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BY EMAIL AND RESS

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Our File No. 2010008

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2010-0008 – OPG Payment Amounts – Revised Issues List

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #1, this letter constitutes SEC's submissions with respect to the Revised Draft Issues List. SEC provided comments prior to the Issues Conference, and some of those comments remain below, but others have been dealt with by revisions since that time.

Our comments below are numbered consistent with the Revised Draft Issues List. For ease of reference, we have referred to the EB-2007-0905 decision as the First Payment Amounts Decision, the EB-2009-0038 decision as the Review Decision, and the EB-2009-0174 decision as the Extension Decision.

1. General.

- (a) There are a number of places in the comments below in which we believe that Board directions from prior decisions should be listed as individual issues under the relevant subject area. This is a matter of drafting precision, not substance, as we believe those are all captured in Issue 1.1.

(b) The Filing Requirements (page 8) contain options relating to IFRS, but whatever approach is taken in the Application, there are still IFRS implications during the Test Period. We believe that an additional issue should be added, as follows:

“Would the disclosure and treatment in the Application of the impact of the transition to International Financial Reporting Standards be consistent with the Report of the Board dated July 28, 2009 in EB-2008-0408, if that Report expressly applied to the Applicant? To the extent that there are any differences between the reporting from the Applicant and the reporting contemplated in the Board’s Report, what are those differences, and what steps, if any, should be taken to deal with those differences?”

2. **Rate Base.** No specific comments.

3. **Capital Structure and Cost of Capital.**

(a) The First Payment Amounts Decision determined (page 161) that hydroelectric and nuclear would have the same ROE, but that the next proceeding should consider whether and how their capital structures should be different to reflect their different risks. While the implication in the First Payment Amounts Decision was that the focus would be on equity thickness, it was not so restricted. If the Board determines that issue 3.3 is intended to express this, we have no concern. If the intention is to expand what the Board already determined, or change it, that should be clarified.

(b) One of the things the Board determined in the First Payment Amounts Decision (page 161) was that the existing (December 20, 2006) formula for changing cost of capital should apply to OPG, albeit with a different starting point. We don’t see where consideration of this question is included in the draft issues list. We would therefore propose addition of the following issue:

“Should a formula be adopted by the Board to adjust the Applicant’s cost of capital for prescribed facilities annually and, if so, what should that formula be?”

4. **Capital Projects.** We are concerned that, since the Niagara Tunnel project does not come into service in the Test Period, some parties will want to avoid consideration of its costs in this proceeding. On the other hand, the Board will at some point have to deal with the fact that the actual costs are coming in significantly higher than those in the Board of Directors approved budget. In our view the earlier this is looked at, the better. We believe that an issue that requires a status update in this proceeding, and a review of the new forecast budget and approach, is a good idea. This may be included in the revised wording of Issue 4.2, in which case we have no concerns. If it is not, we believe the Board should add an issue dealing with this project.

5. **Production Forecasts.** No specific comments.

6. **Operating Costs.**

(a) The Board directed OPG to file an independent evaluation of its corporate cost allocations at page 60 of the First Payment Amounts Decision. We believe that a specific issue should be added for this purpose, as follows:

“Is the Applicant’s response to the Board’s direction in the First Payment Amounts Decision, to file an independent review of its corporate cost allocations, appropriate? Is it appropriate to make any changes to the corporate cost allocations proposed by the Applicant in light of the Applicant’s response to the direction?”

(b) Intervenors requested a variance account for the Regulatory Affairs costs because they were expected to be lower in the period after a rate proceeding. The Board denied this request at page 62 of the First Payment Amounts Decision, precisely because another application was expected almost immediately for 2010. OPG didn’t proceed on that basis. We believe an issue should be added to deal with the combined result of the lack of a variance account, and the Extension Decision, and whether it should affect any amounts ordered in this proceeding.

(c) A key issue in the First Payment Amounts Decision was the poor operating cost levels of Pickering, particularly Pickering A. The Board ultimately decided on a disallowance (page 31), but in the context of an analysis of whether actual costs or benchmarked amounts were appropriate for inclusion in cost of service. As well, at page 28 the Board denied SEC’s proposal for a direction to file a long-term viability plan, saying in effect that if OPG can’t make Pickering viable, the cost will be borne by the shareholder. In light of this, we believe that an issue should be added as follows:

“To what extent, if any, should the OM&A included in rates for the Pickering units be based on benchmark costs as opposed to forecast costs? If any benchmark costs are to be used, what benchmarking information is available and appropriate for application to revenue requirement in the Test Period?”

(d) We still believe that having a long term plan is appropriate. Therefore, we would like to see the following issue added:

“Does the Applicant have a viable plan to produce electricity from Pickering A and Pickering B at an overall reasonable cost over their remaining lives?”

7. Other Revenues.

(a) The First Payment Amounts Decision (page 49) used a three year average for SMO and WT revenues. We assume that consideration of the appropriateness of that approach, and what the actuals were, including 2010, relative to the imposed forecast, are included in issue 7.1? If the Board could confirm that, it would be of assistance.

(b) In the First Payment Amounts Decision (page 50) the Board refused to include Congestion Management payments as a revenue offset. We would like to ask an interrogatory exploring ROE in a past year, probably 2009, with and without the Congestion Management payments and the constrained on or off situations that caused them. We want to explore what costs, if any, of being constrained are included in the forecast revenue requirement, and, if they are, whether the payments should also be included, or whether the costs should be taken out of revenue requirement, in either case to achieve symmetry. If this is included in issue 7.2, we are not concerned. If it is not, we would like to add an issue dealing with the appropriateness of congestion management payments being a revenue offset.

8. Nuclear Waste Management and Decommissioning Liabilities.

(a) There is a 2.23 million bundle threshold for used fuel management liability, which at one time was forecast to be reached in 2011. Unless the effect of this is already in Issue 8.1 or 8.2, we believe that an issue should be added dealing with the potential impact of this, as follows:

“Has the liability threshold for the Applicant on used fuel bundles, 2.23 million bundles, been reached or will it be reached in the test period? Is so, what are the implications on the liability for, and revenue requirement of, nuclear waste management?”

(b) The First Payment Amounts Decision said (page 92) that, in the event there were external changes relative to ARO's, this next proceeding should reconsider the use of the modified rate base method for nuclear liabilities. At least one such external change – IFRS – has taken place, and ARO's have also been considered in other forums such as FERC. It therefore appears to us that the methodology to be used could be a live issue. Given this context, it may be worth adding a sentence to issue 8.1 to clarify, such as:

“Have any regulatory or other bodies issued position or policy papers, or made decisions, with respect to Asset Retirement Obligations that the Board should consider in determining whether to retain the existing methodology or adopt a new or modified methodology?”

(c) What is the status of the Reference Plan? In this regard, do the current issues have sufficient scope that we can explore whether the current Reference Plan will be applicable for the Test Period, or there will be material changes to it? ONFA originally would have required a new Reference Plan no later than December 2011, but that may now have changed. In our view the possibility of a change to the plan should be included in the nuclear liabilities issues, either by broad interpretation or by addition.

9. Design of Payment Amounts.

(a) We would propose that the Board amend issue 9.2 to add the following (see page 55 of the First Payment Amounts Decision):

“Has the Applicant responded appropriately to the Board’s direction in the First Payment Amounts Decision to file a review of the incentive mechanism? Has the incentive produced the results intended by the Board? What changes, if any, to the incentive mechanism are appropriate in light of the experience to date?”

(b) In the last case, OPG proposed, and the Board accepted, that mitigation was appropriate. In this case, there are a number of factors that could result in a substantial increase. We therefore think the following issue should be added:

“To what extent, if any, should the Applicant implement mitigation of any rate increases determined by this Board? If mitigation should be implemented, what is the appropriate mechanism that should be used?”

10. Deferral and Variance Accounts. We have a number of issues within this topic area:

(a) In light of the complexity of the tax loss issue, we propose that the Board add a new issue, worded something like the following:

“With respect to the Tax Loss Variance Account ordered in the Review Decision:

x.1 Has the Applicant filed a complete and appropriate “analysis of its prior period tax returns” as ordered at page 171 of the First Payment Amounts Decision and reaffirmed at page 15 of the Review Decision?

x.2 Are the entries in the variance account and resulting balance consistent with the First Payment Amounts Decision as modified by the Review Decision?

x.3 What adjustments, if any, should be made to this account in light of the Extension Decision?

x.4 Is the Applicant's proposal with respect to the balance in this account appropriate?"

(b) It does not appear to us that the Review Decision was in a position to consider whether there would be an impact on the baseline calculated for the purposes of the Income and Other Taxes Variance Account, but the potential would appear to exist for there to be an impact. SEC would like to be able to ask interrogatories to determine if this is the case. If this is included by implication in existing 10.1, we have no concern. Otherwise, we think a new issue identifying this question should be added in section 10.

(c) The Extension Decision considered certain deferral and variance account impacts, but it is not clear to us that the Board panel in that case was in a position to deal with all possible impacts. We therefore suggest that the following additional issue be added:

"Have all impacts of the Board's decision in EB-2009-0174 been reflected correctly in all deferral and variance accounts? Do those impacts remain consistent in practice with the First Payment Amounts Decision, as modified by the latter decision? Is it appropriate to make any changes to the balances or clearance of any accounts in light of those impacts, or to make any changes to the future terms of any accounts?"

(d) In its letter of August 18, 2009 in relation to EB-2009-0174, the Board said, in denying earnings sharing for 2010, "CME may wish to raise at the next payments proceeding the issue of OPG's 2010 results, and whether those results should be considered in the disposition of the deferral and variance accounts". We are unable to determine any of the issues on the draft list that would include this. If it is not included, we believe that a specific issue should be added to do so. In our view, since this comment was specifically in the context of earnings sharing, the new issue should have sufficient scope to consider forecast earnings by OPG on the prescribed facilities in 2010.

(e) In the First Payment Amounts Decision, the Board decided, at page 49, not to order a variance account for revenues relating to SMO or water transactions. In light of the Extension Decision, we are concerned with whether something is needed to capture 2010 variances, and whether going forward a new variance account should be added for this purpose given the potential for additional extensions. This does not appear to arise under any of the issues on the draft list.

(f) It doesn't appear to us that changes to the terms of existing deferral and variance accounts are included as an issue. The existing 10.5 may cover it, but that is not clear. We would therefore propose that the Board add, at the end of 10.5, the following sentence:

“What changes, if any, should be made to the terms of any deferral or variance accounts that are continued?”

11. Reporting and Record Keeping Requirements. No specific comments.

12. Methodologies for Setting Payments Amounts. SEC believes strongly that this issue should remain on the list. The Board, in its EB-2006-0064 Report in 2007, noted that IRM is slated for OPG in the future. However, as the Board points out at page 22 of the First Payment Amounts Decision, that will happen “when it is satisfied that the base payment amounts provide a robust starting point for that formula”. In this proceeding, the Board first has to determine whether that stage is reached, and then what steps should be taken to establish the IRM structure. While the Board may determine that the appropriate result is some form of consultation process and Board policy paper, the issue should still remain on the issues list for the Board to consider all of its options. At the very least, we note that the Board will have to consider in setting payment amounts for the test period whether those payment amounts will form the basis for IRM, or whether, as has already happened once, the Applicant may simply fail to seek new payment amounts for some period of time after the current test period.

We hope these comments are of assistance to the Board.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.

Jay Shepherd

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