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BY E-MAIL

December 15, 2010

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

Dear Ms. Walli:

**Re: Ontario Power Authority
2011 Expenditure and Revenue Requirement Submission
Ontario Energy Board File Number EB-2010-0279**

In accordance with Procedural Order No. 1, please find attached Board Staff's submissions on the draft issues list in the above proceeding. Please forward the following to the Ontario Power Authority and to all other registered parties to this proceeding.

Yours truly,

Original signed by

Michael Bell
Project Advisor, Applications and Regulatory Audit

Encl.

BOARD STAFF SUBMISSION

DRAFT ISSUES LIST

ONTARIO POWER AUTHORITY
2011 FEES CASE

EB-2010-0279

December 15, 2010

I. Background

On November 2, 2010, the Ontario Power Authority (the “OPA”) filed with the Ontario Energy Board (the “Board”) its proposed 2011 expenditure and revenue requirement and fees for review pursuant to subsection 25.21(1) of the *Electricity Act, 1998*.

On November 24, 2010, the Board issued Procedural Order No. 1. Attached to Procedural Order No. 1 was a draft issues list, which was more detailed and arguably broader in scope than issues lists that had been adopted in previous OPA fees cases. The Board asked parties (including Board staff) to file written submissions on the issues list by December 15, and indicated that an oral Issues Day would be held on December 17.

What follows are the written submissions of Board staff.

II. The Legislative Framework

The Board’s power to review the OPA’s proposed fees is set out in section 25.21 of the *Electricity Act, 1998* (the “Electricity Act”):

25.21 (1) The OPA shall, at least 60 days before the beginning of each fiscal year, submit its proposed expenditure and revenue requirements for the fiscal year and the fees it proposes to charge during the fiscal year to the Board for review, but shall not do so until after the Minister approves or is deemed to approve the OPA’s proposed business plan for the fiscal year under section 25.22.

Board’s powers

(2) The Board may approve the proposed requirements and the proposed fees or may refer them back to the OPA for further consideration with the Board’s recommendations.

Same

(3) In reviewing the OPA’s proposed requirements and proposed fees, the Board shall not take into consideration the remuneration and benefits of the chair and other members of the board of directors of the OPA.

Changes in fees

(4) The OPA shall not establish, eliminate or change any fees without the approval of the Board.

Hearing

(5) The Board may hold a hearing before exercising its powers under this section, but it is not required to do so.

In considering the OPA fees application, the Board should also be guided by its electricity objectives under section 1 of the *Ontario Energy Board Act, 1998* (the “OEB Act”):

Board objectives, electricity

1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer’s economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.

Facilitation of integrated power system plans

(2) In exercising its powers and performing its duties under this or any other Act in relation to electricity, the Board shall facilitate the implementation of all integrated power system plans approved under the *Electricity Act, 1998*.

III. Previous Board Decisions

In previous cases, the Board has arguably taken a narrow view of its mandate to review the actual programs conducted by the OPA. At the issues day in the 2008 fees case

(EB-2007-0791), certain intervenors requested an amendment to the draft issues list regarding the scoping of a review of the OPA's conservation and demand management ("CDM") activities. The Board allowed the proposed amendment, but was clear that it did not view its role to include detailed review of any particular programs undertaken by the OPA (note that the programs were not funded through the OPA's fees):

As several parties noted, this is an OPA fees case and the overall purpose of this hearing is to determine if the revenue requirement and fees proposed by the OPA are reasonable. In order to determine if the fees are reasonable, of course, some examination of the costs that make up this fee may be necessary. The Board does not intend, however, to entertain a debate concerning specific programs that the OPA should consider to meet a MWh goal or target. Questions and submissions surrounding the extent to which the OPA should be focusing some of its attention on MWh reduction, however, will be acceptable. The Board does not consider that allowance of this issue, as scoped, requires the OPA to set specific MWh targets for the purposes of this proceeding, which is to review the proposed revenue requirement and fees.¹

The Board addressed this issue again in its final decision and order in the 2008 fees case:

Fees are separate from the OPA's "charges". Charges are the costs associated with the programs that the OPA undertakes or funds in the CDM and other areas of its mandate and are not recovered through the OPA's fees that are approved by the Board. The Board has no role in approving the OPA's CDM charges. [...]
The Board's role in a fees proceeding is to assess whether the proposed organizational budget is reasonable.²

In its decision and order for the OPA's 2010 fees case (EB-2009-0347), the Board signalled an intention to allow parties to examine the OPA's performance against the metrics it had set. In response to a request by the Vulnerable Energy Consumers' Coalition ("VECC") for more information regarding the OPA's milestones, the Board stated:

¹ EB-2007-0791, Decision on Issues, February 11, 2008

² Decision and Order, EB-2007-0791, p. 6 and p. 9.

The Board is not prepared to wholly adopt VECC's suggestions. However, the Board directs the OPA to include more precise and informative documentation of its performance metrics for review through the fees case process. Such an enhancement, comparable to the evidence provided with respect to the OPA's compensation payments, would enable parties to assess the extent to which the OPA has achieved its stated goals. In future applications the Board directs the OPA to report on its achievement of its metrics, sorted by Strategic Objective.³

The ability to review the OPA's performance against its metrics is one of the themes picked up in the expanded draft issues list, and Board staff make further comments on this topic below.

Although they may have persuasive power, precedents are of course not strictly binding on the Board. In circulating the expanded draft issues list for comment, the Board has indicated a willingness to at least consider broadening its approach to regulating the OPA. The Board will need to consider what weight it gives to previous decisions.

IV. Analysis

Board staff notes that on September 30, 2010 the Chief Executive Officer of the OPA stated, with respect to electricity system planning, that "It's the Power Authority's job to look under every rock for the most cost-effective solution."⁴ Board staff agrees that this is an important mandate of the OPA. An expanded issues list could allow the Board to gain a better understanding about the relationship between the OPA's administrative and non-administrative programs. The Board should consider that this improved understanding may give the Board a stronger ability to consider the reasonableness and appropriateness of the proposed expenditures and fees in the OPA's application. Furthermore, this broader review would be in keeping with the Board's October 27, 2010 letter regarding "A Renewed Regulatory Framework for Electricity," which stated that "[t]he Board, together with consumers, transmitters, distributors and other stakeholders, must consider how to manage the pace of rate or bill increases for consumers. This approach calls for a focus on long-term outcomes that ensure that the Province's electricity system provides value for money for consumers."

³ Decision and Order, EB-2009-0347, p. 6.

⁴ Presentation by Colin Andersen, "What's Next for Ontario's Energy Future," September 30, 2010. Available at: http://www.powerauthority.ca/sites/default/files/news/17243_SP-CAOEN.pdf

The issue for the Board to consider in setting the issues list will be the extent to which the Board's legislative powers permit it to review, or at least consider, the OPA's broader spending initiatives. Board staff offers the following discussion in the hope of assisting the Board in determining the extent of its legislative powers.

An OPA fees case is an unusual proceeding. Section 25.32 of the Electricity Act instructs the Board to review both the revenue requirement and the proposed fees; however little guidance is provided regarding the "tests" the Board should employ in making these assessments. Unlike the legislative provisions governing a typical gas or electricity rates case, the words "just and reasonable" do not appear. Both the Board and the courts have frequently held that the just and reasonable power is a very broad one, but that analysis cannot assist us here.

Also unlike a typical gas or electricity rates case, the Board's powers in an OPA fees case are limited to accepting the proposed fees or rejecting them and referring them back to the OPA for further consideration with the Board's recommendations. The Board does not have the power, in other words, to approve any fees other than those applied for.

In addition, pursuant to s. 25.21(1) of the Electricity Act, the OPA cannot file its application to the Board until after the Minister of Energy and Infrastructure has approved, or is deemed to have approved, the OPA's annual Business Plan. The Business Plan for 2011 (which forms part of the current application) was deemed to have been approved by the Minister under s. 25.22(3). The Board can take some comfort, therefore, that the broader spending programs administered by the OPA have had some level of review by a third party.

The Board's powers in an OPA fees case are very similar to its powers in an IESO fees case (section 19 of the Electricity Act). To date, however, there has been limited jurisprudence on the scope of the Board's powers pursuant to either section 19 or section 25.21 of the Electricity Act.

Although the legislative framework suggests that the Board's powers to review the OPA's fees may be more circumscribed than its powers under s. 36 or s. 78 of the OEB Act, it should not be concluded that the Board is only charged with conducting a perfunctory review. Clearly the Legislature intended that the Board review the proposed

fees and revenue requirement, and it cannot be assumed that such review was meant to be only a “rubber stamp”.

Adding to the confusion is the unusual nature of the OPA and its multiple sources of funding. A typical distribution utility recovers essentially all of its revenues through Board approved rates or charges. Similarly, the IESO recovers almost all of its expenditures through its Board approved fees. For these organizations, virtually all the money they spend (or authorize to be spent) must come from rates, charges, or fees approved by the Board. The revenue requirement approved by the Board in those cases, therefore, is directly linked to the actual expenditures and funding commitments these organizations will make: they are in fact one and the same.

The OPA is different. Only approximately 3% of its spending is recovered through its Board approved fees. According to its 2011-2013 Business Plan, while it will spend \$64.1M on administration costs (i.e. the fees it seeks to recover in this application) in 2011, it will spend \$356.9M on conservation programs, and \$1,789M on generation procurement.⁵ In other words, the proportion of its “spending” that the OPA recovers from Board approved fees is completely dwarfed by its expenditures that are funded through other sources. This is a situation unique amongst rate/fee/payment regulated entities in Ontario.

The question for the Board in this proceeding is the extent to which its approval of the OPA’s administrative fees permits an examination of the broader spending undertaken by the OPA. The bulk of the administrative fees are spent on staff compensation, professional and consulting fees, and general operating costs (such as rent).⁶ The fees are spent, not surprisingly, on administering the OPA’s large conservation and generation programs. The cost effectiveness of this spending appears to be within the Board’s purview – in other words a consideration of whether the Board approved fees provide “value for money”. Absent the power to conduct this type of analysis, it is not clear what the Board would be intended to review.

⁵ OPA 2011-2013 Business Plan, p. 2.

⁶ OPA 2011-2013 Business Plan, page 50 of 52. Approximately 75% of the OPA’s administrative expenses were in these categories in 2009, 2010 and 2011.

The Board should be cautious, however, to not overstep its mandate. Like the Board, the OPA's powers are established by statute. The objects and powers of the OPA are set out in section 25.2 of the Electricity Act:

Objects and character

25.2 (1) The objects of the OPA are,

- (a) to forecast electricity demand and the adequacy and reliability of electricity resources for Ontario for the medium and long term;
- (b) to conduct independent planning for electricity generation, demand management, conservation and transmission and develop integrated power system plans for Ontario;
- (c) to engage in activities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario;
- (d) to engage in activities to facilitate the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources;
- (e) to establish system-wide goals for the amount of electricity to be produced from alternative energy sources and renewable energy sources;
- (f) to engage in activities that facilitate load management;
- (g) to engage in activities that promote electricity conservation and the efficient use of electricity;
- (h) to assist the Ontario Energy Board by facilitating stability in rates for certain types of consumers;
- (i) to collect and provide to the public and the Ontario Energy Board information relating to medium and long term electricity needs of Ontario and the adequacy and reliability of the integrated power system to meet those needs.

[...]

Powers

(5) Without limiting the generality of subsection (4), the OPA has the power,

- (a) to enter into contracts relating to the adequacy and reliability of electricity supply;
- (b) to enter into contracts relating to the procurement of electricity supply and capacity in or outside Ontario;
- (c) to enter into contracts relating to the procurement of electricity supply and capacity using alternative energy sources or renewable energy sources to assist the Government of Ontario in achieving goals in the development and use of alternative or renewable energy technology and resources;

- (d) to enter into contracts relating to the procurement of reductions in electricity demand and the management of electricity demand to assist the Government of Ontario in achieving goals in electricity conservation;
- (e) to take such steps as it considers advisable to facilitate the provision of services relating to,
 - (i) electricity conservation and the efficient use of electricity,
 - (ii) electricity load management, or
 - (iii) the use of cleaner energy sources, including alternative energy sources and renewable energy sources;
- (f) to take such steps as it considers advisable to ensure there is adequate transmission capacity as identified in the integrated power system plan;
- (g) to enter into contracts with distributors to provide services referred to in clause (e);
- (h) to act as a settlement agent for amounts determined under sections 78.1, 78.2 and 78.5 of the *Ontario Energy Board Act, 1998* and to contract with the IESO or another entity to perform or assist in performing the settlements;
- (i) to create a security interest in any property currently owned or subsequently acquired by the OPA, including fees receivable, rights, powers and undertakings, in order to secure any debt, obligation or liability of the OPA.

In addition to its powers and responsibilities under the Electricity Act, the OPA is also subject to various directives that have been issued by the Minister. Based on these powers and responsibilities, the OPA developed five Strategic Objectives. The draft issues list is organized around these five Strategic Objectives.

The Board will want to ensure that the OPA is not spending any of the payment amounts on activities that lie outside of its powers. Similarly, the Board might take an interest if the OPA appeared to be disregarding the instructions of a Ministerial directive. However, it is submitted that it is not generally the Board's role to step in the place of the OPA's management and prioritize work or make decisions on how exactly it will exercise its powers. Nor is it the Board's role to examine the appropriateness of the directives that have been issued to the OPA from the Minister. As discussed above, the Board has only the power to approve the OPA's requested fees, or to send the matter back to the OPA for further consideration with the Board's recommendations. The scope of the OPA's powers and the utility of Ministerial directives are not for the Board to opine on.

Taking all of this into account, then, what should be the scope of the Board's review in this proceeding? The Board's regulation of the OPA (and indeed the OPA itself) is relatively new. During the initial years of OPA regulation, it was not unreasonable for the Board to take a conservative approach to its mandate. However, the OPA has now been operating for more than 5 years. It is responsible for managing very significant spending commitments: over \$2 billion in 2011 alone. Although the revenue requirement for which it seeks recovery from the Board is more modest at \$79.86 million, this is still a significant amount and is more than the revenue requirement of mid-sized electricity utilities.

The Board needs to be satisfied that any fees it approves are prudent. A scope that is broadened from previous proceedings, at least in practice, could provide additional information on which the Board can make its determination. Although the Board does not set the OPA's powers, nor have any role in issuing Ministerial directives, it must have some ability to review the actual activities of the OPA to determine if the fees that it approves are reasonable. To some extent this may involve a review of the efficiency and effectiveness of the OPA's management of its programs.

To be clear, Board staff is not suggesting that the Board has any power to alter or adjust the 97% of the OPA's spending that is not recovered through fees. What the Board can do, however, is review the prudence of the OPA's management of this spending. For example, the Board might find that the OPA's spending for one program area lacks sufficient internal oversight or conversely that another area has too many staff to work on a particular program. To correct this, the Board could refuse to approve the proposed fees, and recommend that the OPA return with adjusted proposed fees to allow for differing staff levels as circumstances might warrant. In order to make these findings, however, the Board would have to at least make itself aware of the objectives, milestones, results, and overall management of these programs.

Similarly, the Board would be acting well within its mandate if it were to look at the OPA's actual expenditures of its fees recovered in previous years versus what the OPA had told the Board it required. For example, if in the 2010 fees case (EB-2009-0347) the OPA told the Board it needed X dollars to prepare for Project Y, it would be reasonable for the Board in the current proceeding to enquire into what amount of money was actually spent, and to understand the reason for any variances. The point of such an exercise would not be to adjust fees retroactively; rather it would be to test

the OPA's forecasting accuracy and it would assist in assessing the reasonableness of the proposed fees in the current application.

In the event that the Board chooses to maintain a narrow scope for the OPA fees review, it is Board staff's view that this consideration of an expanded issues list will still have been useful. The extent of the Board's powers in setting the OPA's fees are not obvious, and a clear decision by the Board will create certainty for the parties and for the sector as a whole. For example, the OPA's current Business Plan states: "[t]he OPA is licensed and regulated by the Ontario Energy Board."⁷ A decision from the Board that the scope of its review is narrow would clarify the extent to which the Board actually regulates the OPA. If the Board settles on a narrow scope, this would indicate that it regulates only the administrative fees of the OPA, without regard to how the OPA's "program" money is spent. In other words it would clarify that the Board has no regulatory oversight of the actual CDM and generation procurement activities of the OPA.

V. Comments on specific draft issues

With the foregoing as context, what follows are Board staff's comments on the draft issues. Board staff does not necessarily take a position on the inclusion of each individual issue; in some cases staff simply presents questions that the Board should consider in assessing the appropriateness of an issue.

If the Board approves the complete draft issues list, however, it is Board staff's submission that the scope and depth of the Board's review still must focus on how each of the issues affects the fees and expenditures for 2011, the subject of this application.

The draft issues list was prepared to explore questions on each of the OPA's five Strategic Objectives in addition to specific questions on efficiency, variance and deferral accounts and design of the 2011 fees.

⁷ OPA 2011-2013 Business Plan, p. 8 of 52.

1.0 Strategic Objective #1.

Draft Issue 1.1 deals with the OPA's activities with regard to its 2010 Strategic Objective #1 initiatives (i.e. the initiatives that were brought forward in the last fees case). If accepted by the Board, this issue would allow parties to explore the OPA's forecast of its spending in 2010 with regard to its actual expenditures. It would also allow for a review of the extent to which the fees approved by the Board were used to efficiently manage the OPA's programs.

Board staff submits that, if the Board accepts this issue for the final issues list, it should clearly scope the issue to indicate that the Board has no authority over the actual amounts spent on programs, nor the appropriateness of any Ministerial directives or the OPA's powers generally.

Draft Issue 1.2 is essentially copied from previous OPA fees cases and should form part of the final issues list.

Draft Issues 1.4 and 1.6 deal with the OPA's allocation and efficient use of the fees it recovers through the Board. This is clearly related to the actual fees approved by the Board, and Board staff submits that it is appropriate to include these issues on the final issues list.

Draft Issues 1.3 and 1.5 relate to the actual initiatives the OPA proposes to pursue, and the milestones associated with these initiatives. Board staff recommends that the Board exercise caution in its approach to reviewing the OPA's initiatives, in particular the specific programs it chooses (or is directed) to undertake to fulfill its objectives. As described above, the Board has no control over the funding for these programs, nor any clear mandate to involve itself in this area. There are also limited remedies the Board can impose to correct any deficiencies it may find. Board staff recommends that, to the extent the Board adds these issues to the final issues list, it scope the issues to ensure that any review is clearly tied to the Board's section 25.21 powers.

2.0 – 5.0 Strategic Objectives #2 through #5

The draft issues 2.0 to 5.0 mirror those under draft issue 1.0. Board staff's submissions under draft issue 1.0, therefore, apply equally to the issues under draft issues 2-5.

Draft Issue 6.0

Draft issue 6.0 relates to the efficiency metrics submitted by the OPA. Board staff submits that it is appropriate for the Board to consider the efficiency with which the OPA fulfils its mandate, and metrics are a key tool for assessing this efficiency. There is a direct link between efficiency and the costs that underlie the fees for which Board approval is sought. Again, staff submits that any exploration of these issues through the hearing should be tied to the setting of the proposed 2011 fees.

Draft Issues 7.0 – 9.0

Draft issues 7.0 through 9.0 are largely copied from issues lists in previous OPA fees cases. The only exception is issue 7.2: Is the proposal to recover OPA fees from export customers reasonable and appropriate? This draft issue was added because of a specific proposal from the OPA that had not been a feature of previous fees applications.

Board staff submits that draft issues 7.0 through 9.0 should be added to the final issues list.

All of which is respectfully submitted.