

By electronic filing and by e-mail

August 23, 2010

Kirsten Walli
Board Secretary
Ontario Energy Board
27th floor – 2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms Walli,

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

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As solicitors for Canadian Manufacturers & Exporters (“CME”), we are writing with respect to OPG’s request for confidential treatment of parts of seven (7) particular interrogatory responses that are listed in Procedural Order No. 6 issued by the Board on August 20, 2010.

OPG’s response to Consumers Council of Canada (“CCC”) Interrogatory No. 1 is the particular item that is of priority concern to CME. OPG relies on that response to justify its refusal to produce the documents and materials CME requested in its Interrogatory Nos. 10 (a) and (c). In its response to CCC Interrogatory No. 1, OPG refuses to produce the requested materials on the grounds of “litigation privilege” and an alleged lack of relevance.

OPG’s letter to the Board dated August 12, 2010, outlining its confidentiality request pertaining to CCC Interrogatory No. 1, is limited to the last paragraph of OPG’s letter to Minister Duguid found at Attachment No. 2 of the response. The August 12, 2020 letter makes no reference to the refusal to produce requested materials and makes no request for confidential treatment of these materials in the event that the Board rejects OPG’s assertions of litigation privilege and irrelevance. Accordingly, we are assuming that these issues will be addressed later, either as preliminary questions at the outset of the hearing, or in another process that the Board establishes to deal with OPG’s assertions.

Our position is that OPG’s assertions are entirely without merit. However, before the Board deals with OPG’s assertions, OPG first needs to answer questions of clarification pertaining to its responses to CCC No. 1 and CME No. 10 that we and others may have. As noted in our letter to the Board of August 19, 2010, we have a number of questions of clarification with respect to OPG’s response to CME Interrogatory No. 10 based on the response to CCC No. 1. Moreover, OPG must provide to the Board, in confidence, unredacted copies of all of the materials that it is refusing to produce in response to CCC Interrogatory No. 1 and CME Interrogatory No. 10 (a) and (c) before matters pertaining to litigation privilege and irrelevance can be argued and determined.

The points upon which we will be relying, when the Board deals with OPG’s assertions of litigation privilege and irrelevance, include the following:

- (a) OPG is a publically owned electricity generator. Its prescribed assets are those of a publically owned regulatory utility. In several prior decisions, the Board has emphasized the stringent disclosure obligations on such entities.



- (b) The Applications OPG submits for approval of payment amounts are not prompted by any breach of duty or obligation owed by ratepayers or other stakeholders to OPG. The Applications cannot reasonably be characterized as “litigation” between OPG and any other interested parties, including Board Staff. OPG’s statutory obligations prompt its Applications for approval of payment amounts.
- (c) The notion that the materials presented to OPG’s Directors, prior to their approval of the Application that forms the subject matter of this proceeding, were materials prepared in “contemplation of litigation”, is without merit. It is clear from public pronouncements made by OPG and its owner, the Government of Ontario, that the materials presented in April and May were prompted by concerns about the consumer impacts of OPG’s initially planned payment amounts application in combination with the requests for increases in transmission rates initially planned by Hydro One Networks Inc. (“Hydro One”). The need to consider mitigation measures prompted OPG’s presentation(s) to its Directors.
- (d) OPG has an obligation to disclose all of the mitigation alternatives that it identified and presented to its Board of Directors. The public has a right to know all of the matters OPG’s Directors considered before approving the Application that forms the subject matter of this proceeding. CME wishes to question whether the mitigation measures OPG’s Board of Directors, selected from the range of alternatives that were identified, are sufficient to produce payment amounts that are just and reasonable.
- (e) A refusal by OPG, a publically owned utility, to make complete disclosure of these alternatives on the grounds that it will reveal a “litigation strategy” that has been adopted to address ratepayer impacts should be a matter of concern to the Board and all other interested parties. Nothing relevant to the adequacy of OPG’s response to legitimate public concerns about consumer impacts should remain secret as OPG asserts. OPG’s refusal to disclose all of the information it presented to its Directors is unjustified and without merit.

These points and others are those upon which we will be relying when the Board eventually deals with OPG’s assertion of litigation privilege and irrelevance.

We have no objection to OPG’s request that the Board treat the last paragraph of its letter to Minister Duguid in confidence on the assumption that the Board is satisfied that the redacted information relates solely to unregulated facilities, as OPG asserts in its August 12, 2010 letter.

Similarly, we have no objection to OPG’s request that the Board accord confidential treatment to parts of its responses to the other six (6) interrogatory responses listed in Procedural Order No. 6. As noted above, our primary concern is to assure that a process is established to deal with OPG’s litigation privilege and irrelevance assertions pertaining to information requested in CCC Interrogatory No. 1 and CME Interrogatory No. 10.

Please contact me if the Board has any questions about the contents of this letter.

Yours very truly,



Peter C.P. Thompson, Q.C.

PCT\slc

- c. Barbara Reuber and Carlton Mathias (OPG)
- EB-2010-0008 Intervenors
- Paul Clipsham (CME)
- Vince DeRose and Jack Hughes

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