Jay Shepherd
Professional Corporation
2300 Yonge Street
Suite 806, Box 2305
Toronto, ON M4P 1E4

BY EMAIL and RESS

July 5, 2013

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

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2012-0451/EB-20123-433/EB-2013-0074 – Union's Request for Confidentiality

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Procedural Order No. 6, these are SEC's submissions with respect to the request by Union Gas ("Union") that the Board treat for large portions of responses to interrogatories set out in Exhibits I.A1.UGL.CME.5, I.A1.UGL.CCC.6-7 and 10-11 as confidential.

These interrogatory responses involve correspondence between Union and Enbridge Gas Distribution ("Enbridge"), and Union and TransCanada Pipelines Limited ("TCPL"), primarily through formal letters. SEC submits that the request should be denied and full responses should be placed on the public record.

Union has requested confidentiality on the basis that the discussions between utilities were carried out under a signed confidentiality agreement between the parties. In our view, the position of Union incorrectly seeks to import the business judgment of the parties to the documents into the Board's determination of confidentiality in the context of the Board's processes, and the public interest. The fact that the parties to the documents have purported to make a determination as to confidentiality does not bind the Board or usurp its jurisdiction. The Board's determination may consider some of the same factors as the determination by the parties, but it is fundamentally an independent judgment, based mostly on different factors, and not guided in any way by the business judgment of the parties.

The Board's procedures make that clear. The *Practice Direction on Confidential Filings* (the "*Practice Direction*") states that, "the onus is on the person requesting confidentiality to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case."[1] Appendix A to the *Practice Direction* sets out the factors that the Board may consider in

[1] *Practice Direction on Confidential Filings* at p. 2

T. (416) 483-3300 F. (416) 483-3305
mark.rubenstein@canadianenergylawyers.com
www.canadianenergylawyers.com

determining if a document should be treated as confidential.[2] In and of itself, the fact that parties have signed a confidentiality agreement does not provide a basis for the Board to grant confidentiality treatment. It is not a listed factor nor does it explain any inherent reason why the document should remain confidential. It may be that the reasons the parties determined something should be confidential would, applied by the Board, cause it to reach the same conclusion. Yet, Union in its cover letter requesting confidentiality did not provided any reasons for why "public disclosure of the information would be detrimental", as is explicitly required by the section 5.1.4 of the *Practice Direction*.[3] It would be unfair to other parties if they were now allowed to provide their reasons for the first time in reply submissions.

The Board has repeatedly stated that all records should be part of the public record unless there is a good reason for affording them confidential treatment – placing materials on the public record is the rule and confidentiality is the exception.[4]

The information for which confidentiality is being sought is central to the issues in this proceeding. The Board recognized in Union's 2013 Cost of Service (EB-2012-0210) proceeding of the importance of consultation and cooperation between Union, Enbridge and TCPL, in providing a cost-effective natural gas service to Ontario ratepayers. The Board encouraged the parties to engage in meaningful discussions.

> The Board is concerned with the apparent lack of cooperation and consultation between Union, Enbridge and TCPL that came to light in this proceeding. The Board is concerned that this may have adverse consequences for Ontario ratepayers – result in higher rates and costs than would otherwise be the case, contribute to the uneconomic bypass of existing natural gas infrastructure, create asset stranding, encourage the proliferation of natural gas infrastructure, and lead to the underutilization of existing natural gas infrastructure.
>
> The Board agrees that the consideration of the Parkway West facilities requires a wider perspective. The Board therefore encourages Union to engage TCPL, Enbridge and shippers in a consultative process, the purpose of which is to jointly consider the need for the Parkway West project, explore reasonable alternatives (including the repurposing of existing facilities) in order to maximize the benefit to Ontario ratepayers. The result of this process would then be filed with Union's Leave to Construct application for the Parkway West facilities. [5]

It is clear that there is a written record of all or some of the discussions between these three companies - all of whom are regulated entities - relating directly to the issues currently before this Board. The public should be able to scrutinize the communications between the Union, Enbridge and TCPL, not only to determine if they followed the Board's direction, but also to better understand the interactions of the various proposed facilities. This analysis is critical to any attempt to determine if is in the public interest for the Board to grant Leave to Construct.

The importance of the interaction between these utilities is highlighted by the on-going developments in this proceeding including,

---

[2] *Practice Direction,* Appendix A
[3] *Practice Direction*, s.5.1.4(a)
[4] EB-2012-0153, *Decision and Rate Order,* dated June 27, 2013 at p.2
[5] EB-2011-0210, *Decision and Order*, dated October 25, 2012 at p.126

i) the release of the National Energy Board's TCPL Mainline Restructuring Decision and TCPL subsequent postponement of expansion plans;

ii) the production of the Memorandum of Understanding between Enbridge and TCPL regarding the capacity allocation of the GTA Project Segment A and election of Option B; and

iii) Union and Gaz Metro's motion for a stay of the GTA project pending an open season.

These issues are key aspects of the interaction between the system expansion and reinforcement plans of the various parties, and are central to the determination of the need for the proposed facilities, their cost, and potential alternatives (Issues A1, A3 and A5). The documents relate directly to these unfolding developments. SEC submits it is important that the documents, any cross-examination relating to these documents during the oral hearing, any submissions in final argument relying on these documents, and any decisions by the Board relying on these documents, should be available for the public to view.

All of which is respectfully submitted.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Applicants and Intervenors (by email)