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BY EMAIL and RESS

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Our File No. 20100008

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 Motion to Exclude Evidence

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #9, the following are the submissions of SEC opposing the motion by OPG to exclude the evidence of Power Advisory on IRM.

Our submissions are of two categories. First, we deal with the extent to which the Power Advisory evidence relates to the issues on the Board-approved Issues List. Second, we deal with the standard that the Board should apply in excluding evidence in rate applications such as this.

Relevance of the Evidence

It is clear that the focus of the Power Advisory evidence is an analytical survey of incentive regulation mechanisms in other jurisdictions, to assess how they could apply to OPG. In some respects, that obviously speaks to the issues on the Draft Issues List that the Board decided not to pursue.

However, the converse of that is not true, in our opinion. The converse would be that because the evidence is largely directed at issues that are no longer on the Issues List, it is not relevant to the issues that the Board did keep on the list. We do not agree with that conclusion.

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To understand this, it is submitted that it is important to assess how the Board can consider the “when and how” questions, i.e. when and how the Board should determine the application of IRM to OPG. Is this just a procedural issue? In our submission, it is not. The exploration the Board approved reflects the fact that IRM for OPG may raise different issues than those dealt with in establishing the IRM that the Board is familiar with for gas and electricity distributors. Because of that, the timing is not obvious, and the process for how to get there is not obvious.

It was our understanding that the Board, in retaining the two IRM-related issues that it did, was inviting the parties who are interested in the issue – i.e. those who are intervening in this Payment Amounts proceeding – to provide input to the Board on “when and how” the application of IRM to OPG could and should be considered. For us to provide that input, we have to do so in context of the IRM options that the Board might have before it in that process. We don’t have to debate the options, and the Board has already made clear that we should not be planning to debate those options, whether through cross-examination of witnesses or otherwise. However, the menu of options is certainly relevant to when and how the Board deals with the issue. It is, it is submitted, the necessary context to the “when and how” questions.

Therefore, it is submitted that the Power Advisory evidence is useful to the Board and the parties to provide the context in which the approved issues are considered. While we would not expect the Board to allow cross-examination on the appropriateness of particular IRM approaches, we do believe that the Board can benefit from presentation of this background information, and cross-examination that explores, for example, whether the menu being suggested is complete, or how the options available to the Board inform the question of timing..

We note, in passing, that SEC does not necessarily endorse the statements and conclusions in the Power Advisory evidence. Our submissions should not be taken as agreeing, but rather as comments on relevance as opposed to quality.

General Principle

Stepping back from the details of this particular evidence, it is our submission that in general the Board should be loathe to exclude evidence that is available, unless that evidence has no probative value whatsoever. The evidence in most proceedings exhibits a range of value to the Board in making its decision. Sometimes it is predictable what will be useful, but all too often it is not clear until final argument, or even the Board’s Decision with Reasons, what evidence turned out to be the most useful, and the least.

Generally speaking, the Board’s practice has been to allow evidence in, even when it looks like it will have marginal value, and then deal with its use in the proceeding by:

- The weight that is given to the material; and
- The scope of cross-examination allowed on the material.

Clearly there are cases in which evidence is presented by a party that has no probative at all, but that has been rare. There are not many examples where the Board has excluded evidence

that is voluntarily presented and has at least some connection to the issues under consideration. Almost every case of exclusion of evidence is one in which the Applicant is asked for information in its possession, and resists filing it on the grounds of relevance. That is not the case here.

The a priori exclusion of evidence may be appropriate in a courtroom, for example, where judges are not specialists in the subject matter, and evidence with limited probative value may inappropriately influence the decision. That is not the case with a specialized economic regulator. OPG does not have to worry that the Board will be confused or unduly influenced by the opinions of Power Advisory on IRM. It does not have to worry that the Board will allow back-door access to the issues it has excluded through this evidence. The Board has ample tools and experience in dealing with those potential harms. This puts the Board in the favourable position of being able to receive evidence such as this and see what happens, as opposed to excluding it in advance and risking an incomplete record on the approved issues.

It is therefore submitted that the Board should deny the motion of OPG, and instead deal with the Power Advisory evidence by

- limiting oral direct and cross-examination on this evidence to matters that assist in considering the approved issues, and
- giving weight to the evidence in its Decision with Reasons only to the extent that it advances the Board's understanding of its options with respect to the approved issues.

Conclusion

We hope these submissions 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)