EB-2009-0038

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch.B, as amended;

AND IN THE MATTER OF an Application by Ontario Powern Generation Inc. pursuant to the *Ontario Energy Board Act* for an Order or Orders determining payment amounts for the output of certain of its generating facilities.

MOTION FOR REVIEW
SUBMISSIONS OF THE
SCHOOL ENERGY COALITION

March 18, 2009

SHIBLEY RIGHTON LLP
250 University Avenue, Suite 700
Toronto, Ontario M5H 3E5

Jay Shepherd
Tel: 416.214.5224
Fax: 416.214.5424
Email: jay.shepherd@shibleyrighton.com

Counsel for the School Energy Coalition

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1 GENERAL COMMENTS

1.1 *Introduction*

1.1.1 On January 28, 2009 Ontario Power Generation filed a Motion for Review and Variance (the "Current Motion") of the Board's decision dated November 3, 2008 in EB-2007-0905 (the "Decision"). The Current Motion seeks an oral hearing on the merits, and a variance account with respect to the tax loss carryforward/mitigation component of the payment amounts, involving a $342 million reduction in those amounts.

1.1.2 This is the second time that the Applicant has sought a review of the Decision. The first time, in a motion filed on November 24, 2008 (the "Previous Motion"), the Board determined that the relief requested was in essence a predetermination of issues that may be addressed by a future panel of the Board. As such, it was inappropriate for the Board to consider granting that relief, and the Previous Motion failed. The prayer for relief on the Previous Motion was significantly different from the prayer for relief on the Current Motion, although both did include a request for a variance account.

1.1.3 These are the written submissions in this matter on behalf of the School Energy Coalition. SEC will also attend and make submissions at the oral hearing of this matter on April 3, 2009.

1.2 *Summary*

1.2.1 The balance of these Submissions set out the positions of SEC with respect to the issues raised by the Current Motion. The following is a summary of those positions.

1.2.2 ***The Decision.*** In our view, the Decision fashioned a remedy that, while it achieved the objectives of the Applicant as set out in the Application in this matter, it did so in a somewhat different way. By questioning the use of tax losses for mitigation, and replacing that construct with a voluntary mitigation of rates, the Decision did not in our opinion produce the optimum solution, but it did produce a solution that was reasonable and consistent with the evidence presented to the Board.

1.2.3 It appears to us that the reason for the result being less than optimal lies in the evidence presented by the Applicant, not an error on the part of the Board panel making the Decision. The Applicant characterized the reduction as voluntary (insisting on this characterization numerous times during the proceeding), failed to provide sufficient information for almost a billion dollars of tax losses to be reviewed with appropriate thoroughness, and didn't seek the variance account that would have been the better result. The Applicant directly caused the result in the Decision about which they have now twice complained. They ended up with a reasonable result, consistent with although not identical to what they asked for. Therefore, in our view there is no

"error" on the face of the record in the Decision.

1.2.4 ***The Previous Motion.*** The central tenet of the Previous Motion was a request for, in effect, "declaratory relief" as to what a future Board panel should do. This was contained in the various "clear acknowledgement" components of the prayer for relief, which together were clearly intended to bind a future Board panel. The Previous Motion was quite rightly denied on the basis that if those arguments are to be put forward, they should be put to that future panel, not this one. The Board panel hearing the Previous Motion correctly characterized the substance of what was being requested, and denied it because it was inappropriate.

1.2.5 The Current Motion has not been presented by the Applicant as a motion for review and variance of the Previous Motion. However, if it were, we submit that it should be denied, because the decision on the Previous Motion was correct.

1.2.6 ***The Current Motion.*** The Applicant has already sought a review of the Decision, and its motion in that regard was denied. In the Current Motion, the Applicant has sought another review of the Decision, and its three grounds for review are:

(a) Excess of jurisdiction in the Decision;

(b) Error of law and fact in the Decision; and

(c) Procedural unfairness in the Decision.

We believe that all of these grounds – which relate solely to the Decision, and not to the Previous Motion - are more appropriate to a court appeal than a motion for review.

1.2.7 In fact, the Current Motion appears to us to have three fatal flaws:

(a) It is more properly brought in court, and appears on its surface to be filed with the Board solely to give the Applicant more time to go to court later;

(b) It is an attempt to re-hear indirectly a motion that has already been denied, and thus raises a question of whether it establishes a very dangerous precedent at the Board; and

(c) It assumes that a future panel of the Board cannot be relied on to make a common sense decision and will instead allow double counting of the tax loss carryforwards to the benefit of the ratepayers.

1.2.8 ***Proposed Result.*** For the reasons set forth above, we believe the Current Motion should be denied.

2 THRESHOLD ISSUES

2.1 *Introduction*

2.1.1 In considering the threshold issues, we are focusing on the Decision, since nominally that is what the Applicant is asking the Board to review and vary. However, since the Current Motion also indirectly impugns the decision on the Previous Motion (by the language "as confirmed by the decision of the OEB review panel dated December 19, 2008…"), we have also considered whether a motion for review of that decision would meet the threshold.

2.1.2 In the case of both the Decision and the Previous Motion, it is our submission that on the threshold issue of whether a motion for review and vary should be heard, the Applicant has not met its onus of demonstrating that the threshold test has been met.

2.2 *Correctness of the Decision*

2.2.1 ***Optimum Remedy.*** The Decision did not, in our view, fashion the optimum remedy in the circumstances. The optimum remedy would have been to allow the mitigation based on "regulatory tax losses" as proposed by the Applicant, but require that all mitigation be charged to a deferral account, while at the same time ordering that the Applicant do a more detailed and defensible calculation of "regulatory tax losses" as evidence to justify clearance of that deferral account.

2.2.2 This is similar to what the Applicant is now proposing, but it is important to note that such a deferral account approach was not proposed in the Application. The Board panel in the Decision reacted to the Application presented to them. In our view a sub-optimal remedy was fashioned when the weaknesses in the Applicant's evidence became clear, but the optimal remedy was also not proposed by the Applicant or any party. What the Board panel came up with was better than the Applicant proposed, but not perfect.

2.2.3 In our view, as much as all parties wish that Board panels would produce perfect decisions, that is not always the case, and imposing the wisdom of hindsight to say that X ("not what we asked for") would have been better is a dangerous precedent.

2.2.4 ***Evidence of the Applicant*** The evidence of the Applicant on tax loss carryforwards/ mitigation can be fairly characterized as statements by the Applicant as follows:

(a) The rules do not require us to make available to the current ratepayers tax losses incurred in prior years and used to shelter unregulated income in those prior years.

(b) However, we are concerned about the size of the increase in the payment amounts,

and so we have voluntarily recalculated the tax losses as if the prescribed assets were in their own separate entity. On that basis, which we view as an application of the "stand-alone principle", there are still almost a billion dollars of loss carryforwards available to shelter regulated income.

(c) We propose to use about half of that to shelter all of the income for the test period from tax. We have therefore assumed in the Application that the tax payable is zero in that period. We will then use the other half of the tax losses, which would nominally, on this construct, be available to shelter income in 2010 and beyond, to provide further mitigation in 2008 and 2009. We will deduct from our cost of service the tax savings that would have arisen had we been able to use those losses in this period as well.

(d) As a result of this proposal, we will not have any tax loss carryforwards remaining as of the end of 2009.

(e) Because this is voluntary, we haven't provided a detailed, year by year reconciliation of the tax losses incurred, and how they have been allocated. You will simply have to take our word for it that the $990 million number we have calculated is correct.

(f) If it turns out that we are reassessed for any prior years in which those losses arise, and those reassessments reduce our losses for those years, we want that money back, and we want a deferral account to be established for that purpose.

2.2.5 ***The Board Panel's Decision.*** In our submission, the Decision can be fairly characterized as follows:

(a) We [the Board] will order a mitigation amount roughly equivalent to what was proposed. That will include assuming a tax obligation during the test year of zero, which is what the Application proposed, and assuming a further reduction in cost of service due to offsetting savings that the Application proposed.

(b) We have doubts about whether you have correctly interpreted the "stand-alone principle" in this context, but there is insufficient evidence and debate in this proceeding to resolve that interpretation definitively. Further, because we have found an alternate way to give you what you asked for, and one that is consistent with your evidence, we don't need to make a generic decision interpreting the stand-alone principle.

(c) We are also not confident that you have calculated your "regulatory tax losses" correctly. Therefore, we will order you to provide full evidence to support that calculation when next you file for a change to the payment amounts. The Board panel can then determine whether the $990 million figure was correct, and whether

there are any loss carryforwards still remaining at the end of 2009. In the context of that discussion, the stand-alone principle and how it is interpreted in this context can be addressed.

2.2.6 In our respectful submission, this was a reasonable result that achieved the planned goals of mitigation, but reserved the Board's ability to deal with the tax loss issue more fully when better evidence is filed.

2.2.7 The purpose of both the Previous Motion and the Current Motion is to assuage nervousness on the part of the Applicant that, since the mitigation is not firmly tied to tax loss carryforwards, a future Board panel may take the view that this application of the stand-alone principle is mandatory (which is, by itself, likely correct). It might then go on to determine that since the tax loss carryforwards have not yet been applied, they should be applied in full in 2010 and beyond.

2.2.8 Such a decision – the second step - on the part of a future Board panel would, in our opinion, fly in the face of common sense. It is hard to imagine that anyone would support it, and we would be astonished if a Board panel would consider it. The Applicant's nervousness is, in our view, ill-founded.

2.2.9 That having been said, the one thing that the Decision could have included is a variance account, much like what has been requested in both the Previous Motion and the Current Motion. That would, in our opinion, have made it a better decision. However, it is submitted that the lack of a variance account does not make the Decision incorrect. Every decision of this Board could, in hindsight, be made better one way or another. Lack of perfection is not, in our view, grounds to review and vary.

2.2.10 ***Limiting the Scope of the Decision.*** The Applicant proposes, in the context of the Current Motion, that there is something procedurally or jurisdictionally improper in a Board panel fashioning a remedy that is not something any of the parties have proposed. With respect, this suggestion is shocking, and should be firmly rejected by this Board.

2.2.11 Many Applicants take the concept of it being "their Application" to heart, as if that somehow gives them control over the process. "Their Application" is an expression of responsibility, not power. It expresses the obligation of the Applicant to make their case, not a right to control the Board's actions. The Board in fact controls its own process, and its mandate is not to choose between options presented to it, but rather to get the right answer. This is not like a court, where the judge picks a winner. In the regulatory context, the decision-maker has the direct responsibility to meet a statutory objective.

2.2.12 This means that, as a practical matter, the Board often fashions remedies on particular

issues that are not based on the positions proposed by the parties. It will find a compromise position, or it will create its own alternate view. If you look at the decision with reasons in any highly contested proceeding, you are likely to find one or more issues resolved in a manner different from any of the choices advanced by the parties**.** This is, indeed, one of the reasons why the Board is made up of individuals with a specialized expertise. They are not at the mercy of those appearing before them. They take input, but they also apply their expertise.

2.2.13 Occasionally, a Board panel will have an alternative view of an issue, and will ask for the input of the parties before making a decision on it. More often, the Board panel will assess the evidence before it, and then fashion what it considers to be the optimum solution in light of that evidence.

2.2.14 The Applicant complains that it did not have a chance to respond to the "proposed solution" the Board was considering. With respect, that misses the point. The Applicant had the opportunity to put in its case in full, and it did so. The Board then had the responsibility under statutory mandate to produce the best result. It did so. If the Applicant believes that the result was wrong in law, it can go to court. However, in doing so, its complaint must be that the the result is contrary to law, not that it had some procedural right to "vet" the Board's proposed decision before it was issued.

2.3 ***Correctness of the Previous Motion***

2.3.1 ***Relief Sought on the Motion.*** While the Applicant has not in the Current Motion sought to challenge the correctness of the Previous Motion, except to say that they wanted a chance to argue the merits, we will briefly comment on its correctness.

2.3.2 It appears clear that the relief sought on the Previous Motion was a series of declarations designed to limit the freedom of a future Board panel to deal with these issues. The genesis of this, as we have noted earlier, appears to be nervousness on the part of Applicant that a future Board panel will allow the ratepayers to get the benefit of the tax loss carryforwards twice. The Applicant wanted to prevent that by getting declarations from a Board panel today that would circumscribe the ability to make that decision in the future.

2.3.3 The Board panel hearing the Previous Motion correctly, in our view, denied the motion without a hearing. When the Board is faced with a prayer for relief that, on its face, seeks a remedy that is not appropriate, it is unnecessary for the Board to have a hearing. The Applicant by their own motion has already presented an insurmountable barrier to success, and a hearing could not change that.

2.3.4 We note, in passing, that in retrospect it would probably have been better if the Board panel on that motion had allowed submissions, at least on the threshold issue. While it was not required to do so, in our view, as a practical matter it might have avoided the

problems implicitly raised by the Current Motion. As a matter of sound practice, we believe that the Board should be reluctant to dispose of a matter without hearing from the parties except in the most glaringly obvious cases.

2.3.5 ***Reliance on Future Board Panels.*** We also note that, in any case, the nervousness that grounded the Previous Motion seems to be an overreaction. We are hard pressed to imagine a future Board panel allowing double recovery by the ratepayers of the benefit of the tax loss carryforwards.

2.3.6 The Board panel considering the Previous Motion quite properly showed confidence that a future Board panel will not make a decision contrary to common sense. Aside from the fact that they could not legally limit the regulatory discretion of a future panel, they realized that it was not in any case necessary to do so**.**

3 PROCEDURAL ISSUES

3.1 *The Board's Review/Appeal Process*

3.1.1 Our biggest concern in this proceeding is not the substance of the Decision, the Previous Motion, or the Current Motion. As we have noted earlier, the Decision if interpreted correctly gives the Applicant essentially what they requested in the first place, with the potential that corrections to the amount of the loss carryforwards will be adjusted later on so that everyone is in the position they should be in.

3.1.2 The more troubling aspect of the Current Motion is the fact that the Applicant appears to believe they can keep asking for relief until they get an answer they like. We believe the Board should firmly and clearly reject that assumption.

3.1.3 In our submission, the motion to review or vary process has become more formalized in the last few years, with the Board being more rigorous in identifying the threshold issue and the substantive issue as being separate components of the inquiry. The Board is regularly asking the first question "Do the rules allow you to be here asking for relief?" explicitly. Then, only if it answers that question in the affirmative, is it asking the second question "Is it appropriate to grant the relief you have sought?" This move to be more disciplined is a good one.

3.1.4 What is implicit in the Applicant's Current Motion is a collateral attack on that discipline. The Applicant can only be before the Board on the Current Motion if, in principle, a party can keep moving to review or vary a decision of the Board as many times as it likes.

3.1.5 In our submission, this would be a seriously negative step in the Board's control of its own process. It is not just the potential for excessive litigation. More fundamental is the principle of finality of decisions. As we all understood the system in the past, applicants and all other parties have a first opportunity to make their case in the hearing proper. In a limited set of circumstances, they can come back to the Board for a second opportunity to make their case using a motion to review or vary. In an even more limited set of circumstances, they can go to court for a third opportunity to make their case. After the second opportunity, the Board's decision is final in all respects unless a court overturns it. It is no longer open for further debate.

3.1.6 What the Current Motion effectively proposes is that no decision is ever final. If a party (typically a utility, since intervenors usually cannot afford it) is unhappy with a decision, it can engage in a guerilla war against it, in effect forum shopping until it gets a sympathetic Board panel.

3.2 *Control of the Motion for Review Process*

3.2.1 The argument that the Applicant could put forth on procedure is that, because there was no hearing in the case of the Previous Motion, it basically doesn't count. With respect, that cannot be sustained. The previous Board panel made a decision. The Applicant doesn't like that decision and doesn't like how it was reached, but it is a valid decision of the Ontario Energy Board.

3.2.2 In our submission, it is critical that the Board in the Current Motion exercise control over its own review process. It cannot allow a party to keep coming back until it gets the answer it wants, and it cannot allow a party to posit different categories of decisions, with some being more final than others.

3.3 *Court Appeal vs. Motion for Review*

3.3.1 We note that some people may have sympathy for the Applicant in that, even if they framed the Previous Motion poorly, they still should have been given an opportunity to be heard. We disagree, but even if that were true, they have a venue to do that, in Divisional Court. If the Board panel hearing the Previous Motion was legally obligated to hear submissions from the Applicant, a court will overturn that decision. On the other hand, if as we believe the Board panel in that case did not need to hear from the parties because the Motion could not succeed on its face, then it should stand.

4 WHAT SHOULD THE BOARD DO?

4.1 ***Remedy***

4.1.1 ***Decision Proposed.*** We propose that the Board deny the motion on the threshold issue, approached from two directions:

(a) There is no error in the Decision that needs to be corrected.

(b) The Applicant has already sought a motion to review and vary the Decision, and the Board has ruled on that motion. A second motion to review and vary the same decision, on the same issue, is not allowed in the Board's procedure.

4.1.2 ***Consequences of the Decision.*** The Applicant will argue that this is unfair, because many parties see that the relief sought, a variance account, would actually make the Decision better. They will argue that the Board should find a way within the rules to achieve the right answer in this case.

4.1.3 While we will rarely argue before this Board that procedural issues should trump getting the right answer, the Board should be intensely conscious of the serious negative precedent allowing the Current Motion would set.

4.1.4 In our view, this is an appropriate situation in which the Board can give effect to this procedural concern, for two reasons. First, the procedural concern is a significant one, going to the root of whether Board panels can count on their decisions being final. Second, as we have noted earlier, the Applicant ended up getting roughly what they asked for in the first place, and their nervousness about what a future Board panel might do is entirely ill-founded**.**

5 OTHER MATTERS

5.1 ***Costs***

5.1.1 The School Energy Coalition hereby requests that the Board order payment of our reasonably incurred costs in connection with our participation in this proceeding. It is submitted that the School Energy Coalition has participated responsibly, in a manner designed to assist the Board as efficiently as possible.

All of which is respectfully submitted.

Jay Shepherd, Shibley Righton LLP
Counsel for the School Energy Coalition