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BY EMAIL and RESS

November 9, 2011
Our File No. 20110327

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

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2011-0327 – Union Gas 2012-2014 DSM Plan – Interim Approval

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #1 in this matter, this letter constitutes SEC's submissions on Union's request for interim approval. In preparing these submissions, SEC has had the advantage of reading the submissions of Board Staff, filed earlier today.

As set forth in more detail below, SEC believes that interim approval is neither necessary nor appropriate.

Is Interim Approval Necessary?

The key question here, it is submitted, is the allocation of risk between January 1, 2012 and the date of the Board's final order in this proceeding, if later.

We agree fully with Board Staff that any risk that spending in this interim period is recoverable from ratepayers should be that of Union, not the ratepayers. Where we differ with Board Staff is in our assessment of whether Union is proposing to accept that

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risk. The Board asked about this in its letter to Union of October 21, 2011, and it is not obvious to us that Union accepted in full all risk associated with spending prior to approval of the 2012-2014 Plan.

The problem, in our view, is that if Union is in fact accepting the risk, it does not need an interim order. As Board Staff correctly points out, the Board's jurisdiction is to approve rates, and there is already sufficient provision in rates for the programs Union is currently offering. Further, while the Board considers the nature of Union's specific DSM program in any application for approval of a DSM plan, after approval Union is free to move money around within those programs with minimal restrictions.

Therefore, without more it appears to us that Union can continue spending the money currently in rates on DSM programs it is currently offering. Nothing is preventing them from doing so. While clearly the incentive mechanism would expire at the end of 2011, the budget is still in rates and continues.

What is up for analysis and determination by the Board in EB-2011-0327 is new programs, new budgets, and new rules with respect to incentives and many other matters. As we understand it, Union is not asking that any of those proposals be approved at this time – on an interim or any other basis - without a hearing, and certainly if they were then legal issues would arise.

In our submission, the only reason that Union could request interim approval of existing programs, the funding for which is already in rates, would be to shift the risk that those programs will not be approved for 2012 to the ratepayers. If they are proposing that, our comments below apply. If they are not proposing that, then no interim approval is legally necessary.

Is Interim Approval Appropriate?

If Union is in fact seeking to shift the risk of non-approval of existing programs in 2012 to ratepayers, in our submission that shift is not appropriate, and interim approval should be denied, for two reasons.

First, in our submission the Board should not, as a general rule, provide substantive relief to an Applicant without complying with the legal rules respecting hearing both sides and deciding based on proper evidence.

In this respect, what the Applicant is requesting is very different from interim rates. In the case of interim rates, the Board makes such an order to allow it flexibility in making

its final order. Without a declaration of interim rates, the Board in its final rate order could not make the effective date earlier than its final order. That is not the case here. The rates are already established, and cover the spending in issue already. The Board's order in this Application can speak from the date of the order, still cover all of 2012, and not run afoul of the rule against retroactivity.

As well, when interim rates are ordered, the utility is entirely at risk with respect to the rates in the interim period. If, under interim rates, a utility collects $50 million in January through March, and then at the end of March gets new, January 1st, rates that would result in $45 million in that period, the utility has to refund $5 million. Indeed, the whole point of interim rates is that the interim order is fully replaced by the final order for that intervening period. Here, if that level of utility risk is being proposed, then as discussed earlier no interim order is required.

Therefore, what the utility is requesting – if it indeed has some impact in the intervening period – would be a new type of interim order from the Board. We believe this would set a bad precedent, and invite many utilities to seek interim relief without consideration of evidence for various matters that have permanent impact during and after the intervening period.

Second, we note that two gas distributors have filed three year plans, Enbridge and Union.

Enbridge took the Board's request to consult with stakeholders to heart, and spent considerable time fashioning a consensus that it has presented to the Board. As a result, Enbridge is not at risk with respect to the timing of approval of its DSM Plan

As is set out in their Application, Union engaged in a much more limited consultation (except with respect to stakeholder engagement, which was done jointly with Enbridge), and simply filed their own proposals for the Board's consideration and decision.

This, of course, was Union's right, but it must have been clear to Union from the Board's application deadline that filing an application by that deadline (actually, eight days later) would create a risk that approval would take place after the beginning of the year. The fact that some aspects of Union's application may be contested could in fact have been inevitable, but the fact that Union had a much more limited consultation is clear on the face of the record.

In our view, if the Board accedes to Union's request and creates a new, special tool for interim approval in this case, that sends a message to companies like Enbridge that its

work spent building a consensus among parties with disparate views is not as valued by the Board as they may have thought.

This is especially problematic in the area of DSM, which has benefited so much from the consensus approach over the last decade. Much of the utilities' success in this area has been the direct result of a partnership between progressive utilities, willing ratepayers, environmental groups, and other stakeholders, enabled and encouraged by a forward-thinking regulator.

Conclusion

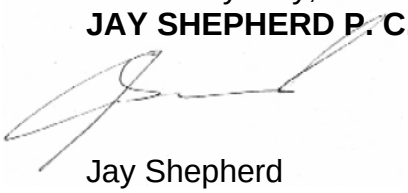
Therefore, in our submission:

a) If Union is fully at risk in the interim period, no interim approval is legally or practically required, and

b) If Union is in fact seeking to have any substantive, enduring impact of interim approval, the Board should deny the request because it sets a new and dangerous precedent, and it sends the wrong message with respect to the value the Board places on consultation and consensus.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.



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cc: Wayne McNally, SEC (email)