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December 31, 2007

BY COURIER (2 COPIES) AND EMAIL

Ms. Kirsten Walli
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Ontario Energy Board
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Dear Ms. Walli:

Re: Pollution Probe – Response to OPA Comments of December 21, 2007
EB-2007-0791 – Ontario Power Authority – Fiscal 2008

We are writing on behalf of Pollution Probe to respond to the letter dated December 21, 2007 from the Ontario Power Authority (the "OPA") regarding whether this matter should be heard either orally or in writing. With respect, the OPA has mischaracterized both the Board's statutory oversight role with respect to the OPA as well as Pollution Probe's position on this particular issue. Accordingly, Pollution Probe again submits that this matter should be heard orally (as it has been in the past).

First, the OPA incorrectly mischaracterizes and minimizes the Board's statutory oversight role with respect to the OPA. Section 25.21 of the *Electricity Act, 1998* clearly states that:[1]

> ...
> (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.
> ...
> (4) The OPA shall not establish, eliminate or change any fees ***without the approval of the Board.*** [emphasis added]

It is thus clear that the Board has a considerable oversight function with respect to the OPA, particularly since the OPA's fees cannot be changed without Board approval. As an additional analogous example, the *Ontario Energy Board Act, 1998* provides that the OPA is ***required*** to have a Board license in order to exercise its powers or perform its duties,[2] and the license may prescribe conditions as appropriate with regard to the objectives of the Board and the purposes of the *Electricity Act, 1998*.[3]

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[1] *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A, s. 25.21.
[2] *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, s. 57.
[3] *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, s. 70.

The Board's statutory objectives on how to approach the OPA's application are also very clear as detailed in the *Ontario Energy Board Act, 1998*:[4]

> 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. [emphasis added]

Pollution Probe thus submits that it is clear that the Board has its standard statutory mandate when reviewing the OPA's application, and an oral hearing is thus required as outlined in our previous submissions, particularly given the broad application of the OPA's fees throughout the province. Pollution Probe further submits that the OPA's statutory mandate does not change the nature of the Board's review (as set out in the above statutory references) so that the Board somehow becomes necessarily deferential (in the same way that the Board is not deferential regarding other electricity applications simply because a local distribution company may be owned by a municipality and run according to the municipality's mandate).

Second, the OPA is incorrect when it states that Pollution Probe's position is that the prospect of an oral hearing "may drive the OPA to settle issues." The OPA further mischaracterizes Pollution Probe's position when the OPA editorializes that Pollution Probe is "wrong in thinking that the 'costs of and uncertainties of a disputed oral hearing' were 'critical factors' that operated as an incentive to the OPA to settle in previous cases" and that "the prospect of an oral hearing will enable participants to squeeze concessions out of the OPA."

Pollution Probe's actual submissions in its November 9, 2007 letter clearly differ from these characterizations, particularly since those submissions do not even attempt to explain why the OPA decided to settle previous cases (which is solely its prerogative). Instead, Pollution Probe simply advanced that the previous process appears to have worked well in the past while procedurally protecting the interests of all parties (particularly since Pollution Probe has a responsible history of taking unsettled issues to oral hearings before the Board). Accordingly, Pollution Probe again submits that the same process should be used again: in other words, "if it ain't broke, don't fix it."

In addition, the OPA's rationale that an oral hearing is not necessary because oral evidence was not led on contentious issues in previous cases simply does not stand up to scrutiny.

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[4] *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, s. 1(1). These objectives are also consistent with the purposes of the *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A as detailed in section 1 (see, for example, subsections (f), (g), & (i)).

The OPA ignores the fact that oral evidence was not previously led ***because a comprehensive settlement occurred***. If settlement had not occurred and contentious issues remained, Pollution Probe expects, just like other matters where the applicant bears the onus, that:

1. the OPA would have led oral evidence which would have been the subject of cross-examination;
2. the parties would have ultimately made their submissions; and
3. the Board would have rendered a decision.

Finally, while we acknowledge that the Board appears to have some large upcoming matters, Pollution Probe submits that the Board's schedule is ultimately not a deciding consideration as to whether or not this matter should proceed orally or in writing. The Board, like any tribunal, deals with matters as they are filed and as they are scheduled before the Board, and some years are unfortunately heavier than others. While other matters may have an impact on overall scheduling, they should not be used as the reason to completely change successful past processes or to determine if a matter should be heard orally or in writing (particularly since each matter needs to be determined individually on its own merits). Pollution Probe also submits that the Board has statutory powers to recover its costs,[5] which should assist the Board with any resource concerns it may have.

In conclusion, it does not appear that the OPA has provided a justifiable reason to depart from previous successful processes, and Pollution Probe accordingly reiterates that the matter should be heard orally at this time. Pollution Probe again respectfully reiterates that it is premature to determine at this early stage that an oral hearing is not necessary for this application, particularly since the Issues List has not been set and no settlement discussions have yet occurred. Pollution Probe also reiterates that the matter should continue to be heard through an oral hearing as long as contentious issues remain outstanding, but, if a comprehensive settlement occurs, the Board could then exercise its discretion to hear the comprehensive settlement in writing.

Yours truly,

Basil Alexander

BA/ba

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[5] *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, s. 30(4).