

April 21, 2011

BY COURIER (2 COPIES) AND EMAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto, Ontario M4P 1E4
Fax: (416) 440-7656
Email: boardsec@oeb.gov.on.ca

Dear Ms. Walli:

**Re: Pollution Probe – Response to OPG Cost Claim Objection
EB-2010-0008 – Ontario Power Generation – 2011-12 Payment Amounts**

Pursuant to the Board's *Decision With Reasons* dated March 10, 2011, we write on behalf of Pollution Probe to provide its response OPG's cost claim objection for this matter. With respect, OPG has provided a selective reading of the Board's *Decision* as the basis of its objection regarding the evidence of Dr. Kryzanowski and Dr. Roberts, and Pollution Probe's full cost claim ought to be allowed.

For context, it is important to review the Board's previous EB-2007-0905 *Decision With Reasons* dated November 3, 2008. In that decision, with respect to potential separate costs of capital, the Board specifically found that:

Although the regulated hydroelectric and regulated nuclear businesses are held by the same entity, in many respects they are operated quite separately. The rate base is separate; the production forecasts, capital budgets and OM&A forecasts have been established separately; the corporate cost allocation is done separately; and the payments are set separately. The two businesses also face different risks. **The Board finds that there may be merit in establishing separate capital structures for the two businesses. It would enhance transparency and more accurately match costs with the payment amounts.**

However, the Board also finds that the evidence in this proceeding is not sufficiently robust to set separate parameters at this time. Drs. Kryzanowski and Roberts developed separate estimates, but concluded with a combined recommendation. Ms. McShane developed separate estimates, but cautioned that she was not as confident with the analytical results because they had been derived from working backwards. **The Board concludes that this is an approach worthy of further investigation which will be explored in OPG's next proceeding. In**

examining whether to set separate costs of capital, the Board intends only to examine whether separate capital structures should be set for the regulated hydroelectric and nuclear businesses. The Board expects that the same ROE would be applicable to both types of generation. This is consistent with the general approach of setting a benchmark ROE and recognizing risk differences in the capital structure.

The Board recognizes that this approach will not alter the overall cost of capital for OPG's prescribed facilities. However, in all other significant respects the specific costs or the hydroelectric and nuclear businesses are used to derive the specific payments for each type of generation. Specific and separate costs of capital for hydroelectric and nuclear would be consistent with the separate nature of these businesses and would provide a more transparent link between the payment amounts for each type of generation and the underlying costs. [emphasis added]¹

As noted above, the Board's concern at that time appeared to be focused on the combined nature of the recommendation instead of the methodology that was used. In fact, Dr. Kryzanowski's and Dr. Roberts' recommendation was ultimately accepted by the Board in that decision,² and there was no indication in the *Decision* that there was any issue with the underlying methodology (which was used again in this proceeding).

It is within this context that Dr. Kryzanowski and Dr. Roberts provided expert evidence again here specifically regarding separate costs of capital. Unlike the previous proceeding, they were the only intervenors to provide expert evidence on the cost-of-capital issues. As well, unlike last time where the experts were ultimately within a range of values, the two sets of experts here provided contrasting viewpoints for the Board's consideration, which resulted in a very different approach to the evidence and proceeding. Further, given the passage of time, they were required to update their evidence to reflect current realities. Although the same methodology was used again, they also provided a particular focus on separate costs of capital for each division (within the required constraints) because that was the issue here. They responded to many interrogatories (several of which were multi-part interrogatories), and they testified before the Board as a panel (as they did before). They acted appropriately throughout, and they were again accepted as expert witnesses without objection by OPG.³

It was only in the Board's *Decision With Reasons* that Board specifically stated for the first time that "[t]he difficulty for the Board is the dependence on qualitative assumptions and analysis."⁴ In contrast to its previous *Decision*, the Board also noted for the first time in this *Decision* that "[t]he Board is also concerned that over time a further issue will arise in relation to the interaction between the individual equity ratios and the combined equity ratio. ... The Board concludes that introducing this level of variability and complexity would not be appropriate."

¹ EB-2007-0907 *Decision With Reasons* dated November 3, 2008 at pgs. 160-161.

² *Ibid*, pgs. 149-150.

³ Transcript, Vol. 12 (October 28, 2010), pg. 136-137.

⁴ EB-2010-0008 *Decision With Reasons* dated March 10, 2011 at pg. 116.

Given this context, Pollution Probe respectfully submits that it is unfair to penalize the experts now for the Board ultimately deciding to not proceed with separate costs of capital. Their actions are instead in accordance with the Board's principles in awarding costs as follows:⁵

- a) They participated responsibly in the process;
- b) Their evidence was not unduly repetitive and was the only evidence put forward to compete with OPG's evidence on this issue;
- c) Although the experts were ultimately not as successful as last time, they still contributed to the Board's better understanding of this issue (which the Board previously and specifically indicated was an issue "worthy of further investigation");
- d) They complied with all directions of the Board (including directions related to the pre-filing of written evidence); and
- e) Their evidence was relevant, and they did not engage in conduct that unnecessarily lengthened the proceeding or was inappropriate, repetitive of other parties, or irresponsible.

As further evidence of the contribution by Dr. Kryzanowski and Dr. Roberts, Pollution Probe submits that the Board's *Decision* acknowledged one of the key underlying points related to separate capital structures. Specifically,

The primary argument put forward by those who support a separate capital structure is related to the assessment of large capital projects. **The Board concludes that this difference in risk can and should be adequately accommodated in the direct valuation of the projects.** OPG maintained that it already does so; other parties dispute this. **This issue can be pursued further by the parties in subsequent proceedings.** [emphasis added]⁶

In light of all the above, there should be no partial denial of the cost claim related to Dr. Kryzanowski and Dr. Roberts. Such a denial would not be in accordance with the Board's general practice regarding costs, and it would be unfair as both the experts and Pollution Probe acted appropriately and in good faith during this proceeding. As no objections have been raised to any of the claimed rates or disbursements, Pollution Probe's full cost claim ought to be now allowed.

With respect to the specific alleged overclaims, Pollution Probe respectfully submits that there are actually no overclaims upon closer examination. As noted in OPG's letter dated April 18, 2011, there is no overclaim with respect to the HST claimed for Mr. Gibbons. The remaining \$4,675.58 is specifically related to the fact that Dr. Kryzanowski is required to charge Quebec PST as he is located in Quebec. As noted in Pollution Probe's cover letter to its cost claim:

For your reference, this claim reflects the tax requirements that apply since Dr. Kryzanowski is based in Quebec. As a result, Dr. Kryzanowski is required to

⁵ See Section 5.01 of the Board's *Practice Direction of Costs*.

⁶ EB-2010-0008 *Decision With Reasons* dated March 10, 2011 at pg. 118.

charge GST (at the rate of 5%) instead of HST, and he is also required to charge Quebec PST (at the rate of 8.5% on both the subtotal and GST). The applicable Form 3 has been modified to take this into account, and the amounts correspondingly flow through the claim.

Dr. Kryzanowski's Form 1 was accordingly modified to account for this requirement, and it clearly shows that \$4,675.58 is attributable to Quebec PST. As the Form 3 does not specifically have a space for PST, the total was included as part of the fees claimed since the PST is 100% payable and directly attributable to the fees (i.e. \$133,826.90 for fees + \$4,675.58 PST = \$138,502.48 total).

Pollution Probe submits that it should be entitled to 100% of this required provincial cost, which it was awarded in the past. Specifically, Pollution Probe notes that it was allowed 100% of these PST costs in the EB-2007-0905 proceeding, and it should not now be penalized.

Pollution Probe also submits that such an allowance is fair given the variety of locations that experts come from and the different applicable tax situations. For example, experts from the US do not charge tax; experts from Ontario charge HST; experts from Quebec charge GST + PST; et cetera. Sometimes these tax situations result in a lesser amount being charged, and sometimes they result in more. However, intervenors should not bear a penalty in their cost claims when more tax is required to be charged, particularly since they do not get a corresponding benefit if less tax is required to be charged. Such a policy would have the unfortunate effect of making certain experts more financially attractive depending on the taxes they are required to charge, and Pollution Probe submits that this would be inappropriate and unfair. Accordingly, out of fairness and in accordance with the Board's practice, the net tax that an intervenor is expected to pay should be generally allowed as part of an intervenor's cost claim.

In light of all of the above and the lack of objections to the claims of Mr. Gibbons and Klippensteins, Pollution Probe respectfully submits that its cost claim should be now allowed in its entirety.

We trust that this is 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 per Applicant and List of Intervenors attached to *Procedural Order No. 3*