



SHIBLEY RIGHTON ^{LLP}
Barristers and Solicitors

Jay Shepherd
Direct Line (416) 214-5224
Direct Fax (416) 214-5424
jay.shepherd@shibleyrighton.com

TORONTO OFFICE:
250 University Avenue, Suite 700, Toronto, Ontario, M5H 3E5
Main 416 214-5200 Toll free 1-877-214-5200
Facsimile 416 214-5400

WINDSOR OFFICE:
2510 Ouellette Avenue, Windsor, Ontario, N8X 1L4
Main 519 969-9844 Toll free 1-866-522-7988
Facsimile 519 969-8045

www.shibleyrighton.com

Please Reply to the TORONTO OFFICE

BY EMAIL

August 21, 2009
Our File No. 2090527

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

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2009-0174 – OPG Payment Amounts

We are counsel for the School Energy Coalition in this matter. These are the SEC submissions on OPG's Application.

The Board, in its letter dated August 18, 2009, noted that OPG has not applied for any change in its payment amounts, and this Application must be limited to its specific subject-matter.

While we agree with that legal conclusion, we note that in making an order affecting rates in 2010, the Board continues to be bound by the just and reasonable standard. The effect of OPG's Application is to get the Board's approval to continuation of existing rates for 2010. The reason for this conclusion is that, without the Board's continuation of the deferral accounts as requested, OPG would not be in a position to continue with the current payment amounts, and therefore would be forced to apply for new rates effective January 1, 2010. It is only if this Board grants the request to continue the deferral accounts that the current payment amounts could be continued.

Thus, in our submission the substance of what is being requested in this application is a request for the continuation of the existing payment amounts. This may be appropriate, but the Board is not in a position to determine that, because it has no evidence as to OPG's expected sufficiency or deficiency in the 2010 year. The only "evidence" it has, in fact, is the publicly available information that CME has brought to the Board's attention, suggesting that OPG may currently be overearning, but that information is untested, without context, and thus not reliable as the basis for a rate decision.

GREAT LAKES
LAW



Without evidence upon which to base a rate decision, in our view it would be inappropriate, and contrary to the Board's normal policies, directly or indirectly to make a final determination as to 2010 rates for this applicant. A final determination by passive acquiescence has, in our view, the same effect as an active rate order decision. If, as a result of the Board's decision in this proceeding OPG has final rates during 2010, that is a final decision as to rates.

The Board has suggested in its August 18, 2009 letter that the question of overearning in the 2010 year may remain in play in OPG's next rates application. We agree, but in our view if rates are final for that year, then it may not be legally possible to take that overearning, if any, into account in the manner that the Board has suggested.

In our respectful submission, the solution to this is to grant the relief requested by OPG in this Application, but at the same time declare the payment amounts to be interim commencing January 1, 2010. Then, if it does turn out, as may be the case, that one of the reasons for the decision not to file a cost of service application for 2010 was expected high earnings, the Board will be in a position to make adjustments that reset the net earnings of OPG for that year to something more reflective of the fair return standard. The Board would not, in its current decision, be predetermining that issue, but would by making rates interim leave its options open at the time of the next OPG cost of service filing, when the Board will have evidence before it with which it can achieve the appropriate result.

All of which is respectfully submitted.

Yours very truly,

SHIBLEY RIGHTON LLP

A handwritten signature in dark ink, appearing to read 'Jay Shepherd', with a stylized, flowing script.

Jay Shepherd

cc: Bob Williams, SEC (email)
Wayne McNally, SEC (email)
Interested Parties (email)