TORYS LLP

Suite 3000
79 Wellington St. W.
Box 270, TD Centre
Toronto, Ontario
M5K 1N2 Canada
Tel 416.865.0040
Fax 416.865.7380

www.torys.com

August 11, 2010

RESS, EMAIL & COURIER

Board Secretary
Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto ON
M4P 1E4

Attention: Ms. Kirsten Walli

Dear Ms. Walli:

Re: EB-2010-0008 - Ontario Power Generation Inc. ("OPG")
2011-2012 Payment Amounts for Prescribed Facilities

Further to the Ontario Energy Board's letter of August 6, 2010, please find enclosed Ontario Power Generation Inc.'s Submissions.

Yours truly,

[Original Signed By]

Charles Keizer

Tel 416.865.7512
Fax 416.865.7380
ckeizer@torys.com

cc: C. Mathias (OPG)
B. Reuber (OPG)
EB-2010-0008 Inervenors (via email)

EB-2010-0008

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 Ontario Power Generation Inc. pursuant to section 78.1 of the *Ontario Energy Board Act, 1998* for an Order or Orders determining payment amounts for the output of certain of its generating facilities.

WRITTEN SUBMISSIONS OF THE APPLICANT,
ONTARIO POWER GENERATION INC.

Introduction

In accordance with the Ontario Energy Board's (the "OEB") letter dated August 6, 2010 these are the submissions of Ontario Power Generation Inc. ("OPG").

On June 30, 2010, Jay Shepherd, counsel of record for School Energy Coalition ("SEC") in this proceeding executed and delivered a Declaration and Undertaking (the "Undertaking") with respect to the receipt and use of OPG's confidential information in this proceeding in the form ordered by the OEB in Procedural Order No. 1. On July 5, 2010, Mark Garner executed and delivered the Undertaking as a consultant for SEC.

In its non-confidential interrogatories filed on the public record on July 30, 2010, SEC disclosed Confidential Information (as defined in Procedural Order No. 3) in breach of the OEB's Order. Counsel for SEC stated in correspondence to the OEB that responsibility for the error rests with him and that all actions were his alone.

In a letter dated August 6, 2010, the OEB Board Secretary summarized the initial Submissions of OPG set out in correspondence from counsel for OPG, dated July 30, 2010, and that of Mr. Shepherd (stated to be in his individual capacity and as counsel to SEC) dated August 3, 2010. OPG accepts the summary of the Board Secretary as a fair summary.

The OEB's Past Relevant Decisions

The OEB has considered cases of a breach and failure to comply with the Undertaking, as well as a failure to comply with an undertaking of confidentiality given prior to the OEB's current Practice Direction on confidential filings. Some of the important principles respecting the Undertaking and undertakings of confidentiality articulated by the OEB are attached as **Attachment 1**.

Explanation and Apology by Mr. Shepherd

OPG accepts as sincere Mr. Shepherd's explanation for the error in disclosing OPG's Confidential Information and his apology for doing so. OPG does, however, believe that behaviour must be shaped by the technology used to store and reference confidential information. While the use of technology and associated software undoubtedly makes work more efficient, it is widely known that a keystroke or click of the mouse can immediately cause uncontainable damage (e.g. clicking "reply to all" instead of "reply"). As a result, the standard for vigilance for a party possessing and undertaking to keep confidential certain information has been raised. Such vigilance includes behaviour such as thorough proof reading and checks to ensure technology is appropriately applied. Parties' behaviours must change in tandem to the technology available.

Conclusion

OPG urges the OEB to be guided by the well articulated principles it has espoused about the Undertaking and about the need to protect the integrity of OEB orders respecting the treatment of OEB-ordered confidential information in previous cases before the OEB. OPG submits that a sanction of SEC counsel is appropriate in the current instance before the OEB. As the Undertaking was personal to Mr. Shepherd, and as OPG accepts that its breach was solely Mr. Shepherd's, OPG considers it appropriate that the sanction be personal to Mr. Shepherd and not apply to SEC. In the circumstances, OPG submits that the Board should order Mr. Shepherd to pay towards the OEB's costs in this proceeding, the amount of $5,000.00[1]. In

[1] The *Ontario Energy Board Act*, as amended, provides;

30(1) The Board may order a person to pay all or part of a person's costs of participating in a proceeding before the Board, a notice and comment process under section 45 or 70.2 or any other consultation process initiated by the Board. . . .

(4) The costs may include the costs of the Board, regard being had to the time and expenses of the Board.

addition, Mr. Shepherd should not be permitted to make any request for costs in respect of any aspect of this particular matter relating to the information disclosure. OPG has discussed the quantum of the sanction and the foregoing condition with Mr. Shepherd and he is in agreement with both.

In addition to the foregoing, as requested in its letter of July 30, 2010, OPG respectfully requests that the OEB issue an order requiring that all persons who received the Confidential Information in question through the SEC interrogatory and who have not executed an Undertaking in respect of it destroy all copies of the document containing the Confidential Information, be prohibited from publishing and disseminating the Confidential Information, be prohibited from using the Confidential Information for any purposes and deliver a certificate to the OEB certifying their destruction of the Confidential Information. Although, there are emails from the Board Secretary requesting the information be destroyed there is no enforceable order from the Board in that regard and no process set out to ensure compliance.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

[Original Signed By]

_____

Charles Keizer
Counsel for the Applicant,
Ontario Power Generation Inc.

August 11, 2010

Attachment 1

EB-2009-0096 – Transcript of Proceeding, Volume I, dated December 7, 2009

"This is a sober way to begin the proceeding, and the first thing I would like to say is that I am concerned and feel for both Hydro One and Mr. Thompson. I believe it was inadvertent, but nevertheless it is serious, and it being inadvertent doesn't undo any damage that might be done.

So -- and I should, for the record, for everyone, emphasize that it is essential that the Board's proceedings on processes on confidentiality be strictly adhered to. There cannot be any exceptions. If there begins to be exceptions to that, we will have to reconsider those guidelines and perhaps change them.

I am not suggesting we do that at this point, because I do think it was an inadvertent one-off kind of circumstance.

However, I agree with Mr. Rogers that it can't go without consequences." (page 13)

EB-2005-001/EB-2005-0437

"As such, the Board retains discretion to vary those conditions in appropriate cases, and enforcement of those conditions is similarly within the purview of the Board. In its exercise of that discretion, the Board is not bound or limited by the conduct of the parties, or by any reasonable expectations of other parties that might be based on that conduct….The Board does not need to decide whether the disclosing parties are estopped from seeking strict enforcement of the undertakings since it is within the authority of the Board to require compliance with its conditions regardless of whether the disclosing parties could be said to retain a right to do so independently of the Board." (page 8)

"The Board cannot hope to promote the full and complete disclosure that is necessary to enable it to adjudicate effectively unless disclosing parties have a reasonable measure of comfort that the Board will, barring exceptional circumstances, require compliance with the conditions under which disclosure of commercially sensitive information was effected." (page 9)

"The Board anticipates that implementation of its new Practice Direction on confidentiality will provide greater clarity and certainty for all parties that appear before it as regards the treatment to be accorded to confidential information. Parties that desire access to commercially sensitive information will know in advance the conditions upon which access is being granted. Parties that disclose commercially sensitive information will know in advance how the Board intends to protect it." (page 12)

EB-2008-0335/EB-2008-0244

"As you are aware, this type of request has been previously considered by the Board. In EB-2005-0011/EB-2005-0437 you brought a motion seeking an order varying a Board "undertaking directive" to allow SEC to use confidential information obtained in a prior proceeding, in a subsequent proceeding. In its Decision and Order the Board stated at page 9:

> To allow a party to retain confidential information in circumstances where the confidential information was disclosed subject to a signed undertaking of confidentiality would not only bring into question the credibility and integrity of the board's processes, but may well make access to confidential information more difficult to achieve in the future.

It is on this same basis that the Board denies your request to retain the Confidential Information provided to you after signing the undertaking in this instance. The preservation of the credibility and integrity of Board process is paramount. As such SEC is hereby ordered to return to the Board Secretary a copy of the Confidential Information immediately and destroy any other copies of the Confidential Information and file with the Board Secretary a certification of destruction in the form prescribed by the Board pertaining to the destroyed documents and materials."