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BY EMAIL AND RESS

July 16, 2010
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 responding submissions with respect to the Revised Draft Issues List. We have made submissions at the time of the Issues Conference, and submissions on July 13, 2010 in compliance with PO#1, and we need not repeat them. These submissions are limited to replying to the submissions of PWU and the Applicant, both filed this week.

Power Workers Union

With respect to the proposed amendments to Section 6, the addition of the words "including consideration of service reliability and asset condition" do not appear to us to add anything, as those are normal parts of the Board's OM&A analysis.

The proposed removal of Section 12 is quite different. It would appear to us that the arguments of PWU boil down to arguing the substance of the issue, rather than whether it is an issue at all. In some respects, this makes the point that the issue is a live one.

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The Board has stated that IRM is on the agenda sooner or later for OPG. Our proposal is that the Board focus on the initial question "Is now the time?", and if the answer appears to be yes, what steps should be taken in that direction. We agree with other parties that it is unlikely this proceeding will result in a full-blown IRM system for OPG's payment amounts. For example, OPG's comment that it would need to file additional evidence on IRM issues is probably well-taken in the context of a complete review of these issues.

However, this Board may for example want to consider whether, given the extension of the last case from two years to three years, there should be preconditions placed on any future extensions of this decision. This would likely entail a sort of "IRM lite" discussion, but it seems clear that the question of the appropriate length of time that the current decision would apply is a necessary issue in this proceeding.

Therefore, we believe that the issues as drafted should be retained, but with the understanding that the Board may decide not to go the whole way on these issues, but to make a more narrowly focused decision such as whether and how to deal with the issues in a future proceeding.

Ontario Power Generation - Principles

OPG has started with three principles.

We agree that the first principle of broad issues subsuming narrower ones is generally correct. However, as we note later it is possible to make that a *reductio ad absurdum*. Some detail will always still be required.

The second principle – limiting issues to the scope of the Application – is also clearly true, but this is one in which the devil is in the details. OPG would like its framing of its requests and evidence to control the scope of the issues list. With respect, the issues are determined by the Board not primarily in the context of OPG's request, but rather in the context of the Board's statutory mandate. The end result is rates. Anything reasonably required or desirable to get to rates that comply with the statutory mandate is, in our view, an appropriate issue for this proceeding.

We also note that the second principle can be used inappropriately to limit review of matters that it is in the public interest to review. The Board will be regulating OPG year after year for a long time. The fact that a major capital program, for example, does not close to rate base in the test period does not mean that the Board should deliberately turn a blind eye to how that program is being handled. If that were there case, on major projects the Board's consideration of their appropriateness and cost would always be too late to do any good, always presented with what is essentially a *fait accompli*. This is not the approach to its regulated entities that the Board has fostered in the past, and we would be sorry to see that kind of "eyes closed" paradigm being adopted.

On the third principle – finality of decisions on individual issues – this kind of issue estoppel approach to regulation is in our view entirely inappropriate. It is well known that decisions by

one Board panel do not bind another, so to simply refuse to consider anything that had been decided in the previous payments decision would, in our submission, be a decline of jurisdiction and thus contrary to the standard legal rules governing the Board's process.

But even if this is looked at as a softer limitation – "don't waste your time on issues that have recently been reviewed in detail unless there is good reason to do so" – in our submission this is not the appropriate time to impose such a limitation. The decision in EB-2007-0905 was the first time that this Board has regulated the rates of OPG, and that Board panel in many areas made clear that they understood they were breaking new ground. For example, nuclear liabilities is a complex area, and the Board panel in the last case struggled with the incomplete information before them, the difficulty of the concepts (particularly in the context of that lack of thoroughness in the record), and the scope of the new responsibility that had been given to this Board. That is not to say that the decision on this issue was not sound. Rather, it is to say that even that Board panel would not have said that their analysis and conclusions should be set in stone forever.

We agree that in general arguing the same issue over and over again in one proceeding after another can be inefficient, even though sometimes it takes two or three successive proceedings before the full scope of an issue is revealed and the Board can reach a conclusion that has a true sense of finality. In this case, the question of duplication and waste does not arise, because any issue being tested in this case will at most be scrutinized for only the second time in this Board's history.

We therefore believe that it is legally incorrect, and an inappropriate regulatory approach, to exclude issues on the basis that they were canvassed in the EB-2008-0905 decision.

Ontario Power Generation – Specific Issues

Issue 1.2. As a general principle, it is true that this is included in the issue of the revenue requirement. However, if that is the case then all issues can in fact be deleted, except one: "What are the appropriate payment amounts?" Everything is subsumed within that. It is normal Board practice to be somewhat more granular in identifying the major sub-issues within the single rates issue. This issue is a standard one for most rates applications.

We also note OPG's comment: "The establishment of economic and business planning assumptions for OPG's business planning is the role of management and not the role of the OEB." We agree 100%, but this truly misses the point. The establishment of an OM&A budget is the role of management. The setting of a capital plan is the role of management. And so on. The OEB does not DO any of these things. The OEB's role is to review what management has decided/proposed, and determine whether it is reasonable and prudent and thus an appropriate foundation for rates.

Issues 4.1 and 4.4. OPG's comment on these issues appears to be solely a matter of drafting, not substance. As long as the prudence of additional costs remains a live issue in all respects in this wording as with the previous one, we are not concerned with the wording change.

Issues 4.2 and 4.5. This is the biggest example of OPG's proposed second principle at work. The Applicant seeks to severely limit review of spending that does not close to rate base in the test periods, for example the Niagara Tunnel.

There are two problems with this.

First, it is true that the Board's role with respect to capital projects is primarily to decide how much of a capital cost should be recovered from ratepayers, and that role only arises when the cost is being closed to rate base. The problem is that, in a multi-year project of large size, as more money becomes sunk it becomes more and more difficult for the Board to deny recovery. By the time the project is ready to close to rate base, billions of dollars have been spent and the project is ready to deliver results. For the Board to say, then, that instead of $2 billion the company should have spent $1 billion is a major step that this Board, quite rightly, takes reluctantly. Far better, in our view, for the Board to review major projects along the way, and provide comments on aspects of those projects that cause the Board concern. Then, the utility can respond to those concerns, either by changing what they are doing or by gathering more evidence in support of the utility's approach. If they do neither, then when the time comes to close to rate base, it is less difficult for the Board to deny some recovery. The utility ignores the Board's input at their peril.

Second, and related to this last point, implicit in OPG's position appears to be that they don't want the Board's opinion on what they are doing. It is one thing to take responsibility for a project, as any good utility does. It is another thing to say to this Board "We don't want to hear what you have to say on this". Unwillingness to consider input from a specialized and knowledgeable regulator is not, in our view, a prudent management approach.

We also note on this that OPG wishes to circumscribe the issue by reference to the Filing Guidelines. The Filing Guidelines are just that, guidelines, and should not be treated as binding by this Board.

Finally, the change from "appropriate" to "reasonable" is inexplicable to us. Is it possible for something to be reasonable but not prudent? Perhaps, but this change appears to us to be more semantics than substance, and we are concerned that it should be clarified if it is allowed to stand.

Issue 5.2. While it is probably helpful to have this additional issue, we agree that it is part of issue 5.1 as well.

Issue 5.4. We have the same view with respect to 5.4, which is part of 5.2.

Issue 6.2 and 6.4. The whole point of reviewing benchmarking is to establish a plan in response. If the Board is only looking at the benchmarking, and not what OPG is doing about it, it may be just wasting its time.

In this regard, we think that again OPG has missed the point when they say "The setting of business targets for OPG is the responsibility of OPG's management and not the OEB". This is true, but the review of those targets for reasonableness and prudence is the responsibility of the

OEB, and is in our view a necessary issue in this proceeding. Management manages. The OEB assesses what they are doing. No decision of management that has a material impact on rates is off limits to the OEB, in our submission, and OPG's attempt to carve out areas of non-scrutiny such as this is ill-conceived.

Issue 6.5. The question of what weight the Board should give to the "observations" in the report is a matter for argument. The suggestion that the observations simply cannot be considered by the Board at all is not a reasonable one.

Issue 6.9. OPG is attempting to collapse a two-part issue into one. Where a cost is incurred in common with other activities, there are two steps to the analysis. First, is the overall cost a reasonable one? For example, is a salary of $10 million to an executive at a given level prudent? Second, is the percentage allocation of that cost to the regulated activity appropriate, which of course involves both the quantum and the methodology for determining it. OPG is seeking to exclude the first step in this analysis, and we believe that is not appropriate.

Issue 8.1. We have made submissions on this point in our letter of July 13th, and they remain valid. The Board in EB-2007-0905 contemplated that there would be further consideration of these issues in the future, as it is an evolving area. Further, IFRS has already established a new set of criteria for this area of accounting, and that is further good reason for this Board panel to consider the issue.

Issue 9.1. This attempt to completely exclude any question of rate design in this proceeding is not appropriate. The structure of the payment amounts does not only come into play because the Applicant wants it to be considered, as they have implied. It also arises as a matter of law because of the Board's statutory mandate to set these rates.

Issue 9.2. OPG has, in their submissions, included only part of the Board's direction on page 55 of the EB-2007-0905 decision. The full quote is as follows:

> *"The Board will require OPG to present a review of the mechanism at the next proceeding, as it has undertaken to do. This review will examine the impact of the incentive structure on OPG's operating decisions."*

In our submission, there is no point in considering a "review" if the question of whether the mechanism is "appropriate" is off the table. The Board's intention was that the new mechanism would be subjected to scrutiny in this proceeding, and we believe this Board panel should ensure that is the case.

Issue 10.2. While this issue is probably included in Issue 10.1, we believe it is useful to keep it as a separate issue.

Issue 11.1. OPG argues for a separate, presumably generic, proceeding for reporting and record keeping requirements. As OPG is the only utility whose payment amounts are regulated, it would appear to us that a separate proceeding is not necessary, as it would have no "generic" aspect to it. It would still be dealing with only one utility's regulatory obligations.

Issues 12.1 through 12.4. Please see our comments in our letter of July 13th, and our comments above in response to PWU.

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)