

May 29, 2009

Via Courier and RESS

Kirsten Walli
Board Secretary
Ontario Energy Board
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**Re: Enbridge Gas Distribution Inc. – 2009 Rate Application, Phase 2
Board File No.: EB-2008-0219, Direct Energy Final Argument**

Dear Ms. Walli,

Please find attached the Final Argument of Direct Energy Marketing Limited in the above noted proceeding.

Yours faithfully

Original signed by

Ric Forster
Director
Government & Regulatory Affairs
Direct Energy Marketing Limited

Cc Mr Norm Ryckman, Enbridge Gas Distribution
Cc Interested Parties

DIRECT ENERGY MARKETING LIMITED

Final Argument re: Enbridge Proposal for Changes to the Rate Handbook Requiring Firm Upstream Transportation by Direct Shippers

Introduction

1. Direct Energy Marketing Limited (DE) accepts that ensuring security of supply is the responsibility of the utility as a prudent system operator and default supplier of natural gas. However, should a utility assert that there are security of supply concerns, and that fundamental changes to the market structure are therefore required, it must substantiate, with appropriate evidence, its concerns about security of supply.
2. The issue in this proceeding is whether any appreciable risk exists of a system failure and, if so, how a solution can be designed to address that risk in a way that is fair, reasonable and without any detrimental impact on competitive markets.
3. It is the position of DE that, on all the evidence, Enbridge has failed to discharge its evidentiary burden of establishing that any change from the status quo is required, much less a change that will dramatically alter the competitive landscape in the natural gas market in Ontario.

No evidence of security of supply issue

4. Enbridge tendered no specific evidence when its application was filed on September 26, 2008 to substantiate its stated concern regarding security of supply. It pointed only to the fact that firm transportation arrangements were being used to support a smaller proportion of marketers' delivery obligations than had been the case in the past.
5. It was only when it filed its supplemental evidence that Enbridge sought to establish any specific factual basis for its stated concern. In the supplemental evidence, Enbridge pointed to the dates of January 13-15, 2009 as being evidence that a security of supply concern existed. However, in cross-examination, Enbridge acknowledged that, on these days, the system had functioned as expected and that all gas required had been delivered by marketers:

MR. WARREN: And in all of that period of time, in all of that decline, you can point the Board to one single day in which your team got nervous about gas supply, but the gas-supply system worked. One day in all of that period of time. Have I got that evidence correct, Ms. Giridhar? One day?

MS. GIRIDHAR: Well, the period 13th to the 15th was one such period of this year, and --

MR. WARREN: Okay. I said three days before, and you

pointed me to one day only in the three days where they got nervous. Have I got it right? One day in that entire period of time, and the system worked, right?

MS. GIRIDHAR: That is correct.

[Transcript, Vol. 1, page 28, line 20 to page 29, line 4]

6. While Enbridge initially stated that January 13, 2009 was the specific day about which it was concerned (and which, in its contention, supported its security of supply concern), its response to undertaking HDU 1.3 established that the peak day in the winter of 2008/09 actually occurred on January 16, 2009 (a date upon which there appeared to be no concern about the timing or adequacy of marketers' deliveries of gas).

7. This suggests a lack of clarity about what issue is actually of concern to Enbridge and raises further questions about why Enbridge tendered no evidence to substantiate their concern with this issue. Enbridge could have tendered engineering-related evidence to establish how pressures on the Enbridge system are reacting on peak days relative to other days in the winter, or an analysis of the amount of stress on city gates and how much gas is flowing to the city gates relative to the approved operating capacities. The issue at hand is therefore unclear and no evidence to support any of the concerns raised was put forward.

[Transcript, Vol. 3, page 18, lines 13-27]

8. As Mr. Ray of Direct Energy commented in his evidence: "There are a lot of physical types of evidence that I would tend to expect would be produced in a situation where a utility would be raising a supply security situation". However, no evidence of this nature was presented by Enbridge, despite its bearing the onus – as applicant – of establishing that such a concern is justified.

[Transcript, Vol. 3, page 18, line 28 and page 19, lines 1-2]

9. In addition, there are a number of market-based indicators that are relevant to a contention that a security of supply issue exists. Again, Enbridge tendered no evidence to establish that any of these indicators or factors is consistent with there being an actual security of supply risk. It is clear that these market-based indicators do not support Enbridge's stated concern and that Ontario is not a "constrained market" where there is limited transportation capacity available. Again, as Mr. Ray stated:

When I look at Enbridge's situation and I take a look at TCPL and what levels of firm transportation are available even on peak days that has been identified in the evidence, where there is short-term firm transportation available to the system, it provides a significant contrast to what an actual constrained market is.

... I wanted to address one more thing about these

anecdotal market indicators that would provide evidence around a supply-demand mismatch.

All supply points within North America have a cost relative to NYMEX, and that's defined as basis. It shows you the relationship for how that gas trades relative to the Henry hub for which NYMEX is predicated upon. When you look at constrained markets in the northeast, you see a significant and substantial premium in the basis market for the peak winter periods. I don't have the actual data in front of me, but relative to my last review of the forward basis for the Algonquin city gate market which delivers into Connecticut, the summer basis trades at around a 50 cents premium to the Henry hub, but the winter trades at a significant slope, with November and March being around a dollar but with the January and February months trading at literally \$3.50 of a premium to the Henry hub.

I might add that \$3.50 historically has been as high as \$7 on a forward basis. This is a pure indication the market clearly understands that's there is a supply security issue, and there can be a rationing of gas supply which will potentially create a very difficult situation to find supply or could force a supplier into a situation where they are paying substantial premiums for gas in the cash month to deliver on a peak day.

When I compare and contrast that to the market area basis that we see for the CDA, you see that the CDA in the summer months trades around 35 cents and in the winter months trades around the mid-60 cents. Clearly there is a

premium to the summer months, and that would be indicative of a utility that is a winter-balanced utility, which Enbridge is. It's a heat-load winter-balance utility. However, there is no indication in forward pricing from the marketplace that there is substantial concern over supply security, whereas a large premium is being placed in those peak winter months.

[Transcript, Vol. 3, page 19, line 22 to page 21, line 10]

10. A further market-based factor for the Board to consider when evaluating whether a security supply issue exists in Ontario is the fact that during the January 13-15, 2009 period cited by Enbridge in its supplemental evidence, Interruptible Rate customers were able to bring in a further 440,000 GJ of gas via Curtailment Delivery Service (CDS). The availability of transportation capacity to deliver such a significant volume of gas during a time of peak demand illustrates the flexibility that exists in the system. This situation can be contrasted with other jurisdictions where regulators have felt it necessary to turn their attention to upstream transportation arrangements.

11. Quite apart from Enbridge's failure to tender evidence to support its contention of a security issue, there is a fundamental flaw in the premise of Enbridge's application. It asserts that regulation of marketers' upstream transportation arrangements is necessary to ensure security of supply, yet according to the evidence, Enbridge purchases "Ontario landed" gas for its peaking supplies without regard for the type of transportation arrangements that underpin this supply. In other words, the most critical molecules of gas that Enbridge requires on peak days to meet the demand of its customers are delivered through transportation arrangements that are less firm than the arrangements Enbridge is advocating be used by marketers to meet their MDV delivery obligations.

[Transcript, Vol. 2, page 106, line 17 to page 107, line 8]; and

[Transcript, Vol. 2, page 130, lines 12 - 26]

12. It is unfortunate that, rather than providing the Board and the parties with objective evidence that would be relevant to a determination of whether a security of supply issue truly exists in the Ontario marketplace, Enbridge put forth an unsubstantiated emergency scenario to justify its proposal. Enbridge cited a possibility that 100,000 residential customers would have service discontinued, thus leading to a cost estimated to be in the range of \$12 million. The derivation of the 100,000 customers was not provided, indicating this is neither a likely nor realistic possibility. Enbridge has, as any prudent utility would be expected to have, a detailed contingency plan calling for a variety of steps to address a shortfall in supply. As was demonstrated in cross-examination, if Enbridge ever got to the point of having to discontinue service to residential customers, this would represent a colossal failure of its contingency plan and would clearly be the result of something other than a failure of marketers to meet their delivery obligations.

[Transcript, Vol. 2, page 20, line 9 to page 22, line 24]

Enbridge unsubstantiated arguments for a fundamental market change

"All customers pay for firm transportation and all customers should therefore get the firm transportation"

13. This justification was cited by Ms. Giridhar innumerable times in the course of her evidence. However, the fact that direct purchase customers pay for firm transportation currently is the result of Enbridge billing limitations, and therefore should not be used as an argument against direct shippers. As direct shippers cannot currently charge their customers directly for transportation, Enbridge uses the TCPL Eastern Toll as a proxy to compensate direct shippers for transportation costs which are bundled with distribution charges. When the new CIS system is functional, marketers will be able to differentiate themselves based on transportation costs, which will allow marketers to compete on another part of the Enbridge bill and should lead to market efficiencies for Ontario natural gas consumers.

14. As acknowledged by Ms. Giridhar in cross-examination, this claim can be made by Enbridge only because of limitations in the Enbridge billing system:

MR. HOAKEN: All right. But can you confirm for me that the reason that you can suggest that all customers are paying the same amount is because of limitations in the Enbridge billing system? So in other words, the billing system as currently configured does not permit you to break out the transportation charge for direct-purchase customers; is that right?

MS. GIRIDHAR: That is correct.

MR. HOAKEN: And you're also aware, I take it, that in the Technical Conference on the 22nd of April, TCPL has indicated that the toll estimate on the TCPL main line for next year is going to be \$1.44 a gJ: correct?

MS. GIRIDHAR: Yes.

MR. HOAKEN: And you'll agree with me that that \$1.44 a gJ is significantly higher than your weighted average cost currently?

MS. GIRIDHAR: Yeah, it will also have an impact on the weighted average cost, because we have TransCanada

long-haul as well in our mix.

MR. HOAKEN: I accept that. But also what will have a downward effect on your weighted average cost, as we've already discussed, is if you are no longer responsible for billing, or at least charging, the transportation for direct-purchase customers?

MS. GIRIDHAR: Correct.

MR. HOAKEN: That will bring your average weighted cost down?

MS. GIRIDHAR: Correct.

MR. HOAKEN: Okay. And as I understand it, Enbridge is introducing a new billing system. I'm told that it was supposed to be April, and then June, and it's now looking more likely for September; is that correct?

MS. GIRIDHAR: Yes.

MR. HOAKEN: But in any case, when that billing system is implemented, as I understand it, then you will be able to break out the transportation charge for direct-purchase customers?

MS. GIRIDHAR: Yes.

MR. HOAKEN: And so at that point, direct-purchase customers will be billed a charge that is reflective of the actual transportation portfolio being utilized to transport their gas?

MS. GIRIDHAR: Correct.

MR. HOAKEN: So to the extent that you can make the claim that all customers are paying for firm so they should get firm, that's no longer the case when the change to the billing system is implemented; correct?

MS. GIRIDHAR: Correct. The change to the billing system will allow unbundling of the transportation charge, and that's certainly a relevant issue.

[Transcript, Vol. 2, page 48, line 10 to page 50, line 3]

The adequacy of existing penalties

15. The evidence establishes that the existing penalties are significant and could result in the termination of the Gas Delivery Agreement of a marketer that fails to meet its delivery obligations. This in effect would put the marketer out of business.

[Transcript, Vol. 1, page 66, line 24 to page 69, line 7]

16. In cross-examination, the Enbridge panel stated that the penalties "have not been stress tested", thus suggesting that there is no evidence that penalties do not incent or produce appropriate behaviour on the part of marketers.

[Transcript, Vol. 2, page 38, lines 3-9]

17. In its cross-examination of the Direct Energy panel, Enbridge attempted to suggest that a lack of willingness on the part of Direct Energy to agree to the inclusion of certain penalties in the tariff provisions indicated that there was a deficiency in the current penalty provisions. However, such a contention misses the obvious point that penalties are intended to create a strong disincentive to inappropriate behaviour (such as willfully breaching contractual commitments for deliveries). There is no evidence that, when viewed in this light, existing penalties are not working. More fundamentally, however, penalties are clearly not intended to be the vehicle through which parties are compensated in the event that a system failure occurs as a result of fault or responsibility on the part of a particular market participant. In such an event, as the Direct Energy panel rightly pointed out, an appropriate adjudication or determination would have to occur about the identity of the party or parties who are responsible, and responsibility (and presumably, the obligation to compensate those adversely affected) would be apportioned accordingly. While Enbridge has sought to support its position in this proceeding through reference to other jurisdictions, there is – as pointed out by the Direct Energy panel – no other jurisdiction with tariff provisions such as those being suggested in Enbridge's cross-examination.

[Transcript, Vol. 3, page 32, line 6 to page 33, line 3; page 35, lines 8-25]

Enbridge's proposed solution is both unjustified and anti-competitive

No basis for 90% Firm Transportation requirement

18. While Enbridge has proposed that marketers be required to show firm transportation arrangements underpinning 90% of their delivery obligations, the evidence establishes that the actual proportion of firm transportation used to service the CDA in the last 10 years has been less than this and, in many cases, significantly less than this. There is no evidence to suggest that having such a proportion of firm transportation has created any adverse or undesirable consequence for the market or Enbridge.

[Transcript, Vol. 2, page 2, line 20 to page 3, line 13; page 6, lines 15-27]

19. Enbridge was asked in interrogatories to provide its analysis to support the proposed 90% requirement. However, it has been unable to tender any concrete or objective evidence to justify such a requirement and, as such, the figure appears to have simply been arbitrarily chosen.

[EGD Response to DE IR#23; Exhibit I, Tab 9, Schedule 23]

The anti-competitive impact of Enbridge's proposal

20. The uncontroverted evidence before the Board is that, if Enbridge's proposal is accepted, the Ontario marketplace could incur estimated costs of \$53 million over the next five years to unwind hedges it has in place for gas to be delivered to the CDA. These costs are in addition to the other transactional and contract costs that direct shippers will incur in complying with Enbridge's proposed requirement. These costs will, to some degree, have to be passed on to customers thus increasing the cost of direct purchase market offerings. This would be a backward step in what has otherwise been a successful development of a competitive market for natural gas in Ontario.

21. As Enbridge has acknowledged, the practical consequence of its proposal is that direct shippers will be required to use the TCPL mainline for their firm transportation requirements.

[Transcript, Vol. 2, page 45, lines 23-27]

22. It is also interesting to note in Exhibit TCU-2.15 that an insignificant percentage of EGD's own system supply requirements (74,431 GJ) are delivered via TCPL long haul transportation, in contrast to the Enbridge requirement for direct shippers to hold 90% Firm Transportation on the same expensive path.

23. It was further acknowledged that the transportation costs that will be incurred by marketers in using TCPL mainline will be in excess of the average weighted cost of Enbridge's transportation portfolio. As demonstrated by Enbridge's response to undertaking HDU 2.1, in 2010 marketers will be required to pay the TCPL toll of \$1.44/GJ, while Enbridge's average weighted cost will be \$1.30/GJ; approximately 0.5174 cents less per cubic meter than marketers. While Enbridge attempts to downplay the significance of this cost differential by providing an annual figure of \$16 per year for Ontario T customers, it should be noted that this is a significant cost to direct purchase customers in the Enbridge franchise area. Assuming that 40% of Enbridge's 2 million customers are direct purchase customers, this equates to approximately \$12 Million in additional annual costs to direct purchase customers (2,000,000 x 40% x \$15 average). It is the submission of DE that any utility-mandated increase in transportation costs for direct purchase customers that are not also applied to system gas customers, will create a competitive disadvantage for marketers. Furthermore such actions create a barrier to customer mobility between system gas and the direct purchase offering.

24. It is clear that any such differential in the transportation cost would place marketers at a significant competitive disadvantage. Just as Enbridge is in a position to, and is expected to, optimize its transportation portfolio, the direct purchase community has similar requirements in order to serve its customers and deliver the most cost effective products to the marketplace. By requiring marketers to service their customers via the most expensive transportation route available, and to source their supply from one declining basin, Enbridge seeks to impose on the direct purchase community a significant structural and competitive disadvantage that will erase the gains that have been made over the past 20 years in developing a strong and robust competitive market in Ontario.

Alternatives

25. If Enbridge had engaged the Ontario natural gas stakeholder community prior to filing its 2009 rate application, it could have understood the impacts of its proposal on direct shippers and their customers. This would have allowed a discussion about amenable alternatives to addressing any perceived concerns of Enbridge. Furthermore, such a consultative approach could have saved a significant amount of effort and cost in this regulatory proceeding for all parties.

26. While DE maintains that no security of supply issue exists, on all of the evidence before the Board it is clear that, if the Board concludes that a security of supply issue does in fact exist, there are a number of more logical and market-friendly solutions that could address any identified concern. Specifically:

Additional short haul capacity

27. Building additional short-haul capacity into the CDA would address a security of supply concern, as acknowledged by the Enbridge panel in its testimony:

MR. HOAKEN: All right. Stay with me here. Turn to the transcript from the April 22nd Technical Conference. If you look at page 174 and at line 26, starting at line 26, what you've confirmed here, as I read it, Ms. Giridhar, is that there's not presently any short-haul capacity into the CDA; is that correct?

MS. GIRIDHAR: That is correct.

MR. HOAKEN: And so going back to my premise about how you deal with a situation where demand exceeds supply, or at least it exceeds capacity, then one of the ways to address that situation is to add additional short-haul capacity into the CDA; correct?

MS. GIRIDHAR: Yes.

MR. HOAKEN: And doing so would address the security of supply concerns that Enbridge has; correct?

MS. GIRIDHAR: Correct.

MR. HOAKEN: And doing so would not then force direct shippers onto the TCPL main line -- exclusively onto the TCPL

main line and to access a declining basin, because that's the effect of your proposal, isn't it?

MS. GIRIDHAR: Certainly if there's constraints and there's only one path that's available today, the outcome would be that we would have to acquire transport on the only pipeline that has uncontracted-for transport, which would be long-haul TCPL.

MR. HOAKEN: Which is the TCPL main line?

MS. GIRIDHAR: Yes. Certainly that would change if they were to make more short-haul capacity available.

MR. HOAKEN: Right. So I'm simply asking you to agree with me that an alternative means of addressing the security of supply concern that you appear to have would be for there to be build of new short-haul capacity into the CDA.

MS. GIRIDHAR: Yes.

[Transcript, Vol. 2, page 29, line 3 to page 30, line 8]

28. In its evidence (Exhibit L, Tab 21, Page 13, lines 16-21), TCPL confirmed that further short-haul capacity into the CDA could be available with 24-36 months lead time. The TCPL panel also confirmed that TCPL is creating approximately 100,000 GJ/day additional short haul capacity available for November 2011.

[Transcript, Vol. 3, page 173, line 16 to page 174, line 7]

Vertical slice

29. In paragraph 14 of its supplemental evidence Enbridge also stated that a vertical slice methodology for transportation would be an alternative way of addressing its stated concerns. However, vertical slice on transportation only - without the inclusion of utility storage assets - continues to provide a competitive advantage for Enbridge as it restricts pipeline availability and supply options. This is due to the fact that Enbridge use of the M12 pipeline which provides significant access to the franchise area is allocated to load balancing. Vertical slice methodology is best implemented in a completely unbundled environment.

Unbundling

30. The Enbridge panel also acknowledged in cross-examination that an unbundled market would address its concerns regarding security of supply. The witness panel stated as follows:

MR. HOAKEN: Okay. And that's helpful, but I'm not sure it answers my question.

You'll agree with me that giving market participants access to assets, including storage, would enhance security of supply?

MS. GIRIDHAR: I think it would depend on how it's being used. Excuse me.

[Witness panel confers.]

MS. GIRIDHAR: To ensure security of supply, there are two things that need to happen. First, Enbridge would continue to have the role of designing to a particular design-day criteria and ensuring that it acquires all the assets required to do so.

And yes, if we had a model whereby each direct-purchase participant was required to bring their own supply to meet the particular demand on the day, so to meet daily demand, in that situation the allocation of storage and associated transport, as well as the long-haul transport to bring daily supplies, could work -- could work to ensure security of supply.

[Transcript, Vol. 2, page 35, lines 3-22]

Further use of short-term firm transportation

31. As outlined, Enbridge has not substantiated that a security of supply issue exists. DE would also suggest that no additional measures as proposed by Enbridge are required. If however, the Board finds that it is necessary to implement a solution for the upcoming winter, DE respectfully submits that any such solution should be temporary in nature, given that the 2010 rate application will specifically consider and address the issue of unbundling.

32. A suitable temporary solution for the coming winter, if the Board finds that one is required, would be for all marketers to contract the same proportion of firm transportation (whether Firm or Short Term Firm) they required during the 2008/09 winter for non-Ontario landed supplies. Enbridge could then contract for any shortfall of the requested 200,000 GJ/day that is not addressed through direct shipper FT or STFT contracting, and treat such costs as a load balancing expense (and thus socialized among all distribution customers).

33. For clarity, Enbridge should only contract for those volumes up to 200,000 GJ/day that are not already met by direct shippers. For example, Exhibit HD3.8 demonstrates that over 800,000 GJ/day of STFT capacity was contracted for the Enbridge CDA last January.

34. Furthermore, as Enbridge is only concerned with a number of days as opposed to the whole season, any additional STFT contracted for by Enbridge should be limited in duration.

[Transcript, Vol. 2, page 130 line 27 to page 131, line 7]

Conclusion

In closing, DE would like to thank the Board for the opportunity to present its views on this important issue and respectfully requests that the Board deny Enbridge's application for proposed changes to the Rate Handbook and avoid implementing any permanent changes to transportation arrangements until the issue of unbundling is addressed in the Enbridge 2010 rate application.