

By electronic filing and by e-mail



July 14, 2010

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Dear Ms Walli,

**Ontario Power Generation (“OPG”)  
2011-2012 Payment Amounts Application  
Board File No.: EB-2010-0008  
Our File No.: 339583-000064**

**A. Introduction**

This letter contains the comments of Canadian Manufacturers & Exporters (“CME”) on the Revised Draft Issues List circulated by Board Staff on July 7, 2010, following the Issues Conference on July 6, 2010.

Because these comments are one (1) day late, we have had the benefit of considering the comments provided on behalf of Association of Major Power Consumers of Ontario (“AMPCO”), Energy Probe Research Foundation (“Energy Probe”), Green Coalition Energy (“GEC”), Ontario Power Generation Inc. (“OPG”), Pollution Probe, Power Workers Union (“PWU”), School Energy Coalition (“SEC”) and Vulnerable Energy Consumers Coalition (“VECC”). As a result, we will include, in this letter, CME’s comments on the submissions made by others with respect to the Revised Draft Issues List.

**B. Guiding Principles**

Our comments are guided by the following principles:

**1. Relevance**

The issues should be relevant to the Application. In regulatory proceedings such as this, issues are relevant even though the same or similar issues have been considered in a previous case. Relevant issues in a particular case cannot be excised because they have been considered previously;<sup>1</sup>

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<sup>1</sup> *Industrial Gas Users Association v. Canada (National Energy Board)*, [1990] F.C.J. 218; 43 Admin. L.R. 102; 19 A.C.W.S. (3<sup>rd</sup>) 1325.

## 2. Broadly Defined Issues

Issues should be broadly defined and broadly interpreted. Sub-issues, subsumed by a broadly defined but complex issue, should be included where a disaggregation of a broad and complex issue is likely to prompt a more organized presentation of and responses to interrogatories. The probable result of this approach is a better understanding of the information that is relevant to identifiable topics that fall within the ambit of a broadly defined issue;

## 3. Issues Considered in Prior Cases

The existence of new information pertaining to issues considered in prior cases depends upon the outcome of the pre-hearing disclosure process, including the evidence, if any, pre-filed by parties other than OPG, and interrogatory responses provided by OPG and other parties who may submit evidence. In this case, the pre-hearing evidence and discovery process does not end until September 9, 2010, being the deadline for interrogatory responses pertaining to evidence filed by parties other than OPG. A Settlement Conference is scheduled for September 14, 2010. Any narrowing of the scope of broadly defined relevant issues cannot be considered before all evidence filings and pre-hearing disclosure processes have been completed. Matters pertaining to the narrowing of issues considered in a prior proceeding are appropriate subject matter for consideration at the Settlement Conference, but not before.

A motion to vary an issue decided in a previous case is not an essential precursor to posing interrogatories to OPG about whether any changes in circumstances have occurred since an issue was decided in a prior case. Nor can a pre-emptive and bald assertion by OPG that no changes have occurred “to its knowledge” lead to a narrowing of a broadly defined issue and a consequential stifling of inquiries about changes. OPG’s knowledge about changes in circumstances is a legitimate topic for scrutiny in the interrogatory process. No one knows whether OPG has even monitored proceedings in other jurisdictions with respect to topics touched on in this case until OPG has responded to specific interrogatories dealing with those matters.

## 4. Reasonableness and Prudence

The appropriateness or reasonableness of test period expenditures relating to multi-year capital projects cannot be examined without considering matters pertaining to the prudence of the entire project. Matters pertaining to the prudence of multi-year projects fall inside, and not outside, the ambit of matters pertaining to appropriateness and reasonableness of test year expenditures on such projects. OPG’s assertions to the contrary lack merit.

For example, to establish the reasonableness of spending \$200M in the test period on a multi-year project estimated to cost \$1B, OPG representatives must be able to demonstrate to its Board of Directors and to its regulator that the \$1B of multi-year expenditures is prudent. Matters pertaining to prudence are subsumed by and fall well within the ambit of matters pertaining to test period appropriateness and/or reasonableness.

Having regard to these principles, our comments on the Revised Draft Issues List and our comments on the submissions already made by others are set out in the sections of this letter that follow.

**C. CME's Comments on Issues List**

**1. Consumer Impacts and Affordability**

At the Issues Conference, we advised that a topic that is not included but should be included in the Issues List is "Consumer Impacts and Affordability". This topic is of major concern to CME. According to recent speeches made by the Board Chair, Mr. Wetston, and Vice-Chair, Ms Chaplin, the topic is also a matter of concern to the Board.<sup>2</sup>

Consumer Impacts and Affordability is a topic relevant to every application for rates the Board considers. It is the subject matter of evidence pre-filed by OPG at Exhibit I, Tab 1, Schedule 2. The topic is also highlighted in OPG Press Releases in March and May 2010.

To enable intervenors to ask questions of OPG about Consumer Impacts and Affordability and to lead their own evidence on the issue, if they wish, we submit that an additional section entitled "Consumer Impacts and Affordability" needs to be added to the Issues List. The broad questions that we submit should be included are as follows:

**13. Consumer Impacts and Affordability**

- 13.1 Are the consumer impacts of OPG's plans appropriate?
- 13.2 What measures for evaluating consumer impacts and affordability are appropriate?
- 13.3 What measures to reduce consumer impacts and to enhance affordability are appropriate?

Our issues 13.2 and 13.3 are matters that are subsumed by and fall within the ambit of our broadly worded Issue 13.1. Nevertheless, we believe that disaggregating the broadly worded issue in this way will lead to a more focused scrutiny of the issue. The appropriateness of the Consumer Impacts of OPG's plans cannot be determined without considering the appropriate way to measure Consumer Impacts and Affordability. Where the outcomes are inappropriate, then one needs to consider the regulatory tools that can be used to adjust those outcomes to make them appropriate.

We are currently planning to lead evidence on the issue of Consumer Impacts and Affordability in the Application by Hydro One Networks Inc. ("Hydro One") for 2011 and 2012 Transmission Rates. We are also considering leading evidence on the issue in this case. A final decision with respect to leading such evidence in this case will be made once we have considered OPG's responses to our interrogatories on this issue.

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<sup>2</sup> Speech to the Electricity Distributors Association ("EDA") Annual General Meeting on March 29, 2010, by Board Chair Mr. Wetston, and Speech to the Ontario Power Summit on May 6, 2010, by Vice-Chair Ms Chaplin.

In Hydro One's 2011 and 2012 Transmission Rates case, we asked that the "Consumer Impacts and Affordability" questions described above be added to the Issues List. In response, Hydro One agreed that the issue of Consumer Impacts is relevant but questioned the appropriateness of considering measures for evaluating affordability in its case. In response, we reiterated that the objective measurement issue is a topic that falls within the ambit of a consideration of Consumer Impacts and Affordability. One cannot evaluate the affordability of a utility's spending plans without first determining the objective measurement tool to apply. The fact that the Board's determination of the appropriate means of objectively measuring affordability in one case may inform its determination of that issue in subsequent issues, does not detract from the relevance of the issue in each case.

For all of these reasons, a broadly defined issue pertaining to Consumer Impacts and Affordability needs to be added to the Issues List.

## 2. Transition of OPG to Incentive Regulation

This topic is of continuing relevance from year to year. Accordingly, in our view, it is appropriate to have a broadly defined issue on the Issues List to deal with it. However, rather than the questions posed in paragraphs 12.1, 12.2, 12.3 and 12.4 in the Draft Issues List, we submit that a more general question should be posed to the following effect:

### Methodology for Setting Payment Amounts

The Board Report, *A Regulatory Methodology for Setting Payment Amounts for the Prescribed Generation Assets of Ontario Power Generation Inc.*, EB-2006-0064, November 30, 2006, stated that, "The Board will implement an incentive regulation formula when it is satisfied that the base payment provides a robust starting point for that formula."

#### 12.1 What process for determining how and when OPG should be transitioned to Incentive Regulation is appropriate?

With an issue of this nature on the Issues List, parties would be free to pose interrogatories of OPG about process, to which OPG would presumably respond in the manner outlined in its letter of July 13, 2010. Matters pertaining to the adequacy of the process OPG envisages could then be considered at the Settlement Conference and, at that time, any agreed upon process for dealing with the issue could be reflected in the provisions of a Settlement Agreement subsequently presented to the Board for approval.

In our view, this approach to the possible transition of OPG to "Incentive Regulation" is more compatible with the principles that the Board should apply when determining the Issues List and is, we submit, more appropriate than the approaches suggested by OPG and others.

## D. CME's Comments on Submissions made by Others

### 1. AMPCO, GEC, Energy Probe, Pollution Probe, PWU, SEC

In our view, all of the topics raised by these parties in their letters of comment are relevant and fall within the scope of this proceeding. We will rely on the Board to

determine whether the Revised Draft Issues List needs to be further revised to cover these topics.

With respect to the transition of OPG to Incentive Regulation, for the reasons already outlined, we submit that matters pertaining to the process to be followed should not be excised from the Issues List. Instead, a broadly worded issue should remain on the Issues List to facilitate a resolution of any differences that may exist with respect to the process at the Settlement Conference scheduled for September 14, 2010.

## 2. OPG

### (a) Guiding Principles

Some of the Guiding Principles OPG urges the Board to apply are inappropriate. As noted above, issues should be broadly defined and relevant to the Application. However, scrutiny of issues considered in previous cases is not conditional on initiating a motion to vary, as OPG suggests. Nor do matters pertaining to prudence fall outside the ambit of matters pertaining to reasonableness and appropriateness, as OPG argues.

### (b) Subsumed Issues

There are a number of issues that OPG says are subsumed by other issues already listed. Issues 1.2, 5.2, 5.4, 9.1, 10.2 and 11.1 are characterized by OPG as subsumed issues.

We submit that these allegedly subsumed issues should not be excised from the Issues List. No harm ensues by leaving these items on the list and, for the reasons outlined above, a listing of what amount to sub-issues of a broadly defined issue already on the Issues List can lead to a more organized presentation of and responses to interrogatories, and a consequential better understanding of the information upon which OPG relies.

### (c) Reasonableness and Prudence

OPG makes a number of re-wording suggestions designed to constrain the scope of certain issues to exclude any examination of matters pertaining to prudence. The changes to Issues 4.1, 4.2, 4.4 and 4.5 are proposed by OPG for this purpose.

For the reasons outlined above, matters pertaining to prudence fall well within the ambit of matters pertaining to appropriateness and reasonableness. The changes OPG proposes are inappropriate and should not be adopted.

### (d) Non-Substantive Wording Changes

OPG makes a number of re-wording suggestions that we consider to be unnecessary because, broadly interpreted, the scope of the issue remains the same with or without the re-wording changes OPG suggests. The changes OPG suggests to Issues 6.4, 6.5, 6.9 and 9.2 fall into this category and are unnecessary in our view.

### (e) Issues Considered in a Prior Case

OPG proposes re-wording Issue 8.1 to exclude questioning about circumstances pertaining to a regulatory approach to asset retirement obligations that differs from the

approach the Board approved in OPG's last case. For reasons already outlined, interested parties are always at liberty to explore the same issue in consecutive proceedings. The extent to which circumstances have or have not changed and the relevance of those circumstances to a consideration of alternatives should be considered after the evidence filing and pre-hearing discovery processes have been completed, and not before. The changes OPG proposes to Issue 8.1 should be rejected.

(f) Incentive Regulation

For the reasons already outlined, the Board should reject OPG's position that no question pertaining to its transition to Incentive Regulation should be included in the Issues List. Instead, a broadly worded question of the type we have described above should be included so that any differences of view with respect to matters pertaining to the process to be followed can be addressed at the Settlement Conference.

We hope that these comments are of assistance to the Board.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Peter C.P. Thompson', with a long horizontal flourish extending to the right.

Peter C.P. Thompson, Q.C.

PCT\slc

c. Carlton D. Mathias (OPG)  
Charles Keizer (Torys)  
Interested Parties  
Paul Clipsham (CME)  
Vince DeRose

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