board gives this direction, the settlement conference will be reconvened in order to address the Board's concerns. All the provisions of a settlement conference apply to such a reconvened conference.

Where, despite any efforts to revise the settlement proposal, the Board is of the view that the quality and detail of the evidence in the proposal or the rationale for the settlement of issues will not allow the Board to make findings on one or more settled issues, or where the Board is of the view that the public interest requires a hearing of certain issues, the Board will hear evidence on those issues even if they were dealt with in the settlement proposal as well as on any issues excluded from the settlement conference. The Board may give directions as to the issues on which it requires evidence at the hearing.

Where the Board does not accept a settlement agreement that the parties have specifically requested be accepted as a package, the Board will reject the settlement proposal as a whole and will proceed to a hearing of all the issues on the issues list.

Where the Board accepts a settlement proposal, it may adopt as its findings the settlement of issues in the settlement proposal. The Board may accept a settlement proposal as a package provided that the Board is satisfied that the evidence supports the settlement proposal, the settlement proposal is in the public interest, and all evidence relevant to the issues in the proceeding is available to all parties and to the Board both in the settlement proposal itself and as part of the public record.

Parties will be informed of the Board's acceptance or partial acceptance of a settlement proposal prior to the hearing.

Acceptance of a settlement proposal by the Board is subject to reconsideration where significant new evidence or information emerges in the hearing or where the effect of external factors has not been sufficiently accounted for in the settlement proposal.

Costs

The settlement conference is part of the Board's proceedings and the Board may award costs in relation to a party's participation in it. Where the Board determines that an intervenor is eligible for costs, the Board may award costs on the basis of a fixed amount per day for participation in a settlement conference. A fixed daily amount would replace any other cost award that might be made in the proceeding in relation to participation in the settlement conference with the exception of reasonable disbursements.

**Appendix A: Rules 38 to 41 of the *Rules of Practice and Procedure* of the
Ontario Energy Board**

38. Settlement Conferences

38.01 The Board may direct the parties to participate in conferences for the purpose of settling the issues in a proceeding.

38.02 Board members shall not participate in a settlement conference and a settlement conference shall not be transcribed or form part of the record of a proceeding.

38.03 A settlement conference may be held in person or electronically.

38.04 A settlement conference shall only be open to parties and their representatives unless the Board directs otherwise.

38.05 The Board may appoint a person to chair and facilitate a settlement conference.

38.06 The facilitator may inquire into the issues and shall attempt to effect a comprehensive settlement of all issues or a settlement of as many of the issues as possible.

38.07 The facilitator may attempt to effect a settlement of issues by any reasonable means including:

- (a) clarifying and assessing a party's position;
- (b) clarifying differences in the positions taken by the respective parties;

- (c) encouraging a party to evaluate its own position in relation to other parties by introducing objective standards; and
- (d) identifying settlement options or approaches that have not yet been considered.

38.08 A party represented at a settlement conference must authorize a representative to settle issues at the conference and that representative must have authority to enter into a settlement proposal.

38.09 Any limitations on a representative's authority shall be disclosed at the outset of the conference.

38.10 Parties, their representatives and other persons attending a settlement conference shall treat admissions, concessions, offers to settle and related discussions as confidential and shall not disclose them outside the conference.

38.11 Admissions, concessions, offers to settle and related discussions in **Rule 38.10** shall not be admissible in any proceeding without the consent of the affected parties.

39. Settlement Proposal

39.01 Where some or all of the parties reach an agreement, the parties shall make and file a settlement proposal describing the agreement.

39.02 The settlement proposal shall identify for each issue those parties who agree with the settlement of the issue and those parties who disagree.

39.03 The parties shall ensure that the settlement proposal contains or identifies sufficient evidence to support the settlement proposal and that the quality and detail of the evidence will allow the Board to make findings on the issues.

39.04 Where the Board is of the view,

- (a) that the rationale for the settlement of issues in the settlement proposal is inadequate; or
- (b) that the quality and detail of the evidence in the settlement proposal will not allow the Board to make findings on the issues,

the Board may direct the parties to make reasonable efforts to revise the settlement proposal.

39.05 Where the Board is of the view,

- (a) that, despite any efforts to revise the settlement proposal under **Rule 39.04**, the quality and detail of the evidence in the settlement proposal will not allow the Board to make findings on the issues; or
- (b) that the public interest requires a hearing,

the Board may hear evidence on the issues.

40. Parties who do not Agree with the Settlement of an Issue

40.01 A party who does not agree with the settlement of an issue will be entitled to offer evidence in opposition to the settlement proposal and to cross-examine on the issue at the hearing.

40.02 Where evidence is introduced at the hearing that may affect the settlement proposal, any party may, with leave of the Board, withdraw from the proposal upon giving notice to the other parties of its intention to do so, and its reasons, and **Rule 40.01** applies.

41. Effect of Settlement Proposal

41.01 Where the Board accepts a settlement proposal, the Board may base its findings on the settlement proposal and the evidence supporting it.

TAB 2

ONTARIO ENERGY BOARD

Rules of Practice and Procedure (Revised November 16, 2006 and July 14, 2008)

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- (a) the identification of issues would assist the Board in the conduct of the proceeding;
- (b) the documents filed do not sufficiently set out the matters in issue at the hearing; or
- (c) the identification of issues would assist the parties to participate more effectively in the hearing.

30.02 The Board may direct the parties to participate in issues conferences for the purposes of identifying issues, and formulating a proposed issues list that shall be filed within such a time period as the Board may direct.

30.03 A proposed issues list shall set out any issues that:

- (a) the parties have agreed should be contained on the list;
- (b) are contested; and
- (c) the parties agree should not be considered by the Board.

30.04 Where the Board has issued a procedural order for a list of issues to be determined in the proceeding, a party seeking to amend the list of issues shall do so by way of motion.

31. Alternative Dispute Resolution

31.01 The Board may direct that participation in alternative dispute resolution ("ADR") be mandatory.

31.02 An ADR conference shall be open only to parties and their representatives, unless the Board directs or the parties agree otherwise.

31.03 A Board member shall not participate in an ADR conference, and the conference shall not be transcribed or form part of the record of a proceeding.

31.04 The Board may appoint a person to chair an ADR conference.

31.05 The chair of an ADR conference may enquire into the issues and shall attempt to effect a comprehensive settlement of all issues or a settlement of as many of the issues as possible.

ONTARIO ENERGY BOARD

Rules of Practice and Procedure (Revised November 16, 2006 and July 14, 2008)

- 31.06 The chair of an ADR conference may attempt to effect a settlement of issues by any reasonable means including:
- (a) clarifying and assessing a party's position or interests;
 - (b) clarifying differences in the positions or interests taken by the respective parties;
 - (c) encouraging a party to evaluate its own position or interests in relation to other parties by introducing objective standards; and
 - (d) identifying settlement options or approaches that have not yet been considered.
- 31.07 Subject to **Rule 31.08**, where a representative attends an ADR conference without the party, the representative shall be authorized to settle issues.
- 31.08 Any limitations on a representative's authority shall be disclosed at the outset of the ADR conference.
- 31.09 All persons attending an ADR conference shall treat admissions, concessions, offers to settle and related discussions as confidential and shall not disclose them outside the conference, except as may be agreed.
- 31.10 Admissions, concessions, offers to settle and related discussions in **Rule 31.09** shall not be admissible in any proceeding without the consent of the affected parties.

32. Settlement Proposal

- 32.01 Where some or all of the parties reach an agreement, the parties shall make and file a settlement proposal describing the agreement in order to allow the Board to review and consider the settlement.
- 32.02 The settlement proposal shall identify for each issue those parties who agree with the settlement of the issue and any parties who disagree.
- 32.03 The parties shall ensure that the settlement proposal contains or identifies evidence sufficient to support the settlement proposal and shall provide such additional evidence as the Board may require.
- 32.04 A party who does not agree with the settlement of an issue will be entitled to offer evidence in opposition to the settlement proposal and to cross-examine on the issue at the hearing.

ONTARIO ENERGY BOARD

Rules of Practice and Procedure (Revised November 16, 2006 and July 14, 2008)

32.05 Where evidence is introduced at the hearing that may affect the settlement proposal, any party may, with leave of the Board, withdraw from the proposal upon giving notice and reasons to the other parties, and **Rule 32.04** applies.

32.06 Where the Board accepts a settlement proposal as a basis for making a decision in the proceeding, the Board may base its findings on the settlement proposal, and on any additional evidence that the Board may have required.

33. Pre-Hearing Conference

33.01 In addition to technical, issues and ADR conferences, the Board may, on its own motion or at the request of any party, direct the parties to make submissions in writing or to participate in pre-hearing conferences for the purposes of:

- (a) admitting certain facts or proof of them by affidavit;
- (b) permitting the use of documents by any party;
- (c) recommending the procedures to be adopted;
- (d) setting the date and place for the commencement of the hearing;
- (e) considering the dates by which any steps in the proceeding are to be taken or begun;
- (f) considering the estimated duration of the hearing; or
- (g) deciding any other matter that may aid in the simplification or the just and most expeditious disposition of the proceeding.

33.02 The Board Chair may designate one member of the Board or any other person to preside at a pre-hearing conference.

33.03 A member of the Board who presides at a pre-hearing conference may make such orders as he or she considers advisable with respect to the conduct of the proceeding, including adding parties.

TAB 3

SETTLEMENT AGREEMENT

FEBRUARY 4, 2008

decisions in this regard, without changing the disposition of any of the other components of the Package.

None of the Parties can withdraw from the Agreement except in accordance with Rule 32 of the Rules. Unless stated otherwise, the settlement of any particular issue in this proceeding is entirely without prejudice to the rights of Parties to raise the same issue in any other proceedings.

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 purpose. Each of the Intervenor Parties further covenants to return forthwith to the Company all copies, including electronic copies, of the financial model (the "Model") produced by the Company during the course of the Settlement Conference to such intervenor Parties or their agents, including solicitors and external experts, and to forthwith provide written confirmation that, to the best of their knowledge, no electronic or other copies of the Model, have been retained. 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.

VI. OVERVIEW OF AGREEMENT

The Board stated in its Natural Gas Forum Report that rate regulation should meet three objectives:

1. establish incentives for sustainable efficiency improvements that benefit customers and shareholders;
2. ensure appropriate quality of service for customers; and
3. create an environment that is conducive to investment, to the benefit of customers and shareholders.

Those Parties shown as being in agreement with the resolution of the various issues in this proceeding accept that the five-year IR Plan established in this Agreement meets

TAB 4

SETTLEMENT PROPOSAL

JANUARY 24, 2007

The Settlement Proposal describes the agreements reached on the completely settled and partially settled issues. The Settlement Proposal identifies the parties who agree and who disagree with each settlement, or alternatively who take no position on the issue. Finally, the Settlement Proposal provides a direct link between each settled issue and the supporting evidence in the record to date. In this regard, the parties who agree with the individual settlements are of the view that the evidence provided is sufficient to support the Settlement Proposal in relation to the settled issues and, moreover, that the quality and detail of the supporting evidence, together with the corresponding rationale, will allow the Board to make findings agreeing with the proposed resolution of the settled issues. In the event that the Board does not accept the proposed settlement of any issue, further evidence may be required on the issue for the Board to consider it fully.

Best efforts have been made to identify all of the evidence that relates to each settled issue. The supporting evidence for each settled issue is identified individually by reference to its exhibit number in an abbreviated format; for example, Exhibit A1, Tab 8, Schedule 1 is referred to as A1-8-1. A concise description of the content of each exhibit is also provided. In this regard, Enbridge Gas Distribution's response to an interrogatory is described by citing the name of the party and the number of the interrogatory (e.g., Board Staff Interrogatory #1). The identification and listing of the evidence that relates to each settled issue is provided to assist the Board. The identification and listing of the evidence that relates to each settled issue is not intended to limit any party who wishes to assert that other evidence is relevant to a particular settled issue.

The parties agree that all positions, information, documents, negotiations and discussion of any kind whatsoever which took place or were exchanged during the Settlement Conference 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 Settlement Proposal.

According to the Settlement Guidelines (p. 3), the parties must consider whether a settlement proposal should include an appropriate adjustment mechanism for any settled issue that may be affected by external factors. Enbridge Gas Distribution and the other parties who participated in the Settlement Conference consider that no settled issue requires an adjustment mechanism other than those expressly set forth herein.

Issues 1.1 to 1.8, 2.1, 2.2, 3.2, 3.5, 3.7 to 3.9, 3.11 to 3.15 and 9.1 have been settled by parties as a package (the "package"), subject to the objections of GEC, Pollution Probe and Schools, as noted earlier, and none of the parts of this package are severable. All parties agree that, for rate implementation purposes only, the Company can adjust rates to recover an additional \$26.0 million, effective as of January 1, 2007, and that this will be implemented at the same time as the Company's April 1, 2007 QRAM is implemented. GEC's and Pollution Probe's agreement in this regard is subject to any later adjustments to the Company's recovery of revenue deficiency that might be required as a result of

TAB 5

SETTLEMENT PROPOSAL
PHASE I

DECEMBER 15, 2008

The Settlement Proposal describes the agreements reached on the issues. The Settlement Proposal provides a direct link between each settled issue and the supporting evidence in the record to date. In this regard, the parties are of the view that the evidence provided is sufficient to support the Settlement Proposal in relation to the settled issues and, moreover, that the quality and detail of the supporting evidence, together with the corresponding rationale, will allow the Board to make findings agreeing with the proposed resolution of the settled issues. In the event that the Board does not accept the proposed settlement of any issue, further evidence may be required on the issue for the Board to consider it fully.

The parties agree that all positions, information, documents, negotiations and discussion of any kind whatsoever which took place or were exchanged during the Settlement Conference are strictly confidential and without prejudice, and inadmissible.

According to the Board's *Settlement Conference Guidelines* (p. 3), the parties must consider whether a settlement proposal should include an appropriate adjustment mechanism for any settled issue that may be affected by external factors. Enbridge and the other parties who participated in the Settlement Conference consider that no settled issue requires an adjustment mechanism other than those expressly set forth herein.

None of the parties can withdraw from the Settlement Proposal except in accordance with Rule 32 of the *Ontario Energy Board Rules of Practice and Procedure*. Finally, unless stated otherwise, a settlement of any particular issue in this proceeding is without prejudice to the positions parties might take with respect to the same issue in future proceedings during the term of Enbridge's current five year IR plan.

OVERVIEW

In the EB-2007-0615 proceeding, the Board approved a settlement agreement that prescribes the rate setting approach to be used by Enbridge over the five year IR term from 2008 to 2012.¹ This approach involves the use of a Distribution Revenue Requirement per Customer Formula (the "Adjustment Formula") to adjust the amount to be recovered in rates for each year of the IR term.

The IR Settlement Agreement requires Enbridge to file prescribed information by October 1st each year, for the purpose of setting rates for the following year. This information is used in the Adjustment Formula to determine the Distribution Revenue Requirement (the "DRR") for the following year. As part of the filing, the Company also sets out the Total Revenue Requirement to be recovered and the allocation of the DRR to its rate classes, and a rate handbook and supporting documentation detailing how rates have been adjusted.

¹ EB-2007-0615, Ex. N1-1-1.

TAB 6

SETTLEMENT PROPOSAL
PHASE II

MAY 5, 2009

3, 4 and 5 and therefore takes no position with respect to those issues. IGUA did not participate in the discovery or settlement processes of Issues 3 and 5 and therefore takes no position with respect to those issues.

Best efforts have been made to identify all of the evidence that relates to each settled issue. The supporting evidence for each settled issue is identified individually by reference to its exhibit number in an abbreviated format; for example, Exhibit C, Tab 1, Schedule 1 is referred to as C-1-1. Where appropriate, references are also included for the pages of the transcripts from the April 22/23, 2009 Technical Conference where issues were addressed by Enbridge and other parties. The identification and listing of the evidence that relates to each settled issue is provided to assist the Board.

The Settlement Proposal describes the agreements reached on the issues. The Settlement Proposal provides a direct link between each settled issue and the supporting evidence in the record to date. In this regard, the parties are of the view that the evidence provided is sufficient to support the Settlement Proposal in relation to the settled issues and, moreover, that the quality and detail of the supporting evidence, together with the corresponding rationale, will allow the Board to make findings agreeing with the proposed resolution of the settled issues.

The parties agree that all positions, information, documents, negotiations and discussion of any kind whatsoever which took place or were exchanged during the Settlement Conference are strictly confidential and without prejudice, and inadmissible.

According to the Board's *Settlement Conference Guidelines* (p. 3), the parties must consider whether a settlement proposal should include an appropriate adjustment mechanism for any settled issue that may be affected by external factors. Enbridge and the other parties who participated in the Settlement Conference consider that no settled issue requires an adjustment mechanism other than those expressly set forth herein.

None of the parties can withdraw from the Settlement Proposal except in accordance with Rule 32 of the *Ontario Energy Board Rules of Practice and Procedure*. Finally, unless stated otherwise, a settlement of any particular issue in this proceeding is without prejudice to the positions parties might take with respect to the same issue in future proceedings, including future proceedings during the term of Enbridge's current five year IR plan.

TAB 7

**IN THE MATTER OF a consultation by the
Ontario Energy Board on the Cost of
Capital.**

**FINAL WRITTEN COMMENTS OF
ENBRIDGE GAS DISTRIBUTION INC.**

In its letter dated October 5, 2009, the Ontario Energy Board (the "Board") invited participants in this stakeholder conference to provide final written comments to the Board. The Board's letter indicated that such comments must be filed by October 26, 2009. These are the final written comments of Enbridge Gas Distribution Inc. ("Enbridge") filed in accordance with the Board's letter.

The Issues List for the stakeholder conference was attached to a Board letter dated July 30, 2009. In this letter, the Board identified three areas where further information is needed, as follows:

- (1) potential adjustments to the established cost of capital methodology (i.e. based on the ERP approach) to adapt to changes in financial market and economic conditions;
- (2) determination of the reasonableness of the results based on a formulaic approach for setting the cost of capital; and
- (3) Board discretion to adjust those results, if appropriate.

These three areas of further information were reiterated in the Board's October 5th letter and again by the Board Chair at the outset¹ and at the conclusion² of the evidentiary portion of the stakeholder conference. In his concluding remarks, the Board Chair added a fourth goal or purpose for the consultative process, namely, to make the Board's draft guidelines final. In the following comments, Enbridge will address the four areas referred to by the Board Chair.

Need to Adjust the Established Methodology

Enbridge supports the use of a formulaic approach to the determination of Return on Equity ("ROE") for utilities regulated by the Board. Not only does the use of a formula

¹ Transcript, September 21, 2009, pages 5-6.

² Transcript, October 6, 2009, page 153.

Looking Ahead

In its notice to stakeholders dated October 5, 2009, the Board indicated that it anticipates that any changes to its policy made as a result of this review will apply to the setting of rates for the 2010 rate year. During 2010, Enbridge will be in the third year of a five year Incentive Regulation plan that was the subject of a Settlement Agreement approved by the Board in EB-2007-0615. While it was not the intention of Enbridge to give up the right to request a reconsideration of ROE during the term of the IR plan, Enbridge has not sought to reopen either the plan or the Settlement Agreement and has not made any request for relief that would trigger a reopening.

Enbridge nevertheless endorses the approval by the Board of returns that meet the Fair Return Standard and that will apply in the setting of 2010 rates for appropriate utilities, as determined by the Board. 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.

All of which is respectfully submitted.

October 26, 2009

TAB 8



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Barristers and Solicitors

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Please Reply to the TORONTO OFFICE

BY EMAIL

January 29, 2008
Our File No. 2060604

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: Gas IRM Applications – EB-2007-0606/615

We are writing to express our concern about an apparent breach by Enbridge Gas Distribution and their counsel of the Rule of Practice as they relate to ADR confidentiality.

In a letter sent to the Board about one hour ago, Enbridge, through its counsel Fraser Milner Casgrain, filed a document purporting to be a Settlement Agreement relating to this proceeding. As the Board will be aware, School Energy Coalition expressly disagreed with the filing of this document as an agreement between the parties thereto, since we are a party and had not agreed. This is a matter of some concern, but we intend to raise that as an issue on Thursday when it is presented to the Board.

However, in addition the cover letter signed by Enbridge's counsel quoted extensively from emails sent by the undersigned to the parties to the negotiation as part of the process of negotiating the terms of the Agreement. Counsel neither asked for nor obtained the permission of the undersigned to quote from these confidential communications.

Pursuant to Rule 31.09 of the Board's Rules of Practice:

*31.09 All persons attending an ADR conference shall treat admissions, concessions, offers to settle **and related discussions** as confidential and shall not disclose them outside the conference, except as may be agreed.*

GREAT LAKES
LAW



The Applicant appears to have breached this rule. While the subject-matter of the improper disclosure is not in any way scandalous, embarrassing or prejudicial, we believe that it is important that the sanctity of the ADR process be maintained. The Board is generally vigilant in these matters, because, we believe, the value of ADR would be seriously undermined if parties no longer believed that their communications during the negotiations would be kept confidential.

Because there appears to have been no resulting harm, we are not seeking any sanctions by the Board, other than, of course, the exclusion of the improper parts of counsel's letter from the record. However, we are providing this information so that the Board can consider how it feels it should respond to this breach of the Rules. We will raise this as a procedural matter on Thursday.

All of which is respectfully submitted.

Yours very truly,
SHIBLEY RIGHTON LLP

A handwritten signature in dark ink, appearing to read 'Jay Shepherd', with a stylized flourish extending to the right.

Jay Shepherd

cc: Helen Newland, FMC (email)
Michael Millar, OEB (email)
Interested Parties (email)