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By electronic filing

November 13, 2012

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

Dear Ms Walli,

**Enbridge Gas Distribution Inc. ("EGD") 2013 Rates
- Submissions**

Board File No.:	EB-2011-0354
Our File No.:	339583-000132

On behalf of Canadian Manufacturers & Exporters ("CME"), we are enclosing our Process Submissions.

We are also attaching a copy of the Cover Sheet and Index of the Joint Compendium compiled on behalf of Consumers Council of Canada ("CCC") and CME. Three (3) hard copies of this Joint Compendium were forwarded to the Board Secretary by courier on Monday, November 12, 2012.

Recipients of this letter who wish to obtain an electronic copy of the Joint Compendium can do so by contacting my assistant, Suzanne Castanza at scastanza@blg.com.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Peter C. P. Thompson', with a stylized flourish at the end.

Peter C. P. Thompson, Q.C.

PCT\slc
enclosures

c. Robert Bourke (EGD)
Intervenors EB-2011-0354
Paul Clipsham (CME)

OTT01: 5366933: v1

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

AND IN THE MATTER OF an application filed by Enbridge Gas Distribution Inc. for an Order or Orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas commencing January 1, 2013

**SUBMISSIONS OF
CANADIAN MANUFACTURERS & EXPORTERS ("CME")**

November 13, 2012

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I. INTRODUCTION

1. These submissions, made on behalf of Canadian Manufacturers & Exporters (“CME”), pertain to the Process Issues described in the Experts’ Conference section of Procedural Order No. 5 dated October 15, 2012.
2. The views on process expressed herein are informed by the contents of materials contained in a Joint Compendium compiled by counsel for Consumers Council of Canada (“CCC”) and CME. Copies of the Compendium were circulated on Friday, November 9, 2012, to counsel for each of the parties who sponsored expert evidence in this case, namely: Enbridge Gas Distribution Inc. (“EGD”), CCC, CME, Schools Energy Coalition (“SEC”), and Vulnerable Energy Consumers Coalition (“VECC”). Copies were also provided to counsel for Board Staff and to the Board Secretary.
3. It is hoped that these materials will assist the Board in adopting processes relating to the establishment and conduct of a mandated Experts’ Conference pursuant to Rule 13A¹ of the Board’s *Rules of Practice* (the “*Rules*”) that comply with the legal requirements of adjudicative impartiality and procedural fairness to which the Board, as a quasi-judicial Tribunal, is obliged to adhere.²

¹ Ontario Energy Board *Rules of Practice and Procedure* (the “*Rules*”), Rule 13A “Expert Evidence”, Tab 1 of Joint Compendium of CCC and CME.

² That an exercise by the Board of its discretion to mandate an Experts’ Conference pursuant to the provisions of Rule 13A engages the legal requirements of judicial impartiality and procedural fairness is the subject matter of comments contained in materials in the Joint Compendium of CCC and CME. See for example the following:

- Tab 15 of the Joint Compendium of CCC and CME, pp.177-179: Gary Edmond, “Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure” (2009) 72 *Law & Contemp. Probs.* 159.
- Tab 19 of the Joint Compendium of CCC and CME, p.17: Bryan Finlay, QC and Kristi Collins, “New Tools for Managing Evidence in Complex Litigation” (Paper delivered at Insight Information seminar on *Complex, Mega and Advanced Litigation*, Toronto, February 28, 2011), online: WeirFoulds LLP at www.weirfoulds.com.
- Tab 20 of the Joint Compendium of CCC and CME, pp.5-6, Freya Kristjanson, “Hot-Tubs” and Concurrent Evidence: Improving Administrative Proceedings” (2012) 25 *Can. J. Admin. L. & Prac.* 79 at 80.

II. OVERVIEW

4. To our knowledge, this case marks the first opportunity for parties, who regularly appear in proceedings before the Board, to make submissions with respect to the appropriate processes to be followed in connection with an exercise by the Board of its discretion under Rule 13A to mandate an Experts' Conference.
5. CME supports the use of Experts' Conferences in proceedings before the Board for the purpose of bringing sharper focus to bear on the underlying facts and assumptions and conclusions drawn therefrom by witnesses whose special expertise is required to enable the Board to fully comprehend those facts, assumptions and conclusions based thereon.
6. However, to achieve such an outcome, the mandate for the Conference needs to be confined to a discussion of underlying facts, assumptions and conclusions that fall within the areas of the special expertise of the witnesses, being an expertise that needs to be shared with the Tribunal and other listeners to enable them to fully comprehend those facts and assumptions, as well as the rationale for the conclusions drawn therefrom.
7. The list of points to be discussed at the Conference should neither prompt nor allow the experts to address matters that do not call for an expert opinion. For example, expert evidence is not required to answer the question "What are the Board's current policies with respect to a consideration of proposed changes in the Equity Ratios of the gas utilities it regulates?" The answer to this question turns on a plain reading of the Board's December 2009 Cost of Capital Report. Expert evidence is not needed to interpret the relevant portion of the Board's Report.
8. Similarly, the question of whether utility-specific changes to the Board's current Capital Structure policy for gas utilities should be considered in advance of the initial review in 2014 contemplated by the Board's December 2009 Cost of Capital Report, is a question upon which expert evidence is neither appropriate, nor required. Cost of Capital experts have no particular expertise in interpreting Board reports delineating current Board

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- policies, including the processes that are to apply to provide a periodic review of those policies.
9. An assertion by a utility Cost of Capital expert witness that the Capital Structure features of the Board's current policy for gas utilities are flawed or incorrect stands on the same footing as an assertion by intervenors that the Formula Return on Equity ("ROE") specified in the Board's December 2009 Cost of Capital Report is inappropriately high for a specific utility. Absent a demonstration of exceptional utility-specific circumstances, these are matters for the review process described in the Board's December 2009 Cost of Capital Report. Expert evidence is not needed to enable the Board to determine these questions.
 10. Cost of Capital experts have no particular expertise in interpreting Court or Board Decisions defining the "Fair Return Standard" which is a legal requirement. This topic is a matter for legal argument.
 11. If the matters discussed at an Experts' Conference are not carefully confined to the limits of the factual subject matter area which requires explanation from those possessing a particular expertise, then the probabilities are that the Conference will produce a Joint Written Statement that is overly broad in that it includes topics which are not the proper subject matter of opinion evidence from those having expertise in the operation of Capital Markets.
 12. The scope of the submissions that the Board has invited in this particular case is limited to the process to be followed at the November 19 and 20, 2012 oral hearing of the evidence from the panel of disagreeing experts.³ Regrettably, affected parties were not invited to make submissions on the appropriate process to follow to establish the

³ See Procedural Order No. 5 dated October 15, 2012, at page 4 where the Board stated as follows:

"As this is a new process at this Board, the Board is inviting all parties to file submissions with respect to the most appropriate procedure for the oral hearing of the concurrent expert witness panel in light of the objectives of the Board as expressed herein and in Rule 13A of the Board's Rules."

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- framework to guide the conduct of the Conference before the Board exercised its discretion under Rule 13A to mandate the Conference.
13. We are stating the obvious when we say that the framework that governs the conduct of an Experts' Conference will affect its output. It is equally obvious to state that the output of the Conference will influence the extent to which affected parties will wish to question the disagreeing experts at the subsequent oral hearing.
 14. The point is, that as a result of what has already taken place in this particular case, there are a number of case-specific factors that should influence a determination of the process to be followed at the oral hearing of evidence pertaining to the unresolved Equity Ratio issue. These case-specific factors include the following:
 - (a) The nature of the expert evidence tendered in this case;
 - (b) The incompatibility of the scope of matters discussed with the objectives of an Experts' Conference; and
 - (c) The breadth of the Conference output, being the Joint Written Statement dated November 9, 2012.
 15. Put another way, matters pertaining to the processes leading to a direction of and the conduct of a mandated Experts' Conference and the process for the oral hearing of the evidence of a panel of disagreeing experts that have participated in such a conference are process matters that are inextricably intertwined.
 16. Having regard to this reality, we provide below our analysis of the above-described case-specific factors that, in our submission, have a bearing on the process to be followed at the oral hearing of evidence on November 19 and 20, 2012. We provide this analysis having regard to the matters that we submit have taken place in this case that fall outside the ambit of the objectives of an Experts' Conference specified in Rule 13A and in Procedural Order No. 5.

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17. We then discuss the procedure that should ideally be followed from the outset with respect to an exercise by the Board of its discretion under Rule 13A so as to confine the Experts' Conference to matters that are the proper subject matter of expert testimony.
 18. From this analysis, we then derive a set of principles that we urge the Board to apply to guide it in this and further cases when issuing process directions under the auspices of Rule 13A.
 19. All three (3) of these factors, namely:
 - (a) What has taken place in this particular case;
 - (b) The procedure that ideally should be followed from the outset; and
 - (c) The guiding principles that we urge the Board to apply,prompt our recommendations for the process that should be followed when the panel of disagreeing experts provides their oral evidence.

III. CASE-SPECIFIC FACTORS

A. Nature of the Evidence of the Disagreeing Experts

20. The evidence from the experts in this particular case relates to the Cost of Capital. Cost of Capital issues are a recurring component of utility rate cases. The Board, and other regulatory Tribunals in Canada, have already taken action to minimize the areas of potential dispute between Cost of Capital experts by establishing policies that apply to the periodic determination of a utility's Cost of Debt and Equity Capital and its appropriate Debt & Equity Capital Structure ratios.
21. The current Cost of Capital policies applicable to EGD were established by the Board less than three (3) years ago, in December 2009. The Capital Structure features of these policies call for a demonstration of a material change in risk to justify a request for an increase in the Equity Ratio of utility Capital Structure.

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22. EGD actively participated in the establishment of these policies and did not question the outcome. In fact, EGD sought to accelerate its derivation of benefits from the policies by seeking the benefit of the Board's higher Formula ROE before the expiry of its 5-year Incentive Regulation Mechanism ("IRM") Plan.
 23. The Board's Report establishing its current Cost of Capital policies includes a process for periodic review every five (5) years, with the initial review to take place in 2014. Matters pertaining to the alleged inappropriateness or incorrectness of the Board's current policies fall within the ambit of the periodic review process contemplated by the current policies.
 24. The specific approvals sought by EGD in its 2013 Rates Application do not include a request that it be exempted from any of the Cost of Capital policies specified in the Board's Report.⁴ There is no assertion in EGD's application that it is operating under exceptionally difficult circumstances that would justify a decision to exempt it from an application of the Board's current policies.⁵
 25. The Board has previously ruled that parties are not allowed to assert that elements of its Cost of Capital policy should not be applied to particular utilities, absent a demonstration of exceptional utility-specific circumstances.⁶
 26. The question of whether any feature of the Board's current policies is incorrect or flawed and/or inappropriate because of special circumstances was not an issue listed by the Board for consideration in this proceeding. The unresolved issue with respect to EGD's Equity Ratio listed for determination in this case is described using the same words as the unresolved Equity Ratio in Union Gas Limited's ("Union") 2013 Rebasing case.

⁴ See EB-2011-0354, Exhibit A1, Tab 2, Schedule 1, EGD's formal Application.

⁵ See EB-2011-0354, Exhibit A, Tab 3, Schedule 1, EGD's List of Specific Approvals Requested.

⁶ Hydro One Networks Inc., EB-2009-0096, Oral Decision dated December 15, 2009, at Transcript Volume 6, page 147.

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27. In its recent decision in Union's case, the Board has confirmed that requests for an increase in Equity Ratio turn on a consideration of matters related to increases in risk as stated in the December 2009 Cost of Capital Report.⁷
28. We submit that, in these circumstances, the scope of the issues and sub-issues of fact and opinion to be discussed during the Experts' Conference by the witnesses on the basis of their special expertise in the operation of Capital Markets should have been confined to facts and opinions related to the question of whether EGD's risks had materially increased since 2006 when the Board fixed its Equity Ratio at 36%.

B. Incompatibility of the Scope of Matters Listed for Discussion with the Objectives of an Experts' Conference

29. As stated in OEB Rule 13A.04 and reiterated in the "Experts' Conference" portion of Procedural Order No. 5, the objectives of such a conference are to narrow issues, identify the points on which the views of the experts differ and are in agreement, and to prepare a Joint Written Statement to be admissible as evidence at the oral hearing.
30. In the context of these objectives, it is of importance to place the scope of the issues which experts should be debating at a conference in its proper context, having regard to the nature and the purpose of expert evidence.
31. Parties opposite in interest to one another retain experts to provide opinion evidence to support allegations made by one party in an adjudicative process that are disputed by another party. Experts provide opinions that they draw from underlying facts and assumptions within a subject matter area that requires explanation from those having a particular expertise. Testimony from those with such expertise is required in order to

⁷ Union Gas Limited, EB-2011-0210 Decision and Order dated October 25, 2012, where the Board stated at page 49 as follows:

"Union reiterated throughout the proceeding that its business and/or financial risks have not changed since 2006. Accordingly, there is no reasonable basis for the Board to increase Union's deemed common equity ratio above the 36% level presently reflected in rates."

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- enable the listener to fully comprehend those facts and assumptions and the conclusions based thereon.
32. Experts testify to rationalize and justify those opinions drawn from those facts and assumptions. This is the evidence of experts that is to be impartial, fair and objective as specified in OEB Rule 13A.02.
 33. While the expert is to provide evidence to assist the Board (OEB Rule 13A.02), the assistance is for the purpose of helping the adjudicator comprehend the underlying facts and assumptions and the conclusions drawn therefrom. The issues that experts for parties opposite in interest should discuss at a pre-hearing Experts' Conference are the underlying facts and assumptions that fall within the subject matter of their particular expertise, as well as the conclusions to be drawn from those facts and assumptions so that a list can be compiled of the facts and assumptions upon which they agree or disagree, and the conclusions to be drawn therefrom upon which they agree or disagree.
 34. The issues and sub-issues to be discussed and narrowed, if possible, are not the issues contained in the Board's Final Issues List. It is not for the experts to define or re-define the disputed issues between the parties, being the matters that the Board has listed for determination in the proceeding. The issues upon which the experts are to focus are the issues of fact and opinion that fall within the ambit of their expertise and no other issues.
 35. Having regard to the foregoing, it is of particular concern to us that the List of Discussion Points prepared by Board Staff and attached to Procedural Order No. 5 did not confine the matters to be discussed at the Conference to issues and sub-issues of fact and opinion falling within the particular expertise of the Capital Market witnesses and, in particular, issues of fact and opinion related to any changes in risks facing EGD.
 36. As already noted, the List of Discussion Points prepared by Board Staff was, regrettably, not the subject matter of any prior submissions from the sponsors of the expert witnesses. Moreover, the List is not framed as a list of issues or sub-issues of fact or

opinion that fall within the ambit of the Cost of Capital expertise of the witnesses. It is not a list of issues but merely a list of topics.

37. We submit that the list of items to be discussed at the Conference should be framed as a list of issues and sub-issues of fact and opinion with these items to focus on the underlying facts and opinions upon which each expert relies. The list of issues and sub-issues should not encompass matters of fact or opinion that fall well outside the ambit of the particular expertise of the witnesses, or are issues of fact and law or purely legal issues. Witnesses with particular expertise in the operation of Capital Markets are not to provide their opinions on legal issues.
38. When establishing the process to govern the conduct of a mandated Experts' Conference, the Board needs to take care to assure that the participation by its representatives in the Conference does not create an appearance of overriding the Tribunal's fundamental obligation to maintain an appearance of impartiality and to satisfy the requirements of procedural fairness.⁸
39. We wish to emphasize that we are not suggesting that the manner in which the Experts' Conference in this particular case was conducted created an appearance of impartiality. We are simply flagging the topic as a matter that needs to be considered. An Experts' Conference is not an opportunity for Tribunal representatives to prompt a discussion of a broad range of topics that are unrelated to the underlying facts and opinions that fall within the ambit of the particular expertise of the, or to enable Board Staff to conduct a pre-hearing examination of expert witnesses retained by other parties, or to treat those witnesses as if they were the Tribunal's witnesses.

C. Conference Output – An Overly Broad Joint Written Statement

40. Because the List of Discussion Points that was used to conduct the Conference was neither framed as a list of issues and sub-issues of fact or opinion confined to the

⁸ See Footnote 2 above.

particular Capital Markets expertise of the witnesses, there are material portions of the output of the Experts' Conference in this case, being the Joint Written Statement dated November 9, 2012, that go well beyond opinions drawn from facts falling within a subject matter area that requires explanations from those having Capital Markets expertise in order to enable the audience to fully comprehend those facts and the conclusions based thereon.

41. This reality is reflected by the caveat at page 3 of the Joint Written Statement as follows:

The form of this Statement was suggested by the facilitator. The structure of the Statement follows the nine discussion points, suggested by Board staff as the starting point for discussions by the experts, and listed in Appendix C of the Board's Decision on Settlement Agreement and Procedural Order No.5, EB-2011-0354, October 15, 2012. The Statement contains the positions of the experts on the evidence filed by James Coyne and Julie Lieberman of Concentric Energy Advisors on behalf of the applicant, Enbridge Gas Distribution Inc., and Laurence Booth on behalf of The Canadian Manufacturers & Exporters (CME), the Consumers Council of Canada (CCC), the School Energy Coalition (SEC), and the Vulnerable Energy Consumers Coalition (VECC). The Statement does not represent an agreement by the experts that all of the nine discussion points in it are relevant to a determination of the issue of whether the proposed change in capital structure increasing Enbridge's deemed common equity component from 36% to 42% is appropriate. The experts refer to their full evidence for a complete presentation of the respective documentation of their positions.

Where the Statement refers to legal requirements, the comments reflect only the experts' interpretation of those requirements. The experts are not lawyers and cannot express an opinion on legal issues.

42. In this particular case, the overly broad List of Discussion Points has influenced the contents of the Joint Written Statement. For example, the Joint Written Statement includes argument pertaining to the meaning and scope of the "Fair Return Standard" which, as already noted, is a legal requirement and not the subject matter of expert opinion evidence. The List of Discussion Points prompted the experts to provide their interpretation of current Board policies, even though, as previously noted, interpreting Board policies does not fall within the ambit of the particular expertise possessed by Cost of Capital witnesses. Moreover, portions of the Joint Written Statement attributable

to EGD's experts allege flaws and errors in current Board policies, notwithstanding the fact, mentioned earlier, that the question of whether any aspects of the Board's current policies are in error is not an issue listed for consideration in this hearing.

43. The process directions that the Board issues pertaining to the hearing of evidence on November 19 and 20, 2012, need to take into account the reality that much of what is contained in the Joint Written Statement falls outside the ambit of the particular matter upon which the Cost of Capital expertise of the witnesses is required, namely, whether EGD's risks have materially changed since 2006.

IV. PROCEDURE THAT IDEALLY SHOULD BE FOLLOWED

44. We reiterate that in this section of our submissions, we propose to discuss the procedure that should ideally be followed from the outset with respect to an exercise by the Board of its discretion under Rule 13A to mandate an Experts' Conference. The five (5) questions we use to frame this discussion are as follows:
- (a) What criteria should be applied when the Board considers whether or not to direct an Experts' Conference?
 - (b) How should the framework for the Conference be established before it begins?
 - (c) Who should be allowed to attend and participate in the Experts' Conference?
 - (d) What output options from the Conference should be available?
 - (e) How should the questioning of a panel of disagreeing experts be conducted at the oral hearing?
45. Our responses to these questions then lead us to suggest a set of principles that should guide the Board when issuing process directions pertaining to a mandated Experts' Conference conducted under the auspices of Rule 13A.

A. What Criteria should be Applied when the Board Considers Whether or Not to Direct an Experts' Conference?

46. Unlike Rule 20.05(1) of the *Ontario Rules of Civil Procedure*,⁹ Board Rule 13A does not list any specific criteria for the Board to consider before determining to mandate an Experts' Conference pursuant to Rule 13A.04.
47. The criteria to be considered by the Court under Rule 20.05(1)(k) of the *Rules of Civil Procedure*, mandating such a Conference, are firstly a requirement that the cost or time savings or other benefits that may be achieved from the meeting of the experts are proportionate to the amounts at stake or the importance of the issues involved in a case. If that criterion is satisfied, then there are two (2) other factors for the Court to consider. They are as follows:
- (a) Whether there is a reasonable prospect for agreement on some or all of the issues of fact and/or opinion upon which the experts have based their conclusions; or
 - (b) Whether the rationale for the opposing expert's opinion is unknown and, as a result, clarification on areas of disagreement would assist the parties and the Court.
48. Simply put, the *Rules of Civil Procedure* suggest that there should be some prospect of achieving either some material clarification of the expert evidence already filed, or achieving an agreement between the experts with respect to some of the issues of fact and/or opinions upon which they rely, which agreement is not already apparent from materials already filed.
49. We urge the Board to consider establishing similar criteria for determining when it should exercise its discretion in mandating a pre-hearing Experts' Conference. Before such a Conference is mandated, there should be something to indicate that the output of

⁹ See Rule 20.05(1) of the *Ontario Rules of Civil Procedure*, Joint Compendium of CCC and CME at Tab 7. The criteria expressed in this Rule stem from the 2007 Osborne Report pertaining to the Civil Justice Reform Project.

engaging in what can be a very time consuming and expensive process is likely to be a material enhancement over the evidence already filed by the experts.

50. The mere fact that parties opposite in interest in proceedings before the Board have presented and are relying on expert evidence to support the allegations they make should not automatically trigger an exercise by the Board of its discretion to mandate an Experts' Conference, including the provision of a Joint Written Statement under the auspices of Rule 13A.

B. How Should the Framework for the Conference be Established Before it Begins?

51. The first point to be reiterated when considering this question is that the issues and sub-issues that fall within the ambit of an Experts' Conference are issues and sub-issues of fact and opinion that require explanation from the parties possessing a particular expertise in order that the audience can fully comprehend those issues of fact and opinion. Put another way, the purpose of the process is to focus the topic areas to be discussed by the experts to those items on which the Tribunal lacks sufficient expertise to fully comprehend the facts that have given rise to the dispute between adversaries.
52. In achieving this objective of focusing on the issues and sub-issues of fact and opinion that require explanations from witnesses possessing a special expertise, it should be recognized that the parties who have retained experts to support the allegations that they make against one another have a comprehension of those issues of fact and opinions that should be regarded as an important item of input into a determination of those factual issues and sub-issues that should be discussed by the experts at a Conference. An order directing a Conference should not be made without advance notice to and prior consultation with counsel for all sponsors of the expert witnesses so that the list of issues and sub-issues to be discussed at the Conference can be confined to matters falling within the ambit of the witnesses' expertise.

53. It is the sponsors of the witnesses and Tribunal representatives that should collaborate to set the framework for the Conference in advance of its commencement so that the ambit of matters to be discussed will be appropriately confined. It is essential that all sponsors and co-sponsors of the expert witnesses be involved in the setting of the framework for the Conference. While the Tribunal and its representatives maintain ultimate control over establishing the Conference framework, considerations of procedural fairness require that a procedural order establishing the list of issues and sub-issues to be discussed should not be made without first obtaining input from counsel for all of the sponsors and co-sponsors of the expert witnesses.¹⁰

C. Who Should be Allowed to Attend and Participate in the Experts' Conference?

54. We recognize that a primary objective of a mandated Experts' Conference is to have the experts identify the issues and sub-issues of fact and opinion upon which they agree and disagree.
55. Provided the list of issues and sub-issues that is used as the basis for conducting the Conference includes only those matters that fall within the particular area of the witnesses' expertise, then the involvement of those attending and participating in the Conference, other than the witnesses, will be limited to the performance of a supervisory

¹⁰ Materials contained in the Joint Compendium of CCC and CME emphasizing the continuing importance of counsel in a process analogous to that authorized by Rule 13A of the Board's *Rules* include the following:

- Tab 5, Federal Court Rules 52.6(2) that allows counsel for the parties to attend an expert conference.
- Tab 16, Megan A. Yarnall, "Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary?" (2009) 88 Or. L. Rev. 311 at 324. The literature indicates that most Australian Courts and Tribunals ensure that counsel is present and active throughout the concurrent evidence process.
- Tab 17, Scott Welch, "From Witness Box to the Hot Tub: How the "Hot Tub" Approach to Expert Witnesses Might Relax an American Finder of Fact" (2010) 5 J. Int'l Comm. L. & Tech. 154-164. At page 156:

"Although distinctions exist in the process, the attorneys for each side still have a valuable role in the concurrent evidence process. For instance, [...] counsel may also ask questions during the course of the discussion to ensure that an expert's opinion is fully articulated and tested against a contrary opinion. In other courts, with an exception for objections, attorney involvement is limited to the end of the courts' and experts' interchange. At which point, these courts ordinarily allow attorneys from opposing sides to ask their experts relevant and unanswered questions, as well as an opportunity to cross-examine the opposing party's expert witnesses. The process resumes from the beginning until all of the issues at hand are thoroughly examined by the court."

function. That said, there is no reasonable basis for prohibiting counsel for all sponsors and co-sponsors of the witnesses from attending the Conference. Considerations of procedural fairness should operate to allow them to attend. They can, if they wish, elect to refrain from attending the Conference. That said, each of them should have the right to attend and be present if for no other reason than to attempt to assure that neither the witnesses nor the Tribunal representatives facilitating the Conference stray from the limits of the framework that has been established to govern the matters to be discussed. We submit that counsel for those sponsoring the expert witnesses have an absolute right to attend the Conference, if they wish, even though the extent of their limited participation in the process will depend upon the extent to which those more actively involved, being the experts and the Tribunal's representatives, fail to adhere to the framework of the issues and sub-issues that is to govern Conference discussions.

D. What Output Options from the Conference Should be Available?

56. Process directions establishing the framework for the Conference within proper limits should allow for the possibility that a Joint Report may not be justified because discussions between the experts that have taken place during the Conference have revealed that the matters upon which the experts agree and disagree remain essentially unchanged from what was stated in their initially filed evidence. We can see no good reason for forcing experts to produce a Joint Report where the Conference has not resulted in any settled Issues or Sub-Issues of fact or opinion that are material.

E. How Should the Questioning of a Panel of Disagreeing Experts be Conducted at the Oral Hearing?

(i) Company Witnesses First

57. Company witnesses should precede the experts and be subject to examination and cross-examination in the traditional manner.¹¹

(ii) Disagreeing Experts

(1) Preliminaries

58. The sponsors of each expert should conduct an examination-in-chief with respect to qualifications, to be followed by any cross-examination thereon that may be necessary. Following the Board's acceptance of the witnesses as qualified, the sponsors can have the witnesses adopt their pre-filed evidence and the Joint Statement, if one has been filed.

(2) Experts' Questions of One Another

59. Expert witnesses are retained to present underlying facts and assumptions upon which they rely and to rationalize the opinions that they have formed on the basis of such facts and assumptions. As a general rule, examinations in adjudicative proceedings should be conducted by counsel for the parties opposite in interest rather than the witnesses upon whom they rely. Witnesses should not engage in arguments with one another.

¹¹ See for example Tab 15 of the Joint Compendium of CCC and CME, at page 164 where the author, in describing the Australian process that followed the questioning of the experts by the Tribunal, stated as follows:

“The second stage of the concurrent-evidence session more closely resembles the conventional adversarial trial. Here, the lawyers reassert control by directing questions to the expert witnesses. Usually, there is little need for examination-in-chief and the lawyers begin by cross-examining the opposing experts in the usual order. The presence of several expert witnesses allows questions to be put to more than one witness, and witnesses can be asked to comment on the other experts' answers. During the second stage, because of the attempt to produce a less adversarial environment, the lawyers (usually barristers) are not always sure about their entitlement to vigorously cross-examine, and experts are sometimes uncertain about the extent of their constraint.”

See also Tab 10 of the Joint Compendium of CCC and CME, *Apotex Inc. v. AstraZeneca Canada Inc.* 2012 FC 559, [2012] F.C.J. No. 621, Hughes J, where counsel was allowed to provide follow-up questions to the experts following their questioning by the Tribunal.

See also the provisions of Section 282.2 of the *Federal Court Rules*, at page 3 of Tab 5 of the Joint Compendium of CCC and CME, specifically allowing counsel to cross-examine and re-examine experts who testify as a panel.

60. On principle, questions by experts of one another should be discouraged rather than encouraged, and particularly so in proceedings before the Board where counsel representing parties who have retained experts are, generally speaking, possessed of sufficient knowledge to pose questions that one expert witness wishes to ask of another.

(iii) Questions from the Tribunal

61. The Tribunal should proceed with their questions in order to highlight their areas of concern for counsel for the parties. These areas of concern will likely influence the questions put to the experts by counsel for the parties.

(iv) Cross-Examination

62. Each expert should be subject to cross-examination by parties opposite in interest subject to the Board's power to constrain duplicate or redundant questions by successive counsel.¹²

(v) Further Questions from the Tribunal, if any

63. These questions would be to clarify anything of interest to the Tribunal that has emerged in cross-examination.

(vi) Re-Examination

64. Counsel who conducted the examination-in-chief of the experts should be allowed an opportunity to re-examine the expert retained by their respective clients.

V. GUIDING PRINCIPLES

65. The principles that emerge from the foregoing analysis that we submit should guide the Board when exercising its discretion with respect to an Experts' Conference under Rule 13A include the following:

¹² The process of allowing all counsel to cross-examine the experts, following the Tribunal's examination of them, appears to be well established. See, for example, the materials at Tabs 10, 14, 16, 17 and 20 of the Joint Compendium of CCC and CME.

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- (a) To achieve the objectives of the Rule, discussions at an Experts' Conference need to be confined to issues and sub-issues of fact and opinion that require explanation from witnesses possessing a particular expertise so that those facts and opinions can be fully understood by the Tribunal;
 - (b) Sponsors of the expert witnesses must be notified and consulted to obtain their input before the list of issues and sub-issues of fact and opinion to be discussed at the Conference is established;
 - (c) The rights of each sponsor and co-sponsor of the expert witnesses to attend the Conference should not be fettered, even though the role of counsel who choose to attend the Conference will be confined to supervisory functions as long as the other Conference participants do not stray from the framework that has been established to govern its conduct;
 - (d) Tribunal representatives participating in an Experts' Conference should take care to confine their actions to achieving Conference objectives in a manner that is compatible with the legal requirements of adjudicative impartiality and procedural fairness; and
 - (e) Considerations of procedural fairness require that the rights of all interested parties to cross-examine the expert witnesses at a hearing should remain unfettered.

VI. PROCESS RECOMMENDATIONS FOR NOVEMBER 19 and 20, 2012 ORAL HEARING

66. Having regard to the preceding analysis of:

- (a) What has taken place in connection with the mandated Experts' Conference in this particular case;

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- (b) The procedure that, in our view, should ideally be followed from the outset where the Board is considering in a particular case an exercise of its discretion under Rule 13A; and
 - (c) The guiding principles that we submit should apply to an exercise by the Board of that discretion.

the procedural directions that we urge the Board to issue with respect to the oral hearing of evidence on November 19 and 20, 2012, as described in the paragraphs that follow.

A. Preliminary Statement

- 67. First, for the reasons described herein, we urge the Board to consider confirming to the parties, either at the outset of the hearing on November 19, 2012, or prior thereto, that the Issue that is of interest to the Board and upon which it would like the benefit of the expertise of the Cost of Capital witnesses is whether EGD's risks have materially increased since 2006 when the Board established its Capital Structure Equity Ratio at 36%, being the issue that the Board recently determined in Union's 2013 Rebasing case.
- 68. A preliminary statement to this effect will, we suspect, materially shorten the cross-examination of the expert witnesses by interested parties at the oral hearing commencing on November 19, 2012.

B. Examination of Witnesses

- 69. With or without such a preliminary statement, we submit that the examination and cross-examination of the witnesses at the oral hearing should be sequenced by having the Company witnesses testify first, to be followed by the expert witness panel. Then, with respect to the expert witness panel, we propose that examinations of the witnesses proceed as follows:
 - (a) Introduction and qualification of EGD's expert witnesses – EGD counsel;
 - (b) Cross-examination on qualifications – by counsel opposite in interest to EGD;
 - (c) Board ruling on EGD witness qualifications;

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- (d) Adoption by EGD witnesses of their pre-filed evidence and the Joint Written Statement;
 - (e) Introduction and qualifications of Intervenors' witness, Dr. Booth – counsel for one of Dr. Booth's sponsors;
 - (f) Cross-examination on qualifications – by counsel opposite in interest to Intervenors;
 - (g) Board ruling on Dr. Booth's qualifications;
 - (h) Adoption by Dr. Booth of his pre-filed evidence and the Joint Written Statement;
 - (i) Questions of expert witnesses of one another – should be discouraged for the reasons already outlined;
 - (j) Questions from the Tribunal – the Tribunal should proceed with its questions of the experts which could reduce the time spent by others in their cross-examination of the experts;
 - (k) Cross-examination of experts – all parties should have a right to cross-examine, provided they do not duplicate questions previously put to witnesses by other examiners;
 - (l) Further questions of the Tribunal – these questions can address any items of interest that emerge during the cross-examinations of the experts;
 - (m) Re-examination – each counsel who led the evidence-in-chief from the experts should have a right of reply, if so advised.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of November, 2012.



Peter C.P. Thompson, Q.C.
Vincent J. DeRose
Counsel for CME

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 Enbridge Gas Distribution Inc. for an Order or Orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas commencing January 1, 2013.

**JOINT COMPENDIUM OF
CONSUMERS COUNCIL OF CANADA (“CCC”) and
CANADIAN MANUFACTURERS & EXPORTERS (“CME”)**

November 9, 2012

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