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March 17, 2009

BY EMAIL & BY COURIER

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge St, Suite 2701
Toronto ON M4P 1E4

Dear Ms. Walli:

**Board File No. EB-2008-0312 Ontario Power Authority
Fiscal 2009 – Expenditure, Revenue and Fees Submission for Review
Argument of Energy Probe**

Pursuant to the Decision on Settlement Proposal and Procedural Order No. 2, issued by the Board on March 6, 2009, please find two hard copies of the Argument of Energy Probe Research Foundation (Energy Probe) in the EB-2008-0312 proceeding. An electronic version of this communication will be forwarded in PDF format.

Should you require additional information, please do not hesitate to contact me.

Yours truly,

David S. MacIntosh
Case Manager

cc: Miriam Heinz, Ontario Power Authority (By email)
Fred Cass, Aird & Berlis LLP (By email)
Intervenors of Record (By email)
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Ontario Energy Board

IN THE MATTER OF sections 25.20 and 25.21 of the *Electricity Act, 1998*;

AND IN THE MATTER OF a Submission by the Ontario Power Authority to the Ontario Energy Board for the review of its proposed expenditure and revenue requirements and the fees which it proposes to charge for the year 2009.

Final Argument On Behalf Of
Energy Probe Research Foundation

March 17, 2009

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**Final Argument On Behalf Of
Energy Probe Research Foundation**

How these Matters came before the Board

- 1. The Ontario Power Authority (the “OPA” or “Applicant”) submitted its annual proposed expenditure and revenue requirement and fees for review to the Ontario Energy Board (“Board”) on November 2, 2008. A Letter of Direction and a Notice of Application were issued on November 28, 2008. The Board approved a usage fee on an interim basis on December 17, 2008, to be effective January 1, 2009.**
- 2. Energy Probe Research Foundation (“Energy Probe”) provided a Notice of Intervention to the Board on December 8, 2008. Confirmation of Energy Probe’s intervention was issued December 17, 2008.**
- 3. Board staff proposed an Issues List which was issued on December 17, 2008 as Appendix B to Procedural Order No. 1, which also outlined a schedule for the proceeding. Procedural Order No. 1 invited parties to file submissions on the proposed Issues List.**
- 4. Energy Probe did file submissions on the proposed Issues List on January 13, 2009, requesting one addition to the List in respect of the Applicant’s workforce hiring practices. The Issues Decision and Order was issued by the Board on January 26, 2009. The Final Issues List included an additional clause – Issue 6.4 – Workforce Hiring Practices.**

5. Energy Probe submitted Interrogatories on February 3, 2009 and received Interrogatory Responses on February 17, 2009. Energy Probe actively participated in a Settlement Conference with the OPA and other Intervenors on February 23, 2009. A Settlement Proposal, together with an updated Energy Probe Interrogatory 7 (Workforce Hiring Practices) response from the OPA, was filed with the Board by the Applicant on February 27, 2009.

6. There was a Complete Settlement on all Issues with the exception of Issue 6.4, Workforce Hiring Practices. As part of the Complete Settlement of Issues 1, 2, 3, 4 and 5, it was agreed that Energy Probe and the Association of Major Power Consumers in Ontario (“AMPCO”) would make written submissions in this proceeding to address the overall level or trend of the budget for those Issues.

7. Subsequent to the filing by OPA of the Settlement Proposal on February 27, 2009, the Applicant, by letter dated March 5, 2009, sought to revise its 2009 Revenue Requirement Submission by filing updated evidence (the “Revision”) in its Exhibit A-1-1, Exhibit B-3-1 and Exhibit D-2-1.

Argument Overview

8. In its Argument, Energy Probe will seek to explore (a) the budget history of the OPA as expressed in respect of its Strategic Objectives, (b) address the outstanding Unsettled Issue 6.4, Workforce Hiring Practices, and (c) make submissions in respect of the attempt by the OPA to make changes to the Settlement Proposal, all in a manner which we believe can be of most assistance to the Board.

OPA Budgets and OPA Spending Trends

9. Energy Probe notes that in the 2006, 2007 and 2008 proceedings in respect of submissions of the OPA to the Board for review of its proposed expenditures and revenue requirements, settlement discussions and oral hearing cross-examinations focusing on other matters, have led to agreement between the Applicant and the Intervenors on the financial issues before the Board. In the 2008 proceeding, while there was no general agreement, the focus of cross examination during the Oral Hearing was not on the Applicant's proposed expenditures and revenue requirements. As a result, over the course of the Board's annual reviews of the OPA, parties have either filed little in the way of comment on financial matters, or have commented on financial matters in the pursuit of other program-related interests of various intervening parties.

10. As the OPA moved closer to a Review of its Integrated System Power Plan (IPSP), it was reasonable that its budgets would rise. The Applicant's employees have provided convincing evidence, and sometimes testimony, on the OPA's budgeting processes, costs and revenue requirements, in each of the Board's Review proceedings.

11. The Board's mandate for the review of the Applicant's annual Revenue Requirement Submission does not permit Intervenors to critically examine OPA programs and initiatives. As well, the shifting of combinations of costs from objective to objective as part of reorganizing and redefining priorities over the past OPA evidentiary filings, has made it somewhat challenging for intervening parties to follow the OPA's growth in manpower, consulting fees paid and operational costs in general.

12. Again in the its 2009 Revenue Requirement Submission, there was a shifting of combinations of costs from objective to objective. By way of explanation, the Applicant stated:

In 2009 the OPA has reclassified the operating costs by Strategic Objective, to simplify presentation on an ongoing basis. Overhead costs directly consumed and allocated to the strategic objectives in the 2008 Revenue Requirement Submission are now included in Strategic Objective 5. The 2008 Budget and Forecast amounts contained in the evidence for all strategic objectives presented in Exhibit B have been restated to reflect this change in allocation methodology. Table 2 following, illustrates the difference between the reporting methods. (1)

13. The Applicant did provide Table 2 in Exhibit D, Tab 2, Schedule 1, page 3 to demonstrate the differences between the 2008 Approved Budget and its reallocation into the 2009 reporting method. On the following pages in that prefiled evidence Exhibit D, Tab 2, Schedule 1, for greater clarity, the Applicant provided a series of Tables presenting the differences between the 2009 Budget request and the 2008 Approved Budget for the major expense categories.

14. Board staff pursued the OPA's shifting of combinations of costs from objective to objective by its Interrogatory 3, requesting that the Applicant provide actual spending over the years 2006, 2007 and 2008 in the 2009 reclassified structure. In its Interrogatory Response, the OPA stated that total actual spending for all the Strategic Objectives combined was \$29.983 million for 2006, \$42.31 million for 2007 and \$57.65 million for 2008. The figures provided for 2006 and 2007 were audited totals while the 2008 figure was an actual unaudited total. (2)

15. To assist the Board in its review of the OPA Budget Trends over the years from 2006 onward, Energy Probe has constructed the following Table combining the data received in the responses to Energy Probe Interrogatory 3 and Board staff Interrogatory 3.

(1) Exhibit D/Tab 2, Schedule 1, p.3

(2) Exhibit I/Tab 1, Schedule 3

Table 1
Energy Probe
Research Foundation

Operating Costs by Strategic Objective –Reclassified by OPA

(\$'000)

Strategic Objective	2006 Actual	2007 Actual	2008 Budget Approved	2008 Actual Unaudited	2009 Budget Request	Variance 09 Budget/ 08 Actual
Strategic Objective 1	4,660	6,086	5,631	4,788	5,790	+ 21%
Strategic Objective 2	8,669	14,374	23,186	16,557	20,072	+ 21%
Strategic Objective 3	5,206	5,552	8,120	6,900	7,732	+ 12%
Strategic Objective 4	377	509	667	629	1,031	+ 64%
Strategic Objective 5	11,070	15,789	26,702	28,776	28,948	+ .1%
Sub-Total	29,982	42,310	64,306	57,650	63,573	+ 10%
Contingency Fund	0	0	3,215	0	1,500	
Total	29,982	42,310	67,521	57,650	65,073	+ 11%

16. To further assist the Board, Energy Probe has constructed a simple Table to demonstrate the variance between the Approved Budgets and the Actual Operating Costs of the Applicant. To see the trend, it is not necessary to allocate the operating costs between Strategic Objectives, since they are periodically reclassified.

Table 2

Energy Probe
Research Foundation

Board File: EB-2008-0312
OPA 2009 Fees Review

Annual Operating Costs - Approved Budget vs Actual
(\$'000)

	2006 Budget Approved	2006 Actual	2007 Budget Approved	2007 Actual	2008 Budget Approved	2008 Actual Unaudited	2009 Budget Request	Variance 09 Budget/ 08 Actual
Operating Costs	29,721	29,983	53,423	42,310	64,306	57,650	63,573	+ 10%
Contingency Fund	1,400	0	4,000	0	3,215	0	1,500	
Total	31,121	29,983	57,423	42,310	67,521	57,650	65,073	+ 11%

17. The question may be: What conclusions can be drawn from Table 2? Is the OPA incapable of forecasting the amount of annual Operating Costs which it requires? Are there internal structural problems at the OPA that are not apparent to the Board? Is there a compensation incentive program which drives Budget Requests that are going to be millions of dollars higher than actual required expenditures? Does the mandate of the Board in respect of its annual review of the OPA expenditure and revenue requirement and its fees request hamper that review?

18. Energy Probe does not submit that it has definitive answers to those questions. It does submit that the Board will need to give careful consideration to requiring an Oral Hearing in the 2010 Review to determine the cause of the OPA's forecasting problems in respect of operating costs.

Issue 6.4 Workforce Hiring Practices

- Has the OPA responded appropriately to the expectation of the Board Panel in respect of workforce hiring practices, as stated on page 11 of the Decision and Order in the EB-2007-0791 proceeding?

19. Issue 6.4 concerns exploring the Applicant's response to Board Findings in respect to its Work Force in the Fiscal 2008 Fees Review. Those Findings were stated by the Board in the Decision and Order, issued May 15, 2008, as follows:

“...the Board has noted that the OPA's 2008 budget reflects a substantial increase in its overall workforce – it increases from 137.0 in 2007 to 183.8 Full Time Equivalents in 2008. In the CDM area specifically, the OPA is doubling its workforce to 66.2 Full Time Equivalents. The Board has also noted from OPA's testimony that the OPA is currently not in a position to forecast its workforce requirements and acknowledged that in the future its workforce could be reduced. The possibility for a reduction in the future has not altered the OPA's practice in continuing to augment its existing workforce with full-time permanent employees. While the Board accepts the OPA's budget associated with its workforce for the 2008 year, in light of the uncertainties for future workforce requirements acknowledged by the OPA, the Board expects the OPA to review its hiring practices for 2008 and to fully justify increases to its permanent full-time workforce in its 2009 fees application.”

20. Before the question that comprises Issue 6.4 can be answered in terms of its appropriateness, it is necessary to determine the response actually undertaken by the OPA in respect of the Board Panel's workforce practices expectation. Much of that answer is found in the OPA Response to Energy Probe Interrogatory 7, and more specifically, in the revised Response filed by the OPA on February 27, 2009.

21. In answer to Energy Probe Interrogatory 7 a), at Exhibit I, Tab 2, Schedule 7, the OPA states the following:

In response to the Board's decision in EB-2007-0791, the OPA has begun to actively track FTEs by temporary and permanent status. This allows for regular monitoring and reporting of the balance of permanent to temporary employees.

22. Further, the OPA states in c) of the Response to Energy Probe Interrogatory 7, that it did not track all of its temporary employees in its payroll system. If they were acquired through an agency, they were paid by that agency, which subsequently billed the OPA for their services. That practice begs the question as to whether they were in fact employees of the OPA.

23. A careful reading of the OPA Response to Energy Probe Interrogatory 7 c), in the submission of Energy Probe, would lead the reader to believe that the OPA has interpreted the concerns expressed by the Board Panel in the EB-2007-0791 proceeding to be directing the OPA to move temporary employees to permanent status, and to fully justify the reasons for doing so in the 2009 Fees Application.

24. The evidence filed by the Applicant shows that it has done just that. In the Response to Energy Probe Interrogatory 7 c), as revised in the February 27, 2009, update, includes the following justifications:

In response to the Board’s decision in EB 2007-0791, the Human Resources department performed an assessment of the staffing of the organization. Roles which had been deemed temporary for extended periods of time and were expected to continue were transitioned to regular roles. In addition, consulting arrangements which may have begun as project-based roles but had evolved into ongoing positions within the organization were transitioned to temporary or regular roles within the organization as appropriate.

25. It is the submission of Energy Probe that the mis-interpretation of the Board Panel’s expectation by the OPA has resulted in the Applicant accelerating the move toward higher percentages of Actual Regular Employees to Temporary Employees as portrayed in the Response to Energy Probe Interrogatory 7 c), and more specifically, in the Table at the end of that response titled “Total OPA Headcount Regular/Temporary”.

26. That Table shows that as a percentage of Total OPA Headcount, temporary employees remained rather steady from 2006 to 2008. The actual temporary employees were 17.1% in 2006, 16.6% in 2007 and 14.6% in 2008. Once the OPA responded to the expectation of the Board Panel in the Decision and Order in the EB-2007-0791 proceeding, the Budget for temporary employees has dropped to 6%. Energy Probe submits that is a dramatic change.

27. The Applicant provides justification for that dramatic change in its Response to Board staff Interrogatory 5, filed as Exhibit I, Tab 1, Schedule 5. In Section 2 of that response, the OPA opines that:

Having a significant portion of OPA staff continuously employed on a fixed term, or temporary basis, creates an inequitable and unhealthy work environment in which some employees have significantly better employment terms and conditions than others.

28. The Applicant has not filed any evidence that it has in fact “an inequitable and unhealthy work environment.”

29. In Section 3 of the Exhibit cited in Paragraph 27 above, the Applicant refers to advice which it has received from its “employment law advisors” in respect of its having temporary employees. Again, this has not been filed. There is no evidence before this Panel of the advice given to the Applicant. That advice may have included opinions on whether or not it was proper for the OPA to keep temporary employees off its payroll, but there is no evidence filed to that effect.

30. As well, there has been no evidence filed in respect of any legal actions undertaken by temporary employees in respect of not being appointed to permanent positions. There is evidence that as a result of the Board Panel’s expectation, more employees have been moved to permanent status.

31. In its Reply Argument in the EB-2007-0791 proceeding, as noted in the Decision and Order in the first Paragraph on Page 11, the Applicant responded that Energy Probe’s arguments and comments in respect of workforce matters had no bearing on this case and that these are matters for the 2009 fees case.

32. Energy Probe submits that the OPA has not responded appropriately to the expectation of the Board Panel in respect of workforce hiring practices. It has not taken into account the recommendations in the Report of the Agency Review Panel, Phase II, often referred to as the second Arnett report, which taken in full would redistribute the OPA into the Ministry of Energy and the Independent Electricity System Operator once the current review of the initial IPSP is completed.

33. It is the submission of Energy Probe that in its Decision in the current proceeding, the Board Panel should point out to the Applicant that it was not requesting an accelerated movement from temporary to permanent employees. It needs to correct the Applicant’s mis-interpretation of the previous Board Panel’s expectation.

34. Energy Probe has no special knowledge of this government's future actions in response to the Arnett Report's recommendations, but it appears likely that some if not all will be acted upon within the current government mandate. Events appear to have indicated that the OPA also has no special knowledge of the government's future actions.

Suggested Changes to the Settlement Proposal

35. By letter dated March 5, 2009, the Applicant applied to the Board to file a revision to its 2009 Revenue Requirement Submission. In doing so, it sought to revise the Settlement Proposal between the parties to this proceeding, which was filed with the Board on February 27, 2009.

36. The requested revision is in respect of the registration fee charged for each proposal for electricity supply and capacity competitive procurements. As the Revenue Requirement Submission now stands, the registration fee is \$10,000, non-refundable.

37. To assist in developing the registration fee and other components of a procurement process for generation capacity, renewables, demand response and energy efficiency, the OPA commissioned a *Report prepared for the Ontario Power Authority by London Economics International LLC*. This report was filed in the EB-2006-0233 OPA Fees Review as Exhibit E, Tab 1, Schedule 2, Attachment 1.

38. In the last three Revenue Requirement Submissions filed by the Applicant, it stated that the registration fee in the amount of \$10,000, non-refundable, served "as a valuable tool to focus OPA resources on participants who are committed to the competitive procurement process." The quoted passage is found at Exhibit D, Tab 2, Schedule 1 of the evidence prefiled in each of the EB-2006-0223, EB-2007-0791 and EB-2008-0312 proceedings.

39. The Applicant's request asks the Board's approval to change the registration fee to a variable amount: up to \$10,000 for electricity supply and capacity procurements. In the Applicant's updated March 15, 2009 (revised) Exhibit D, Tab 2, Schedule 1, Page 1, in the third paragraph, the evidence states that the need and amount of these fees has not yet been established.

40. The rationale presented to the Board for a revision to the Settlement Proposal after it has been filed, is that the OPA wishes to prepare for the launch of the feed-in-tariff ("FIT") program which is described in a provincial bill which has not been passed by the Legislature, but which has been proposed to the Legislature.

41. The Ontario Energy Board's Settlement Conference Guidelines, presented as part of its Regulatory Instruments, provides guidance for the disposition of this request in the last paragraph on Page 8:

Acceptance of a settlement proposal by the Board is subject to reconsideration where significant new evidence or information emerges in the hearing or where the effect of external factors has not been sufficiently accounted for in the settlement proposal.

42. It is the submission of Energy Probe that the request for revision of the Applicant fails the test for reconsideration as described in the Board's Settlement Conference Guidelines and should not be approved.

Costs

43. Energy Probe submits that it participated responsibly in this proceeding. Energy Probe requests the Board award 100% of its reasonably incurred costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 17, 2009

Energy Probe Research Foundation