September 24, 2012

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

Dear Ms. Walli:

Re: EB-2012-0087 - Union Gas Limited - 2011 Earnings Sharing & Disposition of Deferral Accounts and Other Balances – Reply Argument on the Preliminary Issue

Please find enclosed two copies of the Reply Argument of Union Gas Limited for the Preliminary Issue in the above noted proceeding.

If you have any questions please contact me at (519) 436-5473.

Yours truly,

[Original signed by]

Karen Hockin
Manager, Regulatory Initiatives

cc Alexander Smith (Torys)
Crawford Smith (Torys)
EB-2012-0087 Intervenors

EB-2012-0087

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Union Gas Limited for an order of orders amending or varying the rate or rates charged to customers as of October 1, 2012;

REPLY ARGUMENT OF UNION GAS LIMITED

A. OVERVIEW

1. This is Union's Reply Argument, which should be read in conjunction with Union's Argument in Chief. Union remains of the view that it has treated the revenues arising from upstream optimization in 2011 appropriately. These revenues were recorded as part of regulated utility earnings and are subject to sharing with ratepayers pursuant to the terms of the framework agreed to by the parties, and approved by the Board. Union's position is supported by Board Staff.

2. Union optimizes its upstream transportation portfolio, when market opportunities allow for it, by, among other things, entering into gas exchanges with third parties. In recent years Union has used the firm transportation risk alleviation mechanism program ("FT-RAM") available to Union under its firm transportation ("FT") contracts with TransCanada Pipelines ("TCPL") to facilitate these exchanges. These optimization activities are consistent with Union's past practice since at least the early 1990s, are supported by prior Board decisions and accounting orders and benefit both Union and ratepayers.

3. Intervenors now take issue with Union's treatment of these optimization activities and seek to more narrowly circumscribe the "proper" scope of optimization. A key underlying premise of the responding submissions of the Consumers Council of Canada ("CCC") and Canadian Manufacturers & Exporters ("CME"), among others, is that optimization through FT-RAM, or otherwise, is limited to circumstances where there is temporarily a surplus of upstream transportation capacity.

4. This premise allows intervenors to characterize FT-RAM activities as changes to upstream transportation that should be passed through to ratepayers in their entirety. As a review of the regulatory history of exchange optimizations demonstrates, this premise is false.

5. The intervenors' characterization of FT-RAM disregards the fact that optimization transactions are a response to market demand. It also overlooks the fact the risks and costs of FT-RAM optimization transactions lie entirely with Union, as Union is entirely responsible for any resulting losses and the costs are not embedded in rates. The intervenors' approach to FT-RAM optimization is self-serving and unfair. If accepted, it would undermine Union's incentive to pursue efficiencies, since Union cannot be expected to pursue efficiencies at its own expense and at its own risk if Union is to be entirely excluded after the fact from any resulting benefits. That is what the intervenors are, in substance, proposing.

6. Incenting efficiencies — including the seizure of market-based opportunities — is in the short-term and long-term interests of both Union and ratepayers (whose share of the benefits increases as revenues increase). The intervenors' submissions on optimization involving FT-RAM disregard these interests of ratepayers.

7. CME's suggestion that the net revenues of FT-RAM optimization are held in trust has no basis in trust law, as explained below, and is in any event incompatible with the regulatory regime to which Union is subject. Misapplied trust law principles should not be used to retroactively alter the well-established regulatory regime for natural gas in Ontario, compromise the reliability of prior Board orders and accounting orders, and undermine thereby the planning certainty on which all parties before the Board in natural gas regulation proceedings rely.

8. Several intervenors, led by FRPO, argue that "independent" of IRM, Union should not be entitled to profit by "retaining excessive gas supply transportation contracts". The argument is misconceived. The relevant context, as the Board's preliminary issue states explicitly, is the IRM framework. In any event, Union maintained in 2011 (and today) a balanced gas supply portfolio, designed to meet peak, seasonal and annual in-franchise customer needs. There is no evidence otherwise. The prudence of Union's 2011 upstream transportation portfolio (and resulting cost) is the subject of final orders issued by the Board in connection with multiple QRAM proceedings.

9. Finally, the intervenors' suggestion that Union has failed to adequately "disclose" its FT-RAM optimization activities — which is denied — inappropriately shifts the focus from the question of whether Union's FT-RAM optimization activities are consistent with the analytical framework of IRM. The question is not whether Union's FT-RAM optimization activities were adequately "disclosed". The question is whether Union's FT-RAM optimization activities were consistent with the IRM framework. They were.

10. In what follows, we reply in detail to each of the above intervenor arguments.

B. PROPER SCOPE OF UPSTREAM OPTIMIZATION

11. Foundational to intervenor arguments is the assertion that the scope for upstream optimization is limited to instances where Union, as a result of unplanned changes in weather and market demand, has surplus transportation capacity. Intervenors then suggest that Union's FT-RAM exchange optimization activities constitute a novel and inappropriate departure from past practice. Despite the frequency with which the suggestion is repeated throughout intervenor arguments, there is no proper basis for it.[1]

The History of Upstream Optimization Prior to IRM

12. Union has engaged in Board-approved upstream optimization since at least the early 1990s. The sale of exchanges is simply one form of optimization.

13. An exchange is defined as a transaction between Union and a counterparty in which the counterparty gives Union gas at one location, and Union gives the counterparty gas at a different location on the same day. One of the two exchange locations is on the Union system and the other is off the Union system.[2]

14. The sale of exchanges by Union is a regulated activity; exchanges are sold by Union pursuant to its Board approved C1 Rate Schedule. The evidence is that the first deferral account was established in 1993 and that references to revenue being earned on exchanges date back to

[1] See, for example, CME Argument, pp. 5, 8, 17-21, 33 and elsewhere; CCC Argument, p. 2; and SEC Argument, p. 4

[2] K1.1, Tab 12, EB-2003-0087, J20.10

1991.[3] As Union explained in Argument in Chief, Union has been engaged in exchange activity approved by the Board to optimize its upstream transportation portfolio since at least the early 1990s, and has had a deferral account in relation to that activity since that time.[4]

15. Union's ability to optimize its upstream transportation portfolio is affected by a range of factors. These may include the attributes of the upstream transportation contracts, including the FT contracts held by Union. In this respect, Union has a long, Board-approved practice of taking advantage of the attributes attached to TCPL FT contracts, and the value the market places on these attributes, to effect exchanges to the benefit of Union and ratepayers.

16. In EB-2003-0087, Union specifically discussed the assets available to support S&T activity.

> Over the last few years, the level of S&T transactional revenue has been impacted by warmer weather and favourable market pricing conditions. In addition, certain TCPL services (e.g. FT make-up, AOS) that were approved and in place for 2002 only provided transactional revenue opportunities in 2002 and are no longer available. For 2003 and 2004, the Gas Supply Plan reflects a balanced or 'normal' asset utilization forecast.
>
> The actual assets available for S&T transactional services will change on an ongoing basis dependent upon actual weather and market factors including the amount of direct purchase switching, T-Service switching, in-franchise growth, changes in customer use, market prices, and customer demand for S&T services. Union's forecast for S&T transactional services for 2003 and 2004 reflects normal market and operating conditions.[5] (Emphasis added.)

17. As the above reflects, there is nothing novel in Union taking advantage of market circumstances to optimize its upstream transportation portfolio. As Union expressly indicated, "actual assets available for S&T transactional services" would depend, in part, on market factors, i.e., they were not limited to surpluses arising from weather or in-franchise demand. Equally, there is nothing novel about exchange optimization utilizing FT-RAM as an attribute of FT contracts. Examples of Union optimizing similar attributes during the last decade are discussed

[3] K1.1, Tab 13, EB-2011-0210, Vol. 6 page 77-79

[4] Argument in Chief, p. 10

[5] K1.1, Tab 11, EB-2003-0087, Exhibit C1, Tab 3, p. 6, li. 8-18

below, including FT make-up ("FT Make-Up"), authorized overrun service ("AOS") (both of which were referred to by Union in 2004) and Dawn overrun service-must nominate ("DOS MN").

18. **FT Make-Up.** FT Make-Up was a service that TCPL introduced for the year 2002 only. FT Make-Up was similar to FT-RAM in that it essentially allowed for any unused demand charges in any given month to be used as a credit towards any IT volume shipped in the same month. Union used FT Make-Up similar to the way Union uses FT-RAM today. Union took any credits that were created and used them towards an IT service, which was used to underlie or underpin an exchange. FT Make-Up was treated, from a regulatory perspective, in exactly the same way as FT-RAM is treated today: through the transportation exchange account (former account 179-69) as revenue.[6]

19. **AOS.** This was another service provided by TCPL. In essence, TCPL provided inexpensive IT transportation, equivalent to 4 percent of all Union demand charges payable to TransCanada in a given month. Union used those IT credits to fund transactional activity. AOS was treated by Union the same as the FT Make-Up credits and was processed through the same transportation exchange deferral account. Conceptually AOS was similar to FT-RAM, in that under an FT contract with TCPL, Union was given credits that could be used for IT transportation in the same month on any path. To the extent that AOS was used to facilitate exchange services for revenue, that revenue was also captured in exactly the same way as FT-RAM is treated today.[7]

20. While intervenors now seek to differentiate the upstream optimization activities undertaken by Union historically from those undertaken during IRM, fundamentally they are the same. Efforts to link historic transactions to "surplus" assets or "weather permitting" circumstances are not grounded in the evidence.

21. There is nothing inappropriate about Union seizing market-based opportunities to the benefit of Union and ratepayers: on the contrary, realizing such efficiencies is the point of

[6] Technical Conference, Transcript, pp. 14-18

[7] Technical Conference, Transcript, pp. 16-18

optimization. The permissible scope of optimization is not delineated by the parameters suggested by intervenors, such as an unplanned "temporary surplus of transportation capacity".[8]

22. Only CME refers to any evidence prior to IRM in support of the alleged limited scope of upstream optimization. That evidence comes from EB-2003-0087. Properly understood, however, the evidence, in its entirety, confirms Union's position here. The passage cited CME is set out below:

> With a balanced gas supply portfolio, which meets the forecast in-franchise and ex-franchise firm demands there will be few, if any, firm assets available to support TS on a future planned basis.

23. From there CME argues that "the portion of utility gas supply assets that is available to support TS activities is only the portion of those assets that is temporarily surplus because of factors beyond Union's control." The problem with CME's argument is that it overlooks entirely the balance of the evidence in that case quoted above at para. 16 above. To reiterate: there, Union explained that the level of transactional activities was equally a function of market factors beyond weather and in-franchise demand.

24. CME also refers to excerpts from several Enbridge decisions. No context is provided for the excerpts, and no questions were asked in relation to them. On their face, they are inapplicable. At least one refers to commodity sales, which is not at issue, while the others do not support CME's position. It is apparent that the Board's concern was that transactional services not increase gas costs — something which did not happen here.[9]

25. Fundamentally, intervenor argument, also misunderstands the difference between assets available on a "planned basis" and the use of assets on an actual basis having regard to market related factors that may emerge throughout the year.

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[8] CCC Argument, p. 2, para. 10

[9] CME Argument, p. 18, para. 35 and p. 21, para. 47

26. Union does not plan to meet its customer needs — on an annual, seasonal and peak day basis — through exchanges or other optimization activities, other than in rare instances. The plan, as discussed in greater detail in Part D, is to meet those demands, pursuant to the gas supply plan, through the combination of firm upstream transportation contracts, Dawn sourced supply storage capacity and STS deliveries. Union acquires only that capacity necessary to meet those demands, and no more. For this reason, it is entirely correct to say that on a "planned basis" there are few assets available for optimization. That is not to say, however, that where unplanned market opportunities present themselves, be it as a result of weather, customer demands, or market demand for transactional services (including services underpinned by services offered by TCPL such as FT-RAM), Union does not seek to realize those opportunities for its benefit and that of ratepayers alike. Union does so, and has for many years without issue, pursuant to the Board approved regulatory framework.

27. Again, Union's basic approach to optimization has not changed. What has changed is the number and profitability of market-based optimization opportunities under FT-RAM.[10] This is due to significant changes in the market demand for transactional services, and is a positive development for both Union and ratepayers. The resulting benefits for Union and ratepayers were captured because Union, responding to the incentives generated by the IRM framework, bore the cost and the risk of responding to available market-based opportunities. While the amounts generated exceeded previous optimization efforts, Union's approach to FT-RAM optimization was the same as Union's prior approach to optimization and consistent with the Board's regulatory framework.

Regulatory Treatment of Upstream Optimization During IRM

28. Union discussed the closure of the S&T deferral accounts in its Argument in Chief. As discussed therein, it was Union's evidence in EB-2005-0520 and EB-2007-0606 that the closure of the S&T deferral accounts, including Account No. 179-69, was consistent with the parameters of IRM as outlined by the Board in its NGF Report. Union agreed with the Board that, in a true

[10] Technical Conference, Transcript, p. 37

IRM framework, there should be no earnings sharing, and transactional services revenues should not receive special treatment.[11]

29. **EB-2007-0606.** On January 3, 2008, Union and intervenors entered into a settlement agreement in in this matter. As discussed previously, the agreement provided for the closure of the S&T deferral accounts in specific consideration for the increase of the S&T margin built into rates, to $6.9 million In order to achieve this level of margin Union must earn revenues of between $10 and $12 million.[12]

30. The agreement also provided for the Y factors to be included in the IRM plan.[13] One of the agreed Y factors was upstream transportation costs. The parties agreed that "the disposition of Y factor amounts will be in accordance with existing Board approved allocation methods and allocators."[14]

31. In its argument, CME adverts to the fact that Union's pre-filed evidence in that case does not discuss FT-RAM. While true, CME's observation is of no moment.

32. First, Union has candidly acknowledged that, despite FT-RAM being available since 2004, it did not foresee, in 2007, the extent to which the market opportunities relating to that service would present themselves.

33. Second, Union did not discuss in its evidence any of the ways in which it had optimized its transportation portfolio in the past or might do so in the future. Discussing the many ways in which the future might unfold, whether related to optimization or O&M productivity or any other issue, was simply not a feature of the application. Union's intention, and that of the Board and the parties as reflected in the Settlement Agreement, was to put in a place a framework for IRM, not to discuss how each of the parameters would be met going forward. Characterizing the

[11] K1.1, Tab 5, EB-2007-0606, pp. 11-12

[12] K1.1, Tab 6, EB-2007-0606, Settlement Agreement, p. 33; K1.1, Tab 7, EB-2009-0101, Pre-filed Evidence, p. 7

[13] K1.1, Tab 6, EB-2007-0606, Settlement Agreement, p. 15

[14] K1.1, Tab 6, EB-2007-0606, Settlement Agreement, p. 16

"absence" of FT-RAM in the evidence as somehow relevant to this proceeding fundamentally misses this point.

34. Finally, there was no need to discuss FT-RAM, or any other component, of Union's optimization related activities given Union's longstanding Board approved practice and the established accounting.

35. **EB-2008-0220**. This was Union's 2008 deferral account proceeding. It was the first proceeding following Board approval of the IRM framework. In the case, the proper treatment of revenues relating to upstream optimization was specifically considered by the Board.

36. Like FT-RAM, DOS-MN was a temporary service offered by TCPL. And, like FT-RAM it was not discussed by Union in its pre-filed evidence (nor could it have been as the service was only introduced late in 2008).

37. The service was offered for two winter seasons (2008/2009 and 2009/2010).[15] Like RAM, DOS-MN depended on holding FT contracts on TCPL, which involve demand charge commitments. The introduction of the service did not change the demand charge of the FT service, or the assets underpinning the gas supply plan. The purpose of DOS-MN, from TCPL's perspective, was to ensure that TCPL had the proper amount of gas flowing to Dawn to meet certain firm transportation obligations TCPL had to meet on its system. Under DOS-MN, TCPL allocated capacity to shippers based on each shipper's share of FT demand charge commitment to TCPL for the winter season. As a condition of accepting this capacity, shippers agreed to utilize their allocated amount of DOS MN each and every day during the winter timeframe. Shippers were only charged an incremental commodity toll and the appropriate fuel to the delivery point.

38. In the result, Union was able to replace supply it had planned to buy at Dawn with less expensive supply transported from Empress. In other words, Union was able to optimize its upstream transportation portfolio and the services attached to them to more efficiently, i.e. less

[15] K1.1., Tab 13, EB-2011-0210, Transcript Vol. 6, page 84-87

expensively, transport supply. The use of DOS-MN had nothing to do with weather or in-franchise demand.

39. Union was specifically asked whether it was participating in DOS-MN and "whether the full benefits of this service will flow through the Y factor transportation costs." In response, Union advised that:

> Union is not treating any benefit associated with the use of the DOS-MN as a Y factor. Any benefit from the use of DOS-MN over the term of the incentive regulation framework will be used to contribute to the S&T transactional margins already included in in-franchise delivery rates, and will form part of Union's regulated earnings.[16]

40. As Union further explained in its Reply Argument in EB-2008-0220:

> The DOS-MN service is part of Union's transportation portfolio that is available for optimization through S&T transactional activity. Benefits resulting from transactions to optimize transportation capacity have historically been and will, in the future, continue to be recognized as part of Union's regulated S&T transactional activity. The forecast margin from this type of transactional activity has long been recognized in the determination of rates.[17]

41. Intervenors arguments with respect to the preliminary issue in this proceeding was before the Board with respect to DOS-MN. That is, as here, intervenors questioned why reductions in upstream transportation costs were not being passed through to ratepayers as part of the upstream transportation costs Y factor. As the Board summarized the intervenors' argument:

> IGUA and CME also asked Union to comment on and explain Union's treatment of TransCanada Pipelines' new Dawn Overrun Service-Must Nominate ("DOS-MN"). DOS-MN was described as a cheaper transportation service. IGUA and CME questioned why Union considered DOS-MN as related to Storage and Transportation Revenue rather than Upstream Transportation. Under the Settlement Agreement, Upstream Transportation costs are considered as Y factor adjustment items, and, as such, their cost impact flows through to rates. In instances when Upstream Transportation costs decrease, ratepayers would benefit, and, correspondingly, ratepayers would bear the costs when the costs increase.

[16] K1.1, Tab 22, EB-2008-0220, Exhibit B2.2

[17] K1.1, Tab 24, EB-2008-0220, Union Reply Argument, p. 7

> Under the Settlement Agreement variances in Storage and Transportation Revenue items do not flow through to rates. [Emphasis added.][18]

42. The Board considered the intervenors' argument and, ultimately, rejected it. The Board specifically held that Union's approach to DOS-MN was consistent with the IRM framework. As the Board stated:

> Union noted that pursuant to the Settlement Agreement ratepayers were credited with a fixed amount reflecting a forecast performance of its transactional services business. Union also noted that the increased capacity that is associated with the Dawn Overrun Service may have benefits for ratepayers pursuant to the earnings sharing mechanism that continues in place. In other words, ratepayers have been already credited with an amount intended to reflect the transactional services activity of the company. Any additional revenues which may be occasioned by the new TransCanada service will not accrue under this heading, but may lead to earnings sharing distribution.
>
> The Board finds Union's explanation with respect to this concern, which was raised by IGUA in its submissions, to be convincing. In the Board's view this is a fair approach that is consistent with the general architecture of the IRM plan and the Settlement Agreement.[19]

43. Intervenor attempts to distinguish the Board's decision in EB-2008-0220 are without merit. Primarily the efforts seek to differentiate the details of DOS-MN from FT-RAM. As CME says, unlike FT-RAM, a failure to use FT service was not a prerequisite to "availability of DOS-MN".[20] Fundamentally, this misses the point. It does not matter whether DOS-MN was identical in all respects to FT-RAM; it was not. What matters is that DOS-MN was a service offered by TCPL, the use of which depended on having an FT contract (i.e., DOS-MN was an "attribute" of a TCPL FT contract), which permitted Union to optimize its upstream transportation portfolio. The Board was well aware of these facts and concluded that pass-through treatment was not appropriate. No different result should obtain here.

44. **EB-2009-0101.** This was Union's first earnings sharing proceeding under IRM. The case followed EB-2008-0220 by several months. In other words, by the time of the EB-2009-

[18] K1.1, Tab 25, EB-2008-0220, Decision with Reasons, p. 4

[19] K1.1, Tab 25, EB-2008-0220, Decision with Reasons, pp. 8-9

[20] CME Argument, p 25, para. 60

0101 proceeding, parties had the benefit of the Board's earlier decision, in particular the Board's decision in relation to DOS-MN.

45. Union discussed the evidence in the proceeding in its Argument in Chief. As noted there, Union's evidence highlighted that short term transportation and exchange revenues had exceeded Board approved levels by approximately $23 million; that the increase was the result, in part, of Union having put a greater emphasis on upstream transportation portfolio optimization beginning in 2007; that Union had invested in incremental sales staff and technology to capture the incremental revenue opportunities; and that Union's approach to the marketing of transactional services was the direct result of the IRM framework and the elimination of the transportation deferral accounts. Union further advised that its 2009 optimization forecast reflected a continued focused and proactive approach to optimization.[21]

46. Moreover, in response to an interrogatory it received in respect of its focus on upstream optimization, Union advised that:

> Union also focused on further optimizing its upstream supply portfolio. Union was able to extract value from new services introduced by upstream transportation providers, in excess of what was achieved historically. An example of these new services includes TCPL's firm transport risk alleviation mechanism, FT-RAM, storage transportation service risk alleviation, STS RAM and Dawn overrun service must nominate DOS MN. These new services provided increases opportunities for transportation exchange transactions in the market. These opportunities were also influenced by favourable market conditions experienced in 2008.[22]

47. On June 4, 2009, Union and intervenors entered into a settlement agreement. They agreed to continue with the existing IRM framework subject to a change in the level of sharing above 300 basis points to 90/10 in favour of ratepayers.[23] In his submissions in support of the

[21] K1.1, Tab 9, EB-2009-0101, Pre-filed Evidence, pp. 7 and 18

[22] K1.1, Tab 8, EB-2009-0101, Ex. B1, Tab 1, Sch. 4

[23] K1.1, Tab 9, EB-2009-0101, Settlement Agreement, pp. 4-5

settlement agreement, counsel for CME characterized the settlement as "favourable to ratepayers."[24]

48. Most intervenors now seek to distance themselves from EB-2009-0101, the evidence in that proceeding and the parties' settlement. They say, variously, that they were unaware of the details of the FT-RAM transactions and did not consent to those transactions. All of these complaints miss the mark; they are a distraction.

49. While the issue is discussed further below at Part E, the essential point here is that what was known based on the evidence was that the increase in optimization revenue arose not as a result of a temporary "surplus" of assets but because of Union's efforts to maximize opportunities arising from new market services, and that Union had added incremental resources at its own cost to do so. In other words, intervenors knew in EB-2009-0101 that the argument they now advance—that transactional services are limited to instances of temporarily surplus assets—was without merit, and certainly not the approach taken by Union during IRM. And they knew, specifically, that Union had focused its efforts on services offered by TCPL (including FT-RAM), just as Union had focused in the past in relation to FT Make-Up, AOS and DOS-MN.

Reliance on The Gas Supply Deferral Accounts is Misplaced

50. Intervenors purport to bolster their submissions as to the limited scope for transactional services by reference to what they describe as the "fundamental principle that upstream transportation costs are a pass-through".[25] The reliance on this principle is misplaced. The concept that upstream transportation costs are a pass-through does not exist in the abstract. Rather, it is specifically defined by the Board approved gas supply deferral accounts. The words used by the Board in the accounts prescribe what, in fact, is passed through, and what is not. In other words, to the extent the gas supply deferral accounts are relevant, it is because they help define the permissible scope of optimization, *viz*, optimization encompasses those opportunities that fall outside of the clearly defined parameters of those accounts.

[24] KT1.2, Tab 7, EB-2009-0101, Transcript, pp. 61- 62

[25] CME Argument, para. 21

51. The accounts are set out in K1.1 at Tab 3. To summarize what is captured by each one of the accounts:[26]

(a) The North PGVA captures gas cost variances in gas supply commodity only. The balance is calculated by deferring actual Empress gas costs against the Alberta Border Reference Price each month.

(b) North transportation deferred costs are not included in the North PGVA but instead are accounted for in the TCPL Tolls & Fuel - Northern & Eastern Operations deferral account (No. 179-100). Account No. 179-100 captures variance between actual TCPL tolls and those approved in rates. The account does not, nor has it ever, captured the market perceived value of attributes or services attached to TCPL contracts held by Union. It is a tolls account, and nothing more.

(c) The South PGVA captures variances between the forecasted landed cost of gas (both gas supply and transportation costs) to serve sales service customers in Union South and the Ontario Landed Reference Price. The Ontario Landed Reference Price is calculated by adding the TCPL EDA toll and fuel to the Alberta Border Reference Price. As the forecasted landed cost of serving South sales service customers based on Union's South Portfolio will differ from the landed cost of serving those customers from Empress to the TCPL EDA, the South PGVA will always have a debit or credit balance. This debit or credit balance is reflected in the South Portfolio Cost Differential, which is a component of the South PGVA and recovered from South sales service customers.

(d) The UDC deferral account (No. 179-108) captures differences in the actual unabsorbed demand costs incurred by Union and the amount of unabsorbed demand charges included in rates as approved by the Board.[27]

[26] Union also maintains a Spot Gas Variance Account (No. 179-107) and an Inventory Revaluation Account (No. 179-109), although neither is relevant to the matters in issue.

[27] See also, K1.1, Tab 26, EB-2012-0087, JT 1.2

52. The revenues arising from Union's FT-RAM related upstream optimization activities do not fall within any of the gas supply deferral accounts. Specifically, the introduction of FT-RAM did not result in a change to the tolls charged by TCPL. Further, to the extent tolls have changed during IRM, those changes have been passed through to ratepayers.

53. BOMA appears to argue that the optimization transactions at issue should be characterized as gas supply costs because the TCPL IT toll changed as a result of FT-RAM. To begin, the premise of this argument is wrong; the price charged by TCPL for IT service did not change, it remained 110 percent of the FT toll throughout 2011. Moreover, the focus on the IT toll is misplaced. The amount ratepayers were charged was the FT toll, because that was the capacity held by Union (and the FT charge Union paid), not the IT toll, and the FT toll also did not change (or, if it did, the changes were passed through).

54. The introduction of FT-RAM also did not result in a change in the south portfolio forecasted landed cost of gas, which is the product of the planned gas supply portfolio.

55. Lastly, the UDC account has no application either. In respect of each of the transactions at issue, in-franchise customers required gas supply. Put another way, absent the market demand for transactional services and the related optimization transactions, gas would have flowed precisely in accordance with the gas supply plan; there would be no UDC. As Mr. Isherwood testified: "If it wasn't for FT RAM, this same transaction, it would flow Empress to EDA, and we would go back on STS injections back into Dawn, and that is how the gas supply plan is set up."[28]

Analysis of the FT-RAM Transactions Does Not Assist Intervenors

56. **Overview of FT-RAM.** FT-RAM was originally offered as a one year pilot program in 2004.[29] In each of 2005, 2006 and 2007, amendments were made to extend the program for one additional year. The program was made permanent in November 2009. It is now subject to a pending request to discontinue the program.

[28] Technical Conference, Transcript, p. 92

[29] EB-2011-0210 IR response JD-1-16-2

57. FT-RAM is a program offered to shippers who hold firm transportation contracts on TCPL – all which involve demand charge commitments (long haul FT, STS and/or linked short haul capacity). Shippers must take action to realize the benefits of the FT-RAM program. FT-RAM credits are created as a result of empty TCPL pipe and can be used for interruptible transportation within the same month. When using FT-RAM credits, the only incremental cost to shippers is the commodity toll and appropriate fuel to the delivery point.

58. BOMA devotes a portion of its argument to the alleged financial impact of FT-RAM including on TCPL tolls, the apparent suggestion being that Union ratepayers have paid higher rates (as a result of higher TCPL tolls) because of FT RAM.[30]

59. The propositions put forward by BOMA were not put to any Union witness in this proceeding (BOMA did not attend the technical conference), nor in Union's rebasing proceeding. Remarkably, the propositions were not put to TCPL either. As a result, they should be given no weight by the Board.

60. In any event, in several important respects BOMA is simply incorrect. First, as to the reference to the impact of FT-RAM, TCPL's forecast for discretionary revenues in 2013, on the elimination of FT-RAM, is $50 million, not the hundreds of millions hypothesized by BOMA. Second, the benefits to ratepayers from earnings sharing exceed the toll related impact of this level of discretionary revenues. Union is just one of many parties to have taken advantage of FT-RAM; Union's impact is a fraction of the amount suggested by TCPL, let alone BOMA. In any event, and again based on TCPL's evidence, revenues of $50 million equate to roughly a $0.06 impact on the toll from Empress to Union SWDA. This amount is less than the earnings sharing benefit directly related to optimization realized by ratepayers in 2011 of $0.105.[31]

61. **The FT RAM Transactions**. As described in the evidence, Union has been able to realize revenues as a result of FT-RAM through two forms of transactions: what have been described as capacity assignments and FT RAM optimization transactions. These transactions

[30] BOMA Argument, pp. 6-7

[31] K1.1, Tab 17 (JC-4-7-9), Attachment 1, shows a total benefit of $0.16, roughly two thirds of which was experienced by ratepayers (see. K7.3, EB-2011- 0210)

are summarized in more detail below. Fundamentally, however, they do not differ from other optimization transactions undertaken by Union (e.g. "base exchanges") before and during IRM. Like those other transactions, they begin with a market based opportunity, absent which gas would flow pursuant to the gas supply plan.

62. The net effect of the two forms of FT RAM transactions is similar. In both cases, the operational result (gas purchased at Empress and delivered to Union's delivery areas) is the same. Both options are a direct result of Union taking action to optimize the upstream transportation portfolio due to the existence of the RAM program.

63. *Capacity Assignments.* In a capacity assignment, Union, after identifying an available market opportunity and a willing counterparty, engages in an integrated two-step transaction. In the first instance, Union assigns transportation to a third party. At the same time, and as part of that transaction, Union sells an exchange to the same third party to effect delivery, on a firm basis, to Union's delivery area via an exchange.[32] As Mr. Isherwood testified:

> So looking at the two individual steps, we would pay the marketer for the value of the long-haul FT contract. So if it was to the EDA, it would be the 2.24 per gJ; we would pay them the 2.24.
>
> And then for the exchange, where they would -- we would give them gas at Empress and they would give us gas in the NDA, they would pay us whatever, whatever the negotiated rate is, 20 cents, 30 cents.
>
> And that exchange revenue then flows into our transportation exchange account.[33]

64. *FT RAM Optimization.* Beginning in 2008, Union began to use the RAM program by applying available RAM credits earned on empty FT pipe to transport Empress supplies to various delivery areas to meet market demands for customers. The flexibility to apply RAM credits to any path allowed Union to deliver supply to in-franchise customers across multiple delivery areas. In addition, any remaining credits can be used alone, or in combination with, other assets to serve exchanges to customers outside Union's franchise area.[34]

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[32] K1.1, Tab 19, JC 4-7-10, pp. 2-3; K1.1., Tab 18, pp. 1-2

[33] Technical Conference, Transcript, p. 52

[34] K1.1, Tab 19, JC 4-7-10, pp. 2-3; K1.1, Tab 18, pp. 1-2

65. In its argument, CME says a detailed review of the above transactions supports its position that the optimization related revenues should be treated as a reduction to gas supply costs. With respect to capacity assignments, broadly speaking, CME says that:

(a) "the cost to the marketer for the assigned capacity and the benefit to Union of the FT assignment component of the transaction reflect amounts that should be captured in the Gas Supply Deferral Accounts if the transactions were treated as a stand-alone assignment transaction"; and

(b) that the exchange component of a capacity assignment is not an optimization exchange because Union acquires, rather than sells, the exchange.[35]

66. Each of these assertions by CME is without merit.

67. *Responsibility for the FT demand charge.* Contrary to CME's argument, where Union assigns FT capacity as part of a capacity assignment it agrees to pay the marketer for the full value of the TCPL toll; the marketer does not pay Union. This is the evidence set out above. (On this point, and again contrary to CME's submission, there is no contradiction between the evidence and counsel's submission in the rebasing case; the two are aligned.) Moreover, considering the assignment on its own without the exchange ignores the fundamental reality that the two are integrally related; one would not happen without the other.

68. *Union is the seller of the exchange*. To the extent the question of whether Union is the buyer or seller of the exchange is even a proper basis on which to classify the transaction, CME is wrong. Union, in all cases, sells an exchange as part of a capacity assignment. It does not buy the exchange. That is the evidence.[36] The sale of a regulated service generates regulated revenue.

69. Again, as Mr, Isherwood testified:

[35] CME Argument, pp. 30-31

[36] Further, the form of the exchange agreement itself is also in the record at K1.1, Tab 19, JC-4-7-10, Attachment 3

> The second phase of that transaction is we do an exchange where we give them gas at Empress, they give us gas back at the NDA or WDA, and we get paid for that. So it's actually we're selling an exchange.[37]

70. CME's submission on this point appears to confuse the fact that in the case of a capacity assignment, in-franchise customers continue to require gas supply. Accordingly, while Union has assigned capacity, pursuant to the gas supply plan, it continues to hold commodity. This gas is then exchanged (Union sells an exchange) for delivery of a like quantity at a location as needed by Union's customers.

71. With respect to FT RAM optimization transactions, CME again advances two main arguments as to why revenues arising from these transactions should be treated as a gas cost reduction because:

(a) a necessary "precursor" to FT RAM optimization is a decision by Union to "refrain from using the FT service" it has contracted for; and

(b) Union holds the "purchasing power of the IT Optionality" in trust for ratepayers.[38]

72. Again, neither argument withstands scrutiny. Each is discussed below:

73. *The decision to refrain*. CME says that because Union's decision not to flow gas along the full length of its contracted transportation path is not "prompted by factors beyond Union's control", revenues arising from the related optimization transaction do not represent transactional services.

74. CME's argument on this point essentially repeats its arguments about the permissible scope of exchange activity and the assertion that they are limited to weather and related circumstances. For the reasons set out above, this argument is without merit. The flaw in CME's argument is posed by the Board's decision in relation to DOS-MN. As described above, in that case, Union took advantage of DOS-MN by simply electing to replace supply it had planned to buy at Dawn, including the cost associated with the transportation of that supply, with

[37] Technical Conference, Transcript, pp. 53 and 131-132

[38] CME Argument, pp. 33-35

less expensive supply transported from Empress. In other words, Union elected, based on market factors, to depart from the gas supply plan transportation path; it made a choice based on unplanned circumstances.

75. In the result, the fact that Union departed from the gas supply plan was of no moment to the Board. As set out above, it held that the benefit arising from this decision by Union should not be passed through as a reduction in gas costs but rather be treated as optimization revenue.

76. In addition, CME's argument also overlooks the fact that, in all cases, the FT demand charge must be paid to TCPL. Contrary to CME's argument, these charges are not avoided. Even if gas were transported using IT service, and FT-RAM credit applied, the cost of the underlying FT contract (and related demand charges) would remain.

77. *No trust relationship*. CME begins its argument with the premise that the relationship between Union and ratepayers in relation to gas supply is an express trust. It repeats the premise here. The premise, discussed below, is flawed. Union does not have a trust relationship with ratepayers in relation to "IT Optionality", or otherwise. There are no "trust funds" and nothing has been misappropriated. Union simply defrays some portion of the cost of the related exchange by the application of FT RAM credits. CME's argument on this issue is also inconsistent: on the one hand CME says that the permissible scope of optimization is limited but here, however, it recognizes that the exchanges at issue result "after it [Union] has satisfied utility transportation requirements".[39] Ultimately, and contrary to CME's submission, the FT-RAM optimization exchange is identical in all respects to the base exchange, including as to the cost of using incremental upstream transaction. The only difference is in the application of the credits.

C. THE ALLEGED TRUSTEE AND FIDUCIARY RELATIONSHIPS

78. CME submits that alleged net overpayments to Union are subject to an express trust which CME submits was created by paragraph 5.1 of the settlement agreement in EB-2007-0606. CME also submits that Union: (i) owes a fiduciary duty of loyalty to ratepayers, (ii) consequently

[39] CME Argument, p. 34, para. 86

requires the informed consent of ratepayers in order to profit from the use of property held in trust, (iii) did not have ratepayers informed consent to optimization and, as a result (iv) all of the optimization amounts that CME characterizes as, in fact, pass-through gas supply costs are subject to a constructive trust to the benefit of ratepayers.

79. For the reasons set out below, each of these submissions by CME is wrong.

The Alleged Trust

80. In so far as CME seeks relief with respect to what it alleges are net overpayments to Union prior to 2011, CME is blithely disregarding the terms of the preliminary issue framed by the Board in Procedural Order No. 3. The preliminary issue is limited to optimization revenues in 2011. These submissions by CME are not properly before the Board and should be disregarded. In any event, years prior to 2011 are subject to final orders from the Board and are not subject, at law, to adjustment.[40]

81. In so far as CME seeks relief with respect to what it alleges are net overpayments to Union in 2011, it is on the basis that these alleged net overpayments are subject to an express trust. CME submits that this alleged express trust was created by paragraph 5.1 of the settlement agreement in EB-2007-0606, which settlement agreement established IRM. (SEC questions the existence of this alleged trust in its argument.)[41] Paragraph 5.1 provides that upstream transportation costs "will not be adjusted by the price cap index but will be passed through to rates". This submission by CME that trust law principles should be applied in the context of a highly regulated commercial relationship disregards basic principles of trust law and is not supported by any authority. Additionally, all of the trust law cases provided by CME in its book of authorities are constructive trust cases, not express trust cases. As such, they are of no assistance to CME.

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[40] It is well established that the Board does not have the authority to retrospectively change rates. In *Northwestern Utilities v. The City of Edmonton*, [1979] 1 S.C.R. 684, Supreme Court stated at page 691:

> It is clear from many provisions of the Gas Utilities Act that the Board must act prospectively and may not award rates which may cover expenses incurred in the past and not recovered under rates established for past periods.

[41] CME Argument, para. 5, footnote 1 and para. 19. SEC Argument at p. 2

82. In order to constitute a trust, an arrangement must have three characteristics, known as the three certainties: certainty of intent, of subject-matter and of object.[42] In the present case at least two of the three required certainties are absent. Certainty of intention is not established because there is no evidence that establishes certainty of intention on the part of Union to create a trust.[43] Certainty of subject matter is not established because there is no evidence that establishes certainty of the subject matter of the alleged trust.

83. *Certainty of intention*. The intention to create a trust must be expressed clearly and unequivocally. Where certainty of intention cannot be established, no trust will be found.[44] Paragraph 5.1 of the settlement agreement does not show any intention—let alone a certain intention—on the part of the parties to the settlement agreement to create a relationship of trustee and beneficiary between Union and ratepayers. What it does establish is the parties' agreement regarding the future regulatory treatment of upstream transportation costs under IRM. The agreement between the parties on this point was that upstream transportation costs were to be treated under IRM as they had been treated in the upstream transportation costs deferral accounts before the introduction of IRM. CME's contention that the settlement agreement reflects the "intention of the parties to create upstream transportation costs as a pass-through item of expense" cannot be sustained in the face of Union's pre-filed evidence, where Union clearly stated "The cost of gas supply, upstream transportation and gas supply related balancing will continue to be passed through to customers through the Quarterly Rate Adjustment Mechanism ("QRAM"), including the prospective disposition of gas supply related to deferral accounts."[45] Equally, CME points to no decision of the Board in which it was held that the regulatory arrangements prior to and during IRM amounted to a trust.

84. CME relies solely on paragraph 5.1 of the settlement agreement as evidence of the parties intention to create an express trust. CME can point to no trust documents, no declaration of trust and nothing in rate schedules or customer bills indicative of an intention to create a trust. There

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[42] D.W.M. Waters et al., *Waters' Law of Trusts in Canada* (Toronto: Thomson Carswell, 2005), p. 132

[43] *Ibid*

[44] *L'Abbee v.* Denis, 2008 ONCA 328 (CanLII), paras. 4-5

[45] K1.1, Tab 5, EB-2007-0606, Pre-filed Evidence, p. 37

is no evidence that the parties to the settlement agreement intended to create an express trust and no such trust exists.

85. *Certainty of subject matter*. The subject matter of a trust must be expressed clearly and unequivocally. Where certainty of subject matter cannot be established, no trust will be found.[46] CME submits that the subject matter of the trust is "monies recovered by Union in rates to cover the actual costs it incurs to obtain from third parties the transportation of utility gas to the system."[47] CME can point to no trust documents, no declaration of trust and nothing in rate schedules or customer bills indicating that this is, in fact, the subject matter of the alleged trust. There is no evidence to support this bald allegation about the subject matter of the alleged trust and no such trust exists.

86. The alleged subject matter of the alleged trust is also conceptually muddled and implausibly cumbersome. Ratepayers appear, in CME's argument, to be both the settlors of the trust and the future beneficiaries of the trust, while Union is the trustee. If it was the intention of ratepayers, as the settlors of the trust, to create such a trust for their own benefit then some explanation for this approach would presumably have been provided at the time. None was.

87. Finally, none of the trust law authorities relied on by CME deal with the application of trust principles in the context of a regulated industry, let alone a highly regulated utility. This is important because the application of trust law principles in the regulatory context would undermine the certainty and finality required for a utility regulatory regime to operate effectively. The application of trust law (or fiduciary principles) would also be contrary to the intention of the legislature. Nothing in the *Ontario Energy Board Act*, pursuant to which Union is regulated and the Board derives its power, reflects an intention to impose a trust (or fiduciary) relationship.

88. On the whole, the relationship between Union and ratepayers is marked by the usual indicia of a regulated commercial relationship, not a trust.

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[46] *L'Abbee v. Denis*, 2008 ONCA 328 (CanLII), paras. 4-5

[47] CME Argument, p. 12, para. 19

The Alleged Fiduciary Duty

89. The Board is a highly sophisticated economic regulator. It regulates commercial activity (here, the supply of natural gas). While Union is required to (and does) act in good faith to facilitate its effective regulation by the Board, this requirement does not, as a matter of law, transform Union into a fiduciary of ratepayers. As a matter of common law, courts rarely find that fiduciary relationships arise in the commercial context.

90. The Supreme Court of Canada has held that the creation of a fiduciary relationship requires an undertaking on the part of the fiduciary to act as a fiduciary.[48] There is no evidence that Union has undertaken to act as a fiduciary to ratepayers and, in fact, Union has not done so.

91. The *Victoria Order of Nurses* case relied on by CME is of no assistance to CME, and is in fact unhelpful to its argument. The case deals with the duties of charities in administering donated funds under the *Charities Accounting Act*, R.S.O. 1990, c. 10 (the "*CAA*"). In *Victoria Order of Nurses* the Court concluded that the charitable corporation, the conduct of which was being questioned, was a trustee because section 1(2) of the *CAA* expressly deems a charity to be a trustee in connection with the management of donated funds and expressly deems property received by a charity to be trust property.[49] This does not support CME's position that Union is a fiduciary of ratepayers. On the contrary, because nothing in the *Ontario Energy Board Act* makes Union a fiduciary the *Victoria Order of Nurses* decision is in fact unhelpful to CME's case.

92. SEC's submissions on Union's alleged fiduciary duty to ratepayers are also unhelpful. All of SEC's examples of fiduciary-beneficiary relationships are distinguishable from Union's relationship with ratepayers because, in each case, the source of the fiduciary relationship does not apply to Union's relationship with ratepayers. As discussed above, Union is not a trustee of ratepayers. The fiduciary relationship between a director and a corporation is governed by statute. As discussed above, the *Ontario Energy Board Act* does not impose fiduciary duties on

[48] *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247.

[49] *Victoria Order of Nurses for Canada and Victorian Order of Nurses for Canada—Ontario Branch v. Greater Hamilton Wellness Foundation*, 2011 CarswellOnt 12086, 2011 ONSC 5684, para. 69; CAA, s. 1(2).

Union. Finally, while lawyer-client and agent-principal relationships are governed by longstanding common law, no common law authority has been cited for the proposition that utilities are fiduciaries of their ratepayers. SEC's submissions on this issue should be rejected in their entirety.

93. Finally, the fact that ratepayers pay for gas supply does not make them the legal or beneficial owner of any upstream transportation assets. As the Supreme Court of Canada made clear in ATCO, ratepayers pay for regulated service but doing so does not create an ownership interest in assets otherwise held by the Union. As the Court stated:

> The respondent in this case is a public utility in Alberta which delivers natural gas. This public utility is nothing more than a private corporation subject to certain regulatory constraints. Fundamentally, it is like any other privately held company: it obtains the necessary funding from investors through public issues of shares in stock and bond markets; it is the sole owner of the resources, land and other assets; it constructs plants, purchases equipment, and contracts with employees to provide the services; it realizes profits resulting from the application of the rates approved by the Alberta Energy and Utilities Board
>
> ….
>
> Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors.[50]

D. NO PROPER COMPLAINT REGARDING GAS SUPPLY PLAN

94. Led by FRPO, several intervenors argue that "independent" of IRM, Union should not be entitled to profit by "retaining excessive gas supply transportation contracts". The argument is misconceived. The relevant context, as the Board's preliminary issue states explicitly, is the IRM framework and the treatment of optimization revenues. The prudence of Union's gas supply portfolio in 2011 is not at issue in this proceeding, nor could it be. Union's 2011 upstream transportation portfolio is the subject of final orders issued by the Board in connection with multiple of QRAM proceedings. As discussed above, the Board has no jurisdiction to engage in retroactive rate-making to alter these orders.

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[50] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, para. 3 and 68

95. In any event, consistent with Union's prior Board approved practice, Union maintained in 2011 (and today) a balanced gas supply portfolio, designed to meet annual, seasonal and peak day in-franchise bundled customer needs (i.e. system supply and bundled DP customers). There is no evidence otherwise.

96. Union discussed its gas supply plan, including the principles that guide that plan and the use of SENDOUT to model the various possible transportation routes in EB-2011-0210. There, Union explained that it plans to meet in-franchise bundled customer demands through the combination of firm upstream transportation contracts, Dawn sourced supply, storage capacity and STS deliveries. Union acquires only that capacity, and commodity, necessary to meet those demands, and no more. Union relies on those submissions.

97. FRPO suggests that Union's gas supply plan is not "right-sized".[51] Despite this complaint it does not point to any specific FT contract (or the related parameters) held by Union as being inappropriate. Its assertion that ratepayers are "burdened" with the cost of transport Union does not need on a peak day has no evidentiary basis and is, with respect, nonsense. FRPO also ignores the fact that since 2002 Union has reduced its level of contracted long haul FT capacity by over 47 percent, while increasing its short haul capacity from zero to 115,000 GJ/day.

98. Equally wrong are FRPO's comments regarding the additional response provided by Union at FRPO's request. No complaint was made with the response at the time it was provided.[52] Further, while FRPO may not like the answer, as it exposes the flaws in FRPO's theory of serving in-franchise demands through STFT and IT service as opposed to FT, that does not mean the answer is non-responsive.

99. Finally, arguments that Union should have planned to make use of "cheaper" FT-RAM transportation fundamentally misunderstand the program. As discussed above, even if Union were to make use of IT transportation it is not less expensive because the full FT demand charge

[51] FRPO Argument, p. 1

[52] Union Additional Response, dated August 29, 2012. The response is comprehensive, covering five pages, plus a further four pages of schedules.

must always be paid by Union. There are no FT-RAM credits unless Union first holds an FT contract and pays the associated demand charge. Indeed, absent FT-RAM, intervenor arguments in this respect would result in Union paying more than it does now for gas supply.

E. UNION'S ALLEGED FAILURE TO DISCLOSE

100. The intervenors' focus on the mechanics of FT-RAM and the alleged inadequacy of Union's "disclosure" of those mechanics is entirely misplaced. The intervenors' suggestion that Union has failed to adequately "disclose" its FT-RAM optimization activities inappropriately shifts the focus from the question of whether Union's FT-RAM optimization activities are consistent with the analytical framework of IRM. The question is not whether Union's FT-RAM optimization activities were "material" and adequately "disclosed". The question is whether Union's FT-RAM optimization activities were consistent with the IRM framework. As has been demonstrated above, they were consistent with the IRM framework.

101. In any event, as has been demonstrated above, intervenors and the Board were aware of Union's approach to optimization from proceedings before and during IRM, including EB-2008-0220 and EB-2009-0101.

102. Insofar as the intervenors' complaints about "disclosure" relate to the alleged issue of informed consent in the fiduciary context, they are irrelevant. The issue of informed consent would only arise if Union was found to be a fiduciary of ratepayers, had made use of ratepayers' property for its own profit and sought to prove that it had ratepayers' consent to use that property for that purpose. As Union was not a fiduciary of ratepayers, the issue of informed consent does not arise, nor does the adequacy of the disclosure provided to obtain informed consent.

F. CONCLUSION

103. The sole issue for the hearing as set out in the Board's Procedural Order No. 3 is whether Union has treated the upstream transportation optimization revenues appropriately in 2011 in the context of Union's existing IRM framework. It is Union's position that, for the reasons set out above, and those set out in its Argument in Chief, the answer to the question before the Board is yes. The revenues have been treated appropriately.

104. The Board should make principle and fact based decisions. Principled decision making means adhering to the settlement agreement, as well as prior Board decisions and accounting orders. The IRM framework has worked effectively, and has achieved the objectives first established by the Board. There is no evidence that any individual customer views the results of IRM as other than positive. The various intervenor arguments on Union's treatment of optimization revenues are not based on principle, consistency or proper accounting; they are simply an attempt to retroactively renegotiate the terms of the IRM agreement and claw back regulated earnings to which they have no entitlement. The Board should dismiss their arguments.

105. It is imperative that parties have certainty during the IRM term. For the settlement agreement process and for IRM to succeed in the future, utilities need to know that if they make investments in revenue enhancing activities the gains will not be clawed back in the future. It is in the public interest that utilities have enough certainty so they can make requisite investments.

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