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July 5, 2010

VIA EMAIL & 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-2010-0159 Canadian Niagara Power Inc.
Deferral Account Application – Submissions of Energy Probe**

Pursuant to Procedural Order No. 1, issued on May 28, 2010, please find attached the Submissions of Energy Probe Research Foundation (Energy Probe) in the EB-2010-0159 proceeding for consideration of the Board. An electronic version of this communication will be provided in PDF format.

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

Yours truly,

David S. MacIntosh
Case Manager

cc: Douglas Bradbury, Canadian Niagara Power Inc. (By email)
Andrew Taylor, Energy Law (By email)
Olena Loskutova, Consultant to Energy Probe (By email)
Peter T. Faye, Counsel to Energy Probe (By email)

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Ontario Energy Board

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

AND IN THE MATTER OF an Application by Canadian
Niagara Power Inc., requesting approval to establish a deferral
account to record certain preliminary costs.

**SUBMISSIONS ON BEHALF OF
ENERGY PROBE RESEARCH FOUNDATION
("ENERGY PROBE")**

July 5, 2010

**CANADIAN NIAGARA POWER INC. – DEFERRAL ACCOUNT
EB-2010-0159**

**ENERGY PROBE RESEARCH FOUNDATION
SUBMISSIONS**

How these Matters came before the Board

1. On April 9, 2010, Canadian Niagara Power Inc. (the “Applicant” or “CNPI”) filed an Application with the Ontario Energy Board (the “Board”) seeking approval to establish a deferral account to record certain preliminary costs associated with an application by CNPI for leave to construct transmission facilities which were denied by the Board.
2. The Board issued a Notice of Application and Hearing on April 28, 2010. Energy Probe filed Interrogatories on June 7, 2010; the Applicant filed its Responses on June 15, 2010.

Submissions

3. The Board’s Decision in RP-1999-0034 established four criteria that the Board would apply for deferral account requests from Distributors. These were Causation, Materiality, Inability of Management to Control and Prudence.
4. The context of that proceeding was the development of a Rates Handbook and the deferral accounts being considered were for distributor transition costs. However, subsequently the Board has applied the four criteria to other deferral account requests from distributors and transmitters.
5. A recent example of this is the Board’s Decision in EB-2008-0272 in which it considered a request by Hydro One Networks for the establishment of a deferral account to record the cost of preliminary work on IPSP projects. Two passages in that Decision are particularly relevant to the question of criteria that the Board uses to authorize the establishment of a deferral account.

6. The first passage appears on page 57:

“Board staff stated that the account appears to be justified but invited Hydro One to address how the account would meet the Board’s articulated criteria of causation, materiality, inability of management to control and prudence”

7. Further in the Decision on page 59 the Board confirms Board Staff’s understanding of the requirements for establishment of a deferral account:

“The Board does have criteria that must be reasonably met in order for the Board to authorize the establishment of a deferral account. Hydro One argued that it has met the Board’s four criteria”

8. Energy Probe understands these passages and their context to mean that Board approval of a new deferral account is contingent on the applicant satisfying these four criteria. However, the analysis required by the Board in considering the four criteria appears to Energy Probe to resemble a prudence review of the costs.

9. If the deferral account requested by CNPI in the present proceeding were approved following such an analysis, Energy Probe is concerned that the Applicant could claim in a future proceeding that prudence had already been tested and should not be repeated.

10. In its response to Energy Probe’s IR#1, CNPI took the position that the four criteria do not apply to this Application. However, it went on to consider how its costs could be considered to have met the criteria and reiterated that analysis in its final argument.

11. If the Board chooses to evaluate the deferral account application on the basis of the four criteria, Energy Probe has the following submissions on the merits.

12. On the criterium of causation, Energy Probe is not able to assess CNPI's argument that the costs of the project are outside of the base on which its rates have been derived. That would require an analysis of CNPI's previous transmission rates application to determine if development capital included any proposals to reinforce its transmission system as described in the EB-2009-0283 application. None of that evidence is before the Board in this Application.

13. On the criterium of materiality, Energy Probe accepts the Applicant's argument that the project costs exceed its materiality threshold.

14. On the criterium of management inability to control, Energy Probe does not accept the Applicant's argument that the event that precipitated the costs and was "*outside management's control*" was the regulatory requirements for filing a leave to construct application.

15. Energy Probe submits that the event initiating the costs was the decision by CNPI management to undertake the project. If that decision was prompted by an external event over which management had no control then, in Energy Probe's submission, the claim of management inability to control might have some basis.

16. However, according to the Applicant's response to Energy Probe IR#2, CNPI was not directed by the IESO or other relevant authority to undertake the project.

17. Furthermore, Energy Probe's understanding of the evidence in the leave to construct application EB-2009-0283 leads it to conclude that the project was not precipitated by any Ministerial directive as was the case with Hydro One's deferral account application in EB-2008-0272. Nor was it required by the provisions of the *Green Energy and Green Economy Act 2009*, as was the case in Great Lakes Power application for a deferral account in EB-2009-0409.

18. Energy Probe submits that the project was conceived and initiated solely by CNPI under the assumption that it needed to improve its transmission system reliability. Therefore, with no external driver for the project, the costs must have been within management control and the Applicant does not satisfy this criterium.

19. On the criterium of prudence, Energy Probe does not accept the Applicant's argument that its costs were prudently incurred. The Applicant argues that prudence is satisfied because it didn't spend more than was necessary to bring a leave to construct application to the Board. Energy Probe submits that this does not address the test for this criterium that the option selected must represent the most cost-effective option (not necessarily least initial cost) for ratepayers. Energy Probe takes this position for the following reasons:

- The Board's Decision in the leave to construct application (EB-2009-0283) found that the project was not needed on reliability grounds. In that case, Energy Probe submits that CNPI did not have sound reasons for pursuing the project in the first place because reliability was already within the IESO accepted range. If the project was unnecessary for reliability Energy Probe submits that it could not have been the most cost effective option for ratepayers.
- Once the reliability justification was rejected the project became discretionary and had to meet the economic benefits test. One of the options to be analyzed in this test was the "do nothing" option as noted in the Board's Decision at the bottom of page 12. This would have resulted in no costs to ratepayers. Because the Board found that the economic benefits of the project had not been justified, the "do nothing" option, in Energy Probe's submission, became, by default, the most cost effective option for ratepayers.
- One argument that could be advanced by the Applicant to support its prudence argument is that it could not know at the time of project inception that it would fail both the reliability and economic benefits tests.

- Energy Probe disagrees with this prospective argument. The Board in its Decision on the leave to construct application (EB-2009-0283) noted at page 11 that *“The issue of the need for improved reliability of the CNP transmission system is further addressed by the IESO’s evidence which indicates that for transmission systems such as CNP’s system, the IESO uses two measures to assess the reliability performance of the transmission system. One measure is based on the load restoration period and the other is a measure of the unsupplied energy. The IESO submitted that the CNP transmission system meets the reliability requirements on both counts.”*
- Energy Probe submits that CNPI was aware or should have been aware of the IESO’s measures for reliability performance and either knew or should have known that the project could not be justified on reliability grounds. However, even if CNPI did not know, it could have asked the IESO to evaluate the project from a reliability standpoint prior to committing to significant expenditures on project development. Having that evaluation at an early stage in the project would have allowed CNPI management to reconsider and abandon the project thereby avoiding much of the development costs it eventually incurred.
- Energy Probe further submits that, had CNPI properly evaluated the project at the outset, it would have realized that its economic benefits analysis might not be adequate to justify the project if its reliability justification was rejected. In that event, management should have delayed spending on the project until it was certain that its economic justification was strong enough to carry the project through the leave to construct application process.
- In Energy Probe’s submission, CNPI’s failure to exercise proper care in its analysis of the project need led to unnecessary costs and, as a result, those costs were not prudently incurred.

20. For the above reasons, Energy Probe submits that the Applicant has not satisfied at least two of the four criteria for establishment of a deferral account and should be denied its Application.

Costs

21. 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

July 5, 2010

Peter Faye

Counsel to Energy Probe Research Foundation