

September 24, 2010

BY E-MAIL

Kirsten Walli
Board Secretary
Ontario Energy Board
27th Floor - 2300 Yonge Street
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

**Re: EB-2010-0008
Motion by OPG**

By notice dated September 15, 2010, OPG brought a motion to exclude from this proceeding the evidence filed by OEB Staff, being a report prepared by the Advisory LLC titled "Update to Report on Methodologies for Setting Ontario Power Generation Payment Amounts" (the "Power Advisory Report"). OPG also sought orders excluding interrogatories and responses to those interrogatories asked in respect of the Power Advisory Report, and an order prohibiting the attendance of the authors of the report as witnesses in the proceeding.

In response to its motion, OPG received submissions from OEB Staff and the School Energy Coalition ("SEC") opposing the requested relief, and from the Power Workers Union ("PWU") and the Association of Power Producers of Ontario ("APPrO") in support of the motion. This is OPG's reply to the submissions of OEB Staff and SEC. OPG also relies on the submissions of the PWU and APPrO.

The Power Advisory Report is the result of an RFP issued in June long before the Issues List in this proceeding was settled. Consistent with the terms of the RFP, the Power Advisory Report is a survey of incentive regulatory mechanisms available to consider in respect of OPG and an evaluation of how those mechanisms might apply. Based upon the RFP and the Report's content, the Power Advisory Report does not, and was never intended to, address Issues 12.1 and 12.2 - when and how the OEB should establish an incentive regulation mechanism for OPG.

OEB Staff, in its submissions, has all but admitted that the Power Advisory Report does not address Issues 12.1 and 12.2. Further, in Exhibit M, Tab 1.15, Schedule 1, OEB Staff was asked to set out a list, by reference to page and paragraph, those parts of the Power Advisory Report that are in response to those issues. OEB Staff responded by indicating that the Power Advisory Report, "updates the London Economics Report (May 19, 2006) and as such, Issues 12.1 and 12.2 are not its prime focus". OEB Staff indicated that they felt that the report would serve as a useful resource to frame the issues and to represent a range of options that might be considered in a future proceeding. OEB Staff further went on to identify those few portions of the Power Advisory Report that are said to address Issues 12.1 and 12.2.

With respect, on a careful read of the sections identified by OEB Staff in the response to interrogatory M-1.15-1, they do not relate to Issues 12.1 or 12.2. For example, OEB Staff indicates that section 4.1 of the Power Advisory Report responds to Issue 12.2. That issue asks “what processes should be adopted to establish the framework for incentive regulation”. Section 4.1 of the Power Advisory Report is entitled “General Assessment of Alternative Methodologies for Setting Payments”. The section provides an outline of general observations regarding various alternative incentive regulation mechanisms. There is no discussion in the section about the OEB process by which those methodologies might be implemented. The other sections identified by OEB Staff all suffer from the same failing; at most indicating that the Board and other parties will have a better understanding of OPG’s cost of service after this proceeding is completed.

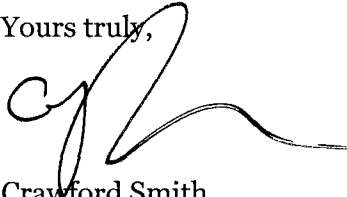
For its part, SEC, while acknowledging that the Power Advisory Report largely speaks to the issues on the Draft Issues List that the OEB in the Issues List Decision ordered not be a part of this proceeding, argues that the report should nevertheless be admitted for the purpose of providing context for the consideration of the approved issues. SEC asserts that for it to provide input, SEC must do so in the context of the mechanisms that the OEB might have before it in that process.

There are two main flaws with SEC’s submission. First, it is not possible to have the context suggested by SEC without a full consideration of incentive regulation. For example, parties might not, in fact, agree that the options put forward by Power Advisory LLC are the options the OEB should have before it in a future proceeding and therefore the evidence may not provide the correct context. Parties would need to put forward their own evidence as to what these options might be. This is the very thing the OEB decided to exclude when it finalized the Issues List.

Second, the SEC submission ignores the fact that the written evidence filed by parties in advance of the hearing should be relevant on its face and directed to the OEB approved issues. If this is not the case, the Issues List does not serve its intended purpose which is to frame the relevant inquiry in the proceeding. In effect, SEC (and OEB Staff) argue that the authors of the report should be permitted to testify about “how and when” the OEB should implement incentive regulation simply because they have filed a report on a very different issue, that is “what that regulation might look like”. With respect, parties cannot justify their failure to file evidence in respect of the relevant issues with a response that cross-examination can be directed to those issues through evidence that is wholly unrelated to those issues. Parties are entitled to know in advance what a witness has to say about the issues in question. This is ensured by the requirement to file evidence in writing. As matters now stand, the first time OPG will have any indication as to what the authors of the Power Advisory Report think about Issues 12.1 and 12.2 will be in response to questions on cross-examination. If the OEB undertakes such a practice, it will neither promote regulatory efficiency nor fairness.

OPG agrees with SEC’s general observation that evidence should be excluded where it lacks probative value and is unrelated to the issues as determined by the OEB. It is submitted that this is such a case and the OEB should not hesitate to exercise its power to exclude the Power Advisory Report and grant the relief sought by OPG in its notice of motion. This does not mean that the Power Advisory Report will not be available for use in a subsequent proceeding. On the contrary, it could be filed in a subsequent proceeding intended to discuss the full range of incentive regulation issues.

Yours truly,

A handwritten signature in black ink, appearing to be 'Crawford Smith', written over the words 'Yours truly,'.

Crawford Smith

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CGS/tm

c: Charles Keizer
Andrew Barrett/Barbara Reuber (OPG)
Intervenors