



By electronic filing and by e-mail

July 7, 2010

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

Dear Ms Walli,

Electricity Conservation and Demand Management Targets

Board File No.: EB-2010-0216
Our File No.: 339583-000076

As solicitors for Canadian Manufacturers & Exporters (“CME”), we are submitting this letter to provide comments in response to the Board’s June 22, 2010 letter to all Licensed Electricity Distributors and all Other Interested Parties.

In its June 22, 2010 letter, the Board describes and encloses a Directive issued by the Minister of Energy and Infrastructure on March 31, 2010 (the “Directive”) with regard to Electricity Conservation and Demand Management (“CDM”) Targets to be met by Licensed Electricity Distributors. The Board invites Interested Parties to submit comments on the distributor-specific CDM Targets proposed by the Ontario Power Authority (“OPA”). The Board emphasizes that, pursuant to the Directive, it is not conducting a “hearing”. The letter also describes the separate consultation process the Board has initiated to develop a Conservation and Demand Management Code (the “CDM Code”) as required by the Directive and notes that the purpose of the CDM Code is to set out the obligations and requirements that licensed distributors must comply with in order to achieve the CDM targets set out in their licenses.

The purpose of this letter is to question whether the actions that the Directive requires the Board to perform, without a hearing, are compatible with the Board’s statutory rate-setting jurisdiction under the *Ontario Energy Board Act, 1998* (the “OEB Act”).

The Directive requires the Board to allocate a total CDM Target between specific distributors and to establish the obligations and requirements that licensed distributors must comply with in order to achieve these distributor-specific CDM Targets. Achieving these targets is an exercise that will cause regulated distributors to incur costs that will, in turn, be recoverable in the electricity bills that specific distributors charge for the regulated services they provide.

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Under Sections 78(3) of the *OEB Act* and Section 21(2), the Board's statutory obligation with respect to rates or other charges, that are paid to electricity distributors in connection with the regulated services they provide, is to determine the reasonableness thereof, after a hearing. We question whether the Board has jurisdiction to respond to the Directive without holding a hearing.

As a quasi-judicial regulatory tribunal, fully empowered to determine all questions of law and jurisdiction, the Board has a duty to determine the jurisdictional validity of the Directive. The Board's obligation to consider the legality of actions required of it is expressed in the recent Supreme Court of Canada decision in *R v. Conway*, (2010) S.C.C. confirming that administrative tribunals, with authority to decide questions of law, have a duty to consider and determine such questions, including constitutional questions, as threshold issues.

The Attorney General of Ontario ("AG of Ontario") acknowledged the existence of the Board's duty to consider and determine threshold questions of legality in a Written Argument filed on or about June 23, 2010, in Board proceeding EB-2010-0184 pertaining to a Motion brought by the Consumers Council of Canada ("CCC") and Aubrey LeBlanc ("LeBlanc").

In these circumstances, we respectfully request that the Board establish a process for receiving submissions on this threshold question of law and jurisdiction before it proceeds to complete the tasks required of it by the Directive. We respectfully submit that the Directive raises a question of law as to whether the Board has jurisdiction to respond to it without a hearing, and that the Board has a duty to consider that threshold question of law and jurisdiction before it proceeds without a hearing. We submit that the Directive cannot override the statutory requirement for a hearing where the outcome of the process will be charges related to the provision of regulated services by electricity distributors.

We invite Board Staff to contact us if they wish to discuss our thoughts on process alternatives for implementing the requirements of the Directive in a manner that is compatible with the Board's statutory rate-setting jurisdiction under the *OEB Act*.

Submissions pertaining to this threshold question could be made in parallel with the submissions that the Board has invited in the CDM Code Consultative EB-2010-0215.

Yours very truly,



Peter C.P. Thompson, Q.C.

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