

December 15, 2010

BY COURIER (7 COPIES) AND EMAIL

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Dear Ms. Walli:

**Re: Pollution Probe – Pre-filed Submissions for Issues Day
EB-2010-0279 – Ontario Power Authority – Fiscal 2011**

Pursuant to Procedural Order No. 1, we write to provide Pollution Probe's pre-filed submissions on the draft issues list for this matter. In short, Pollution Probe supports the draft issues list as proposed with a few non-substantive typographical corrections.¹

In light of the Board's interest in receiving comments about the broadened scope of this issues list (as compared to previous years), the remainder of this submission focuses on why such a broadened scope is appropriate. Pollution Probe submits that the Board has jurisdiction to make such broader inquiries, and that such broader inquiries would be of assistance to the Board in order to review the OPA's proposed expenditures, revenue requirements, and fees in accordance with the Board's statutory mandate. Each of these issues is reviewed in detail below.

Why The Board Has Jurisdiction

The Board's jurisdiction to review the OPA's proposed expenditures, revenue requirements, and fees is found in section 25.21 of the *Electricity Act, 1998*.² As a result of this section, the Board may approve the OPA's proposed expenditures, revenue requirements, and fees, or the Board may refer them back to the OPA with the Board's

¹ These typographical corrections include: Issue 2.2 – "16.421million" should read "16.421 million"; Issue 3.2 – "Strategic Objecting" should read "Strategic Objective"; and Issues 5.3-5.6 – "Strategic Objective #4" should read "Strategic Objective #5".

² S.O. 1998, c. 15, Schedule A.

recommendations.³ However, any resulting changes to the fees ultimately cannot be implemented without the approval of the Board.⁴ The Board thus has a significant statutory oversight role with respect to the OPA, and it has jurisdiction to make inquiries that would assist with its review of the OPA's proposed expenditures, revenue requirements and fees.

How Such Broader Inquiries Assist the Board In Carrying Out Its Statutory Mandate

While section 25.11 of the *Electricity Act, 1998* provides general jurisdiction, this section does not specify how the Board is to review the OPA's proposed expenditures, revenue requirements, and fees; that is instead left up to the Board. However, such a review must be conducted in accordance with the Board's statutory objectives. For ease of reference, these are reproduced below:⁵

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. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1. [emphasis added]

This part of the Act is to be given a "fair, large and liberal interpretation as best ensures the attainment of [the Act's] objects",⁶ and any Board review thus needs to be in accordance with a "fair, large and liberal" interpretation of these objectives. Pollution Probe submits that the broadened scope of this issues list is in accordance with such an interpretation for the purposes of this review.

For example, many of the proposed issues appear to be regarding how and whether money is being spent in a cost-effective manner to achieve the OPA's strategic

³ *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A, s. 25.21(2).

⁴ *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A, s. 25.21(4).

⁵ *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, s. 1.

⁶ *Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, s. 64(1).

objectives. In other words, the Board would be ensuring that there is appropriate “value for money” similar to what it does in a rates case. In addition, issues related to conservation and demand management would also be directly related to statutory objective 3 above.

Pollution Probe also submits that the considerably changed context (due, for example, to statutory amendments) justifies a broader issues list. For instance, while objectives 1 and 2 above have been a part of the Board’s statutory mandate for several years, objectives 3-5 were explicitly added as stand-alone equivalent objectives effective September 9, 2009 as part of the *Green Energy and Economy Act, 2009*.⁷ These amendments were thus not in place for prior OPA cases except for the fiscal 2010 case, and the amendments do not appear to have been explicitly considered as part of the OPA fiscal 2010 case. Other major elements of the *Green Energy and Green Economy Act, 2009* have also come into force. In addition, the budget, role, and experience of the OPA have grown considerably over the years, and it is appropriate that a more detailed review now be done in order to assist the Board with fulfilling its statutory objectives.

Pollution Probe does not believe that such a broader issues list would be inconsistent with previous Board decisions given the nature of those decisions. For example, in the OPA fiscal 2008 case, the Board simply found that it would not be assisted by very specific interrogatories regarding two particular areas of local electricity supply,⁸ which is very different than the nature of the draft issues list proposed here. In addition, the significantly changed context (as noted above) indicates that a broader issues list is appropriate.

Regardless, even if the Board believed that there was an inconsistency with a previous decision, the Board is not bound by the principles of *res judicata* or *stare decisis*. As noted by Sara Blake in *Administrative Law in Canada*:⁹

This flexibility enables a tribunal to continue its pursuit of the public interest, to consider and apply changes in policy and to effectively regulate dynamic and ongoing relationships between parties.

...

A tribunal is not bound to follow its own previous decisions on similar issues. Its decision may reflect changing circumstances in the field it governs. Though not binding, previous decisions should be reviewed to provide an analytical framework and reduce the risk of arbitrariness. The tribunal should be open to argument as to why a previous decision ought not to be followed. If it does depart from its previous ruling, it should provide an explanation. [emphasis added]

Accordingly, if there are any inconsistencies with previous decisions, the Board is not bound by those decisions. Further, the Board’s long-standing practice of providing oral

⁷ See e-Laws Table of Proclamations for *Green Energy and Green Economy Act, 2009*, S.O. 2009, c. 12, Schedule D, s. 1.

⁸ EB-2007-0791 Transcript re: Motion Hearing (dated March 28, 2008 at 48.

⁹ Sara Blake, *Administrative Law in Canada*, 4th ed. (Markham, ON: LexisNexis Butterworths, 2006) at 133-134.

or written reasons for its decisions would provide a sufficient explanation as to why the Board is changing its approach, particularly given the changed context.

Conclusion

In light of all of the above and the oral submissions to be made at Issues Day, Pollution Probe supports the draft issues list as proposed. Further, Pollution Probe submits that the broadened scope of this draft issues is in accordance with the Board's statutory objectives and is appropriate for this case.

We trust these submissions are of assistance, and please do not hesitate to contact the undersigned if you wish to discuss this matter further.

Yours truly,



Basil Alexander

BA/ba

cc: Applicant and Intervenors by email