

IN THE MATTER OF sections 25.20 and 25.21 of the
Electricity Act, 1998;

AND IN THE MATTER OF a Submission by the Ontario
Power Authority to the Ontario Energy Board for the review
of its proposed expenditure and revenue requirements and
the fees which it proposes to charge for the year 2011.

**ARGUMENT IN CHIEF
OF THE
ONTARIO POWER AUTHORITY**

1. Introduction

1. On November 2, 2010, the Ontario Power Authority (OPA) filed with the Ontario Energy Board a Submission for Review in respect of its proposed expenditure and revenue requirements and fees for 2011. The Submission for Review is based on a Business Plan for the fiscal year 2011 that was approved by the Minister of Energy (the Minister). In the Business Plan approved by the Minister, the OPA set its 2011 operating budget at \$64.1 million, which is a reduction of \$1 million from the Board-approved budget for 2010.¹

2. As a result of a number of adjustments, the total revenue requirement originally proposed by the OPA for 2011 was \$79.861 million. In its Submission for Review, the OPA proposed to charge a usage fee of \$0.523 per MWh, which was a reduction of \$0.028 per MWh from the 2010 Board-approved fee of \$0.551 per MWh.²

3. The OPA proposes that the 2011 usage fee be charged to all consumers of Ontario electricity, including export customers.³ The proposal that the usage fee be charged to export customers was identified as Issue 7.2 on the Board-approved Issues List and, at Issues Day on December 17, 2010, the Board ordered that the recovery of the 2010 usage fee of \$0.551 per MWh from customers currently charged the fee (that is, from non-export customers) be continued on an interim basis.⁴

¹ Exhibit A-1-1, para. 1.

² Exhibit A-1-1, para. 3.

³ Exhibit D-1-1, pp. 2-3.

⁴ Issues Day Transcript, pp. 3-4; Issues Decision and Procedural Order No. 2, p. 8.

4. On March 28, 2011, the OPA filed evidence that updated its proposed revenue requirement and usage fee for 2011. This update is based on 2010 audited actual revenues and expenses, 2010 actual electricity usage and an updated forecast by the Independent Electricity System Operator (IESO) of electricity usage in 2011. As a result of the updated evidence, the OPA's proposed revenue requirement for 2011 decreases to \$78.882 million and its proposed usage fee decreases to \$0.514 per MWh.⁵

5. During the Settlement Conference held on March 30 and 31, 2010, no settlement was reached by the parties to this proceeding, but the Board was advised following the Settlement Conference that no party had any issue with respect to Deferral and Variance accounts (Issues 8.1 and 8.2 in the Board-approved Issues List). The Board's oral hearing of evidence proceeded on May 9, 10, 12 and 13, and witness panels were called to answer questions about Issue 7.2 and, more generally, about the OPA's Strategic Objectives 1, 2 and 3.

6. As a result of issues pursued in written interrogatories and at the oral hearing, the OPA believes that it is critical to ensure that this proceeding is kept within the scope that has been laid down in the provisions of the governing legislation. The OPA's argument in chief, then, will begin with submissions about the scope of the proceeding. The OPA will also address Issue 7.2 and it will make brief submissions about other issues that were raised during the oral hearing.

2. Scope of the Revenue Requirement Proceeding

7. The OPA's Revenue Requirement Submission is filed, of course, under section 25.21 of the *Electricity Act, 1998* (the Act).⁶ Section 25.21 is one of 35 sections in Parts II.1 and II.2 of the Act that govern the activities of the OPA: many of the 34 other sections provide essential context for section 25.21. Among the elements of this context are provisions of Parts II.1 and II.2 that: (a) draw a clear distinction between fees and charges; (b) explain the respective roles of the Minister and the Board; and (c) apply to the development of an Integrated Power System Plan (IPSP) by the OPA.

2(a) Fees and Charges

8. Section 25.20 of the Act authorizes the OPA to establish and impose "fees and charges" to recover the costs of the OPA's activities under the governing legislation and any other type of expenditure that is permitted by regulation. Subsection (3) of this provision makes clear that "charges" – as opposed to "fees" – may be established and imposed to recover costs and payments under procurement contracts. Subsection (4) states that the OPA's recovery of its costs and payments related to procurement contracts – that is, charges – shall be deemed to be approved by the Board.

⁵ Exhibit D-1-2.

⁶ S.O. 1998, c. 15, Sched. A.

9. Because the OPA's charges are deemed to be approved under subsection 25.20(4) of the Act, the scope of the OPA's Submission for Review to the Board does not include charges. Indeed, it can be seen from subsection 25.21(1), that the Board's review of the OPA's submission includes fees, but does not extend to charges. Specifically, section 25.21(1) provides that "[t]he OPA shall ... submit its proposed expenditure and revenue requirements ... and the fees it proposes to charge ... to the Board for review". By the express words of the Act, the OPA's Submission for Review to the Board does not include charges.

10. In its Decision and Order with respect to the OPA's 2008 expenditure and revenue requirements and fees, the Board had this to say about "charges":

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.⁷

2(b) Roles of the Minister and the Board

11. Pursuant to section 25.22 of the Act, the OPA must, at least 90 days before the beginning of each fiscal year, submit its proposed Business Plan to the Minister for approval. The Minister may approve the Business Plan or refer it back to the OPA for further consideration. If the Minister does not approve the Business Plan at least 70 days before the beginning of the fiscal year, the Minister shall be deemed to have approved the proposed Business Plan.

12. Section 25.21 of the Act makes it crystal-clear that the OPA may not file its Submission for Review with the Board until after the Minister has approved, or is deemed to have approved, the Business Plan. In this regard, subsection 25.21(1) states that, at least 60 days before the beginning of each fiscal year, the OPA shall submit its proposed expenditure and revenue requirements and its proposed fees for review by the Board, but the OPA "shall not do so" until after the Minister approves or is deemed to approve the Business Plan under section 25.22. In short, a Minister-approved Business Plan is a statutory prerequisite for the OPA's Submission for Review to the Board.

13. Subsection 25.21(2) states very precisely the powers that the Board may exercise in respect of a Submission for Review by the OPA. The Board is empowered to choose either one of two options: it may approve the proposed requirements and the proposed fees, or it may refer them back to the OPA for further consideration, with recommendations.

⁷ EB-2007-0791 Decision and Order, page 6.

14. The inter-relationship between sections 25.21 and 25.22 of the Act is of fundamental importance to an understanding of the Board's mandate under section 25.21. This emerges clearly when subsections 25.21(2) and 25.22(2) are compared and, for ease of comparison, these provisions can be juxtaposed, as follows:

25.21(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.

25.22(2) The Minister may approve the proposed business plan or refer it back to the OPA for further consideration.

15. This comparison reveals that the Board and the Minister exercise essentially the same powers, with two differences. One difference is that the Minister reviews the proposed Business Plan while the Board reviews the proposed revenue and expenditure requirements and fees. The other difference is that subsection 25.21(2) contemplates recommendations in the event that the Board sees fit to refer the requirements and fees back to the OPA. Otherwise, the Minister and the Board are empowered to choose either one of the same two options: approval or referral back to the OPA.

16. Given these statutory provisions, it cannot possibly be the case that the Act is intended to give the Board authority to change a Business Plan that has been approved by the Minister. Pursuant to the Act, the Minister exercises approval authority in respect of each Business Plan and subsection 25.21(2) does not give the Board any express authority in respect of a Business Plan, nor does it give the Board a broader set of powers than the Minister that could be drawn on to authorize the Board to exercise a mandate with respect to a Minister-approved Business Plan. The Act gives the Minister and the Board very similar powers in relation to two different matters, namely, approval of each Business Plan by the Minister and approval of expenditure and revenue requirements and fees by the Board.

17. It follows that, in reviewing the OPA's proposed revenue and expenditure requirements and fees, the Board's role is to consider the expenditure and revenue requirements that are appropriate for the fulfillment by the OPA of the Business Plan approved by the Minister. This is confirmed by subsection 25.21(1) of the Act which, as discussed above, makes clear that a Minister-approved Business Plan is a statutory prerequisite for the OPA's Submission for Review to the Board.

18. This statutory framework applies, for example, to the Board's consideration of the OPA's milestones, which were the subject of a number of questions during the oral hearing. The milestones are set out in the Business Plan and are approved as part of

the Business Plan by the Minister under section 25.22 of the Act. The Board's role under section 25.21 of the Act is to review whether the OPA's proposed revenue and expenditure requirements and fees are appropriate for the fulfillment of the milestones – together with the other elements of the Business Plan – that have been approved by the Minister.

19. Obviously, the Board's role in determining whether proposed revenue and expenditure requirements and fees are appropriate for the fulfillment of a Minister-approved Business Plan is very much unlike the role of the Board in rate cases involving electricity and gas transmitters and distributors. The powers exercised by the Board pursuant to the *Ontario Energy Board Act, 1998* (the OEB Act)⁸ in its consideration of the rates to be charged by electricity and gas transmitters and distributors stand in stark contrast to the powers of the Board under section 25.21 of the Act. Among the provisions of the OEB Act that apply in respect of rates for transmitters and distributors are the following:

- ~ electricity and gas transmitters shall not charge for transmission except in accordance with an order of the Board and electricity and gas distributors shall not charge for distribution except in accordance with an order of the Board;⁹
- ~ the Board may make orders "approving or fixing just and reasonable rates";¹⁰
- ~ a rate order may include "conditions, classifications or practices";¹¹ and
- ~ if the Board is not satisfied that the rates applied for are just and reasonable, it may fix such other rates as it finds to be just and reasonable.¹²

20. The contrast between the powers of the Board in respect of rate applications by transmitters and distributors and the powers of the Board in respect of the OPA's Submission for Review is particularly striking when considered in light of the many suggestions in this proceeding that the Board should order or require actions by the OPA.¹³ Transmitters and distributors cannot charge for transmission or distribution, respectively, except in accordance with orders of the Board and, as set out above, there are numerous other references to orders in the statutory provisions that lay out the Board's powers in rate cases.

⁸ S.O. 1998, c. 15, Sched. B.

⁹ Subsections 36(1) and 78(1) and (2) of the OEB Act.

¹⁰ Subsections 36(2) and 78(3) of the OEB Act.

¹¹ Subsections 36(4) and 78(6) of the OEB Act.

¹² Subsections 36(5) and 78(7) of the OEB Act.

¹³ See, for example, all six of the "recommendations" set out at pages 10-11 of Exhibit L-2-1.

21. Similarly, subsection 78(2.1) of the OEB Act provides that the Smart Metering Entity shall not charge for meeting its obligations under Part IV.2 of the Act except in accordance with an order of the Board and subsection 36(1.1) of the OEB Act provides that the Smart Metering Entity shall not conduct activities relating to the metering of gas except in accordance with an order of the Board.

22. By way of contrast, the word "order" does not appear anywhere in section 25.21 of the Act. The wording of section 25.21 does not contemplate that, in a revenue requirement proceeding, the Board will order or require particular actions by the OPA. It is true, of course, that subsection 19(2) of the OEB Act states that the Board shall make any determination in a proceeding by order (and under section 23, the Board may attach conditions to an order). However, the "determination" to be made by the Board under section 25.21 is whether the OPA's expenditure and revenue requirements and fees are appropriate, not whether the activities set out in the Business Plan approved by the Minister are appropriate.

23. Thus, it is clear from the governing legislation that the Board's review of the OPA's submission under section 25.21 is not intended to be a process to direct or determine how the OPA should go about its business. The Minister-approved Business Plan sets out how the OPA will go about its business (in other words, the business activities that the OPA will pursue) and the Board's role is to review whether the OPA's proposed expenditure and revenue requirements and fees are appropriate for the fulfillment of the Business Plan in the fiscal year that is the subject of the review.

(c) IPSP

24. Section 25.30 of the Act requires the OPA to develop and submit to the Board IPSPs that meet the requirements of the Act and the applicable regulations. Subsection 25.30(2) requires the OPA, in preparing its IPSPs, to follow directives issued by the Minister and approved by the Lieutenant Governor in Council that set out the goals to be achieved during the period to be covered by an IPSP. Subsection 25.30(4) states that the Board shall review each IPSP submitted by the OPA to ensure that it complies with any directions issued by the Minister and is economically prudent and cost effective.

25. On February 17, 2011, the Minister issued a directive under subsection 25.30(2) (the Supply Mix Directive) for the preparation of an IPSP by the OPA. There can be no doubt whatsoever that this directive falls under the provisions of section 25.30 of the Act. Indeed, the opening sentence of the Supply Mix Directive is as follows:

In my capacity as Minister of Energy and pursuant to the authority granted to me under subsection 25.30(2) of the *Electricity Act, 1998*, I am providing the Ontario Power

Authority (OPA) with direction for the preparation of an integrated power system plan (the "Plan").

The Supply Mix Directive goes on to give detailed directions to the OPA with respect to "the Plan".

26. The evidence filed in this proceeding by the Green Energy Coalition (GEC) raised an issue about the OPA's compliance with the Supply Mix Directive and discussed this issue at some length.¹⁴ However, the Act makes clear that compliance with the Supply Mix Directive is to be considered as part of the Board's review of the IPSP under subsection 25.30(4) of the Act.

27. The Board addressed the scope of the revenue requirement proceeding relative to the IPSP proceeding in its Decision with respect to the OPA's 2008 Revenue Requirement Submission. In this regard, the Board stated as follows:

...the issues that GEC raises are generally contained in the issues that the Board will review as part of the IPSP proceeding. ... There will be an evidentiary record in that proceeding to consider those issues. It would not therefore be appropriate for the Board to comment specifically or generally on GEC's submissions in this proceeding.¹⁵

3. Issue 7.2

28. The OPA proposes that its usage fee be charged to all consumers of Ontario electricity, including export customers. If approved by the Board, this proposal would bring the OPA's practice for recovering its volumetric fee in line with the similar fee charged by the IESO. It would also take account of the fact that export customers benefit from the planning, conservation and procurement activities of the OPA.¹⁶

29. The authority of the OPA to establish fees under section 25.20 of the Act parallels the authority of the IESO to do so under section 18. The provisions of section 25.21 with respect to the review of the OPA's fees by the Board are identical, in all material respects, to the provisions of section 19 with respect to the review of the IESO's fees by the Board.

30. The IESO allocates its total costs to market participants, including exports, based on total megawatt hours delivered to the wholesale markets.¹⁷ In its original application

¹⁴ Exhibit L1.2, especially pages. 2, 3, 5, 6, 8, 9, and 10.

¹⁵ EB-2007-0791 Decision and Order, page 8.

¹⁶ Exhibit D-1-1, page 2. In its written evidence delivered on behalf of HQ Energy Marketing Inc., Elenchus Research Associates Inc. said: "We agree that 'export customers also benefit from the planning, conservation and procurement activities undertaken by the OPA'": Exhibit L1.1, p. 7.

¹⁷ Exhibit D-1-3, p. 12.

for approval of its fee design, the IESO put forward five principles for consideration, as follows:

- (i) simplicity;
- (ii) best industry practice;
- (iii) fairness, equitability, neutrality and transparency;
- (iv) cost reflectiveness; and
- (v) recovery of its revenue requirement.¹⁸

The IESO recommended the volumetric fee structure because it is simple to understand and administer, it is comparable to the fee structure of other market and system operators and it is reasonably fair and equitable in that it charges buyers according to their usage of IESO services, as measured by energy purchases.¹⁹

31. The evidence filed by HQ Energy Marketing Inc. (HQEM) in this case put forward a set of principles for a sound "rate" structure that, although fewer in number, match closely with the principles relied upon by the IESO at the time when its fee proposal was accepted by the Board. The principles cited in the HQEM evidence are as follows:

- (i) full cost recovery;
- (ii) fairness; and
- (iii) efficiency.²⁰

32. The OPA submits that the issue to be resolved by the Board in respect of the OPA's fee proposal is not so much a disagreement about underlying principles as it is about the application of those principles to the OPA. Because, as the Board has recognized, the OPA is a unique organization,²¹ there is no comparable organization that has a similar set of responsibilities for such a broad range of initiatives.²² However, it is the very breadth and complexity of the OPA's responsibilities and initiatives that make a cost causality approach unrealistic. As stated in the evidence of Concentric Energy Advisors, Inc. (Concentric):

The entities [discussed in the Concentric evidence] provide very specific services related to transmission planning, scheduling and market operations, and do not provide nearly the broad range of services provided by the OPA. Even though these entities can make a connection between the service provided and the beneficiaries of these services in some cases, there are costs they incur that must necessarily be broadly allocated to all market participants. The services

¹⁸ Exhibit D-1-3, p. 11.

¹⁹ Exhibit D-1-3, pp. 11-12.

²⁰ Exhibit L1.1, pp. 3-4.

²¹ EB-2009-0347 Decision and Order, p. 4.

²² Exhibit D-1-3, p.8.

provided by the OPA are far more broad and more complex, involving planning functions as well as public policy initiatives, and therefore do not lend themselves to a cost causality/beneficiary pays approach. The services that the OPA provides benefits all market participants, including exporters.²³

33. As alluded to in this passage from the Concentric evidence, the activities of the OPA are not conducive to a methodology that seeks to allocate costs on the basis of multiple "rate" classes. The OPA submits that, due to the breadth and complexity of the OPA's responsibilities and initiatives, and the benefits realized by all market participants from the OPA's activities, the principles upon which the IESO's fee structure is founded apply even more strongly in the case of the OPA to justify a usage fee payable by all consumers of Ontario electricity, including export customers.

4. Other Issues

34. During the oral hearing of this revenue requirement submission, the OPA found it difficult in many instances to discern a connection between the questions put to the witnesses and the Board's role in reviewing the OPA's 2011 expenditure and revenue requirements and fees. As a result, it will be necessary for the OPA to see and consider the submissions of other parties before attempting to respond to their positions.

35. Nevertheless, there were certain themes that took on some prominence during the hearing and that the OPA is able to comment on at this time. One theme was that the Board should impose requirements, or provide guidance, regarding future revenue requirement submissions by the OPA. Since only one intervenor, GEC, filed any evidence on an issue other than Issue 7.2, this theme can be seen most plainly in GEC's evidence.

36. Among other things, the GEC evidence asserts that the Board should make clear that, in all future revenue requirement proceedings, the OPA will be expected to include in its submission an analysis that "documents" how the OPA plans to meet each "Ministry Directive".²⁴ The OPA submits that the role of the Board in respect of an OPA Submission for Review is not to review a plan for meeting Minister's directives, many of which may not be known at the time when a Submission for Review is filed. As discussed above, the role of the Board is to review whether the OPA's proposed expenditure and revenue requirements and fees are appropriate for the fulfillment of the Minister-approved Business Plan and, based on the outcome of this review, to approve the requirements and fees or refer them back to the OPA for further consideration.

²³ Exhibit D-1-3, p. 10.

²⁴ Exhibit L1.2, p. 10.

37. Aside altogether from the jurisdictional issue, however, the OPA submits that suggestions such as the one propounded by GEC are problematic and not a worthwhile use of the OPA's resources. The list of Minister's directives on the record in this proceeding²⁵ clearly shows that numerous directives have been issued in the period after the date of filing of each revenue requirement submission by the OPA to the end of the fiscal year covered by each particular submission. In order to illustrate this point, the 2008-2011 Directives Table below shows the directives issued after the date of filing of each of the OPA's revenue requirement submissions for the years 2008 to 2011.

2008-2011 Directives Table

| Revenue Requirement Submission | Filing of Submission for Review | Directives Issued After Filing of Submission for Review |
|---|--|--|
| 2008 Revenue Requirement EB-2007-0791 | November 2, 2007 | <ul style="list-style-type: none"> • December 20, 2007 – OPG HESA agreements • January 31, 2008 – Gas Fired Generation • February 25, 2008 – Energy From Waste Pilot Projects • March 12, 2008 – Broadcasting Initiative • April 10, 2008 – Combined Heat and Power • May 1, 2008 – Broadcasting Initiative • August 18, 2008 – Southwest Greater Toronto Area Supply • September 17, 2008 – Amendment to June 13, 2006 Supply Mix Directive |
| 2009 Revenue Requirement EB-2008-0312 | November 3, 2008 | <ul style="list-style-type: none"> • December 19, 2008 – Durham and York Region EFW Facility • December 22, 2008 – Broadcasting Initiative • December 24, 2008 – New Contracts: Early Movers Facilities • January 23, 2009 – Biogas and RESOP • May 7, 2009 – New Contracts with Hydro Facilities • September 24, 2009 – Feed-in tariff ("FIT") program • September 30, 2009 – Transmission Availability Test |

²⁵ Exhibit A-5-1.

| | | |
|--|---------------------|---|
| 2010 Revenue Requirement EB-2009- 0347 | November 9, 2009 | <ul style="list-style-type: none"> • December 8, 2009 – Supplement to July 13, 2006 Direction • January 6, 2010 – New Contract: Lennox Generating Station • March 4, 2010 – Industrial Electricity Efficiency Program • March 18, 2010 – Broadcasting Initiative • April 1, 2010 – Korean Consortium renewable energy projects • April 23, 2010 – GEA Conservation Framework • July 5, 2010 – Low-Income Conservation Initiative • August 26, 2010 – Atikokan Biomass Energy Supply Agreement • September 17, 2010 – Green Energy Investment Agreement |
| 2011 Revenue Requirement EB-2010- 0279 | November 2, 2010 | <ul style="list-style-type: none"> • November 23, 2010 – New Contracts with Non-Utility Generators November 23, 2010 – Combined Heat and Power ("CHP") • November 26, 2010 – Partnerships Program Amendment • February 3, 2011 – Environmental Attributes – Pilot Program • February 17, 2011 – Supply Mix Directive²⁶ |

38. As can be seen from the 2008-2011 Directives Table, any attempt by the OPA to formulate a plan to meet directives during an upcoming calendar year would need to be re-visited upon the issuance of new directives. This is apparent from GEC's evidence, where the recommendation is made that the OPA be required to re-file the 2011 revenue requirement submission due to the directions given in the Supply Mix Directive on February 17, 2011.²⁷ An attempt by the Board to set parameters in one case for future revenue requirement submissions would be subject to even greater uncertainty because the parameters would be established much further in advance of the particular period than the filing of the revenue requirement submission for that period. As the Board said in the Issues Decision and Procedural Order No. 2 for this proceeding, "circumstances require the OPA to maintain a certain amount of flexibility".²⁸

39. Another theme of questions during the oral hearing concerned the role of the OPA in assisting with the Board's consideration of whether there is duplication among

²⁶ In respect of the 2011 revenue requirement submission, Table 1 shows directives issued up to the date of this argument in chief.

²⁷ Exhibit L1.2, p. 10. During his oral testimony, GEC's witness recognized the impracticality of this recommendation and effectively withdrew it: Transcript, Volume 4, p. 145.

²⁸ EB-2010-0279 Issues Decision and Procedural Order No. 2, p. 7.

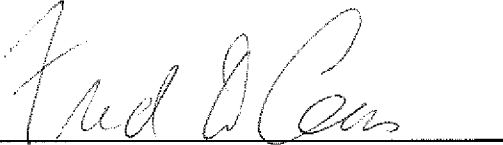
CDM programs proposed by electricity distributors for Board approval and the OPA-contracted Province-wide programs. The OPA will present its proposals on the substantive role that it should play with regard to reviewing Board-approved CDM programs in its forthcoming submission in EB-2011-0011. The OPA is of the view that its recommended approach can be accommodated within its proposed 2011 operating budget.

5. Order Requested

40. The OPA therefore respectfully requests that the Board approve the OPA's proposed expenditure and revenue requirements and fees for 2011, including the updated revenue requirement and usage fee referred to above.²⁹ The OPA also requests approval of the proposed disposition of deferral and variance accounts (Issue 8.1) and the proposed establishment of deferral and variance accounts (Issue 8.2), both of which are matters in respect of which there were no subsisting issues after the Settlement Conference in this proceeding.

All of which is respectfully submitted.

May 17, 2011

A handwritten signature in cursive script, appearing to read "Fred D. Cass", written over a horizontal line.

Fred D. Cass
Counsel for the Ontario Power Authority

²⁹ Exhibit D-1-2.