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BY EMAIL and RESS

November 2, 2009
Our File No. 2090711

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

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2009-0331 – OPG 2011 Payment Amounts Filing Guidelines

We are counsel for the School Energy Coalition. In accordance with the Board's letter of September 24, 2009, this letter constitutes the SEC's submissions with respect to the Staff Scoping Paper and the proposed amended Filing Guidelines.

The issues raised in these submissions were, for the most part, discussed at, or arose out of the discussions at, the Stakeholder Conference on October 22, 2009. We believe that conference was a useful exchange of information, helping all parties understand each others' views. As requested by Staff we have attempted to ensure that all of the comments we made there are covered in these written submissions.

Staff Scoping Paper

Proposed Procedural Steps: Staff has proposed a set of procedural steps for the application, and we have three comments on that proposal:

(a) OPG has advised that they plan to file at the end of March. While that provides nine months until the new rates should be in place, in our view that is a tight schedule given the complexity of the issues that will likely be raised, and the fact that the last application took roughly twelve months. In our view, the Board should encourage OPG to file, if possible, no later than the end of February, and earlier if possible.

(b) The proposal includes two rounds of interrogatories, plus a technical conference. While it is perhaps useful to have that much pre-hearing discovery available if required, we feel it is unlikely that a three-step discovery will be required, and perhaps the second round of interrogatories can be deleted. It can always be added by the Board during the process if the answers in the first round and the technical conference suggest a second round is required.

(c) Intervenor and Staff evidence are due after the Issues List is finalized. In our experience, Intervenors and Staff need to see answers to interrogatories and any technical conference questions before evidence can be finalized. Often, even the need for evidence is not clear until after interrogatory answers.

Rate Base: As a general comment, this is the first place in the Staff Scoping Paper in which the suggestion of a "focused examination" of an issue is raised. This, we understand, means a more limited examination, and can be contrasted with a full examination.

Our concern with this is that, when there is a suggestion of a limited review of an issue at the outset, often the applicant will take this to mean there are restrictions on the questions that can be asked by intervenors. In our view, in a cost of service application issues are either relevant to rates, or they are not. Anything that feeds revenue requirement is by definition relevant, and in our submission before hearing the evidence the Board is not legally in a position to restrict review of that relevant issue, because it is not until then in a position to assess materiality.

As a practical matter, it is likely that many of the potential issues in this proceeding will not end up requiring an exhaustive review. However, the time to determine that is much later in the process, likely at the time of the ADR. We have seen many situations in the past where issues that looked, on Day 1, like they were going to be uncontroversial, turned out to be significant once the answers to interrogatories and technical conference questions were added to the record.

We are particularly concerned with the suggestion that, because intervenors did not mount a full-out attack on OPG's rate base in the last Payment Amounts proceeding, that implies that it will not be subject to any debate in this proceeding. Until we have had a chance to see the application, and explore the evidence through the discovery process, it is simply impossible to determine whether there are material issues of concern.

In addition, we believe that the issue is too narrowly framed, and should be reworded as follows:

"Is the rate base for each Test Year appropriate?"

Capital Structure and Cost of Capital: The proposed issue for capital structure appears to be necessary, and appropriately worded.

Under ROE, Staff appear to be assuming that either the existing ROE formula, as applied in EB-2007-0905, or some new "rule" established in EB-2009-0084, would be equally non-controversial. In our view, any changes proposed in the EB-2009-0084 Report will not in any way be operative for OPG until they are fully considered in a rate proceeding. We believe it is likely that, if the result of EB-2009-0084 is any material change to the existing ROE formula (or long term or short term debt,

or capital structure, for that matter), and OPG proposes to adopt that change, that will be a major issue of controversy in this proceeding.

With respect to the two issues proposed under the ROE heading, in our view the second is the necessary result of the Board's decision to allow OPG to go an extra year on the old Payment Amounts. A number of ratepayer groups were concerned about this, but the Board approached that proceeding very narrowly, recognizing that any excess earnings that might have resulted from the extension could be dealt with in the next full cost of service proceeding. The first issue, on the other hand, should in our view be simplified, as follows:

> *"Is the proposed ROE for the Test Years appropriate?"*

The proposed issues for Cost of Debt and Reporting for Hydroelectric and Nuclear Businesses appear to us to be appropriate.

Capital Projects: There is a general question here as to whether the Board should review ongoing projects that are not expected to be in service in the Test Years. In our view, the Board should do so, because it is better for the Board to comment earlier rather than later if it is concerned with the prudence of spending. For large generation projects, it is as a practical matter very difficult for the Board, <u>after the fact</u>, to deny inclusion of amounts in rate base due to concerns about prudence. Even if a review shows that spending was far out of line, by the time a project is in-service the Board's flexibility to influence a good result is limited. On the other hand, if the Board looks at projects either before they are started, or at least before they are completed, the Board can give the regulated entity direction. Then, if contrary to the Board's review in advance of project completion, the regulated entity incurs imprudent expenditures anyway, it is well within the Board's mandate to deny recovery.

A case in point is the Niagara Tunnel project, which is reportedly well over budget. While there may well be legitimate reasons for that, and all costs may have been prudently incurred, the time for the Board to review the status of that major project is in this proceeding. This is especially true since the original budget of the project was not subject to Board regulation, but once the budget exceeds what was originally approved by the OPG Board of Directors, it is the Board's responsibility to review it, something it has not yet had an opportunity to do.

We would change the wording of the first Hydroelectric issue to read as follows:

> *"Were the Niagara Tunnel costs, in excess of those approved prior to EB-2007-0905 by the OPG Board of Directors. prudently incurred, and is the revised budget for the project appropriate and prudent?"*

With respect to the second Hydroelectric issue, we would add the phrase "prior to EB-2007-0905" after the word "approved". The third issue appears to us to be necessary and appropriately worded.

The first of the two Nuclear issues should, in our view, be amended to explicitly include the "prudently incurred" test. The second appears to be appropriate as is. We would also add a third issue, to reflect the direction in the EB-2007-0905 Decision, as follows:

"Is the capitalization approach used for Pickering 2&3 appropriate?"

On Nuclear Refurbishment and New Build, we are concerned that a stranded assets issue may be arising. An appropriate issue should be added dealing with whether any stranded assets have arisen or are expected to arise, how OPG proposes they be treated, and what the Board considers appropriate treatment.

Operating Costs: We propose that the second issue under Nuclear be added to Hydroelectric as well. In both cases, we believe the applicable years should be 2011 and 2012, not 2008 and 2009. With that exception, we have no submissions in this area.

Other Sections: We have no further submissions on the other parts of the Staff Scoping Paper.

Filing Guidelines

The following comments follow the numbering in the Guidelines. We have only listed those on which we have submissions.

1.1 In the last sentence of this section, it implies that only common issues are being considered. This should be clarified that separate hydroelectric and nuclear issues will also be considered. In our view, the previous wording was easier to understand than the proposed wording.

2.1.1 The issues of GAAP vs. IFRS accounting treatment will be an important one in this proceeding. OPG is required to have 2010 and 2011 in IFRS for accounting purposes anyway (2011 as the first operational year under IFRS, and 2010 for comparison purposes), so in our view those two years should be filed in IFRS, and also in the previous Canadian GAAP. If only 2011 is filed in both, it will be difficult for the Board to understand the impacts with any perspective, because only the impacts in one year will be available. Any impact that changes from year to year will not be shown properly.

2.2.2 It is not clear from this what IFRS impact reporting will be required. In our view, for any material difference from Canadian GAAP to IFRS, the Applicant should identify the difference in the Test Years, and estimate the difference in each of the previous years being filed.

2.2.3 This application will be filed within the context of the Applicant's 2010 – 2014 Business Plan. We believe that this Business Plan should be filed with the Application (perhaps, depending on its contents, in confidence). While the Business Plan will likely contain material that is not relevant to the Prescribed Facilities, it will provide a very valuable context for the Board to understand the expenditures for which OPG is seeking recovery in this Application. This is especially true since the issue of corporate cost allocations will be an important aspect of this proceeding. Without understanding the overall direction and plans of the Applicant, it will be difficult for the Board to assess whether the significant allocations of costs between regulated and unregulated business are reasonable.

We note that a Business Plan is often the subject of an interrogatory, rather than included in the filing at the outset. In this case, since it is fairly clear that it will be both relevant and material, in our view it should be stipulated in the Filing Guidelines rather than await the interrogatories.

2.6 One of the problems that has arisen in some past cost of service proceedings is reconciling capital budget to rate base. We suggest that the Filing Guidelines include an express reconciliation, showing for the last two historical years, the Bridge Year, and each of the two Test Years what capital projects are closing to rate base, and when, and the CWIP at year end.

2.8.1 We are concerned that the $20 million materiality threshold for OM&A detailed reporting continues to be too high. It may be the case that, as the Payments Amount proceeding becomes more consistent and well understood, a high threshold can be used. Right now, when the Board is still doing only its second proceeding of this type, in our submission a lower threshold, either $5 million or $10 million, would be better.

2.8.1 Human Resources information is often highly confusing because of the various ways in which personnel can be counted: FTE's vs. headcount, average vs. year end vs. weighted average, full-time vs. part-time, etc. The Filing Guidelines should stipulate a full set of personnel data using a common metric, and should require that any exhibits that include numbers of employees should clearly indicate which measure is being employed.

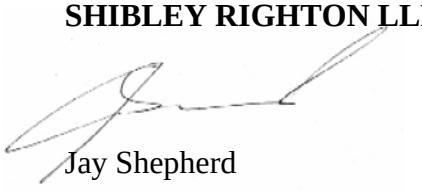
2.11 It is our understanding that the nuclear fixed payment issue may once again come up in this proceeding. As well, the design of the hydroelectric incentive will be an issue. We suggest that the Filing Guidelines require a reasonable set of revenue scenarios (based on production forecast sensitivities, and production profiles) for any proposed design of the payment amounts for either nuclear or hydroelectric.

Conclusion

We thank the Board for this opportunity to comment on the issues and the filing guidelines.

All of which is respectfully submitted.

Yours very truly,
SHIBLEY RIGHTON LLP



Jay Shepherd

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