

February 1, 2008

Kirsten Walli
Board Secretary
Ontario Energy Board
Suite 2701
2300 Yonge Street
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: EB-2007-0905

We are counsel to the Consumers Council of Canada ("Council"). These are the submissions of the Council filed pursuant to Procedural Order No. 1, dated January 24, 2008.

These submissions are in two parts. The first part contains submissions on the draft issues list. The second contain submissions on the issues of statutory interpretation set out in Procedural Order No. 1.

I The Issues List

Subject to the following comments, the Council is prepared to accept the draft issues list. The comments are:

1. The Council is unclear as to the scope of issue 2.3. It would appear to contemplate this panel of the Board deciding how OPG's ROE should be set in the future. It is an open question, for the Council, whether this panel should determine how OPG's ROE should be set beyond the test years to be covered by the application, namely 2008 and 2009;
2. The Council submits that issue 6.5 raises questions which extend beyond the category of "Other Revenues". The Council submits that issue 6.5 should be listed as a separate category, under the heading of "Costs and Revenues Related to the Bruce Nuclear Generating Station";
3. The Council does not understand what issue 9.4 means. Before being able to comment on it, we require clarification as to what the issue means.

II Issues of Statutory Interpretation

Procedural Order No. 1 sets out three issues, which incorporate a number of questions, all of which relate, directly or indirectly, to the question of the Board's jurisdiction, under section 78.1 of the *Ontario Energy Board Act*, (the "Act") and O. Reg. 53/05 (the "Regulation") to grant OPG's request for an interim order increasing its rates.

By way of general introduction, we observe that the Council has no threshold objection to an interim rate increase. Consumers will feel the effect of whatever rate increase is ultimately granted to OPG. The concern of the Council is that that effect is more pronounced, and for some consumers more burdensome, where a large increase is imposed retroactively.

Based on that consideration, the Council's position is that, where there are reasonable grounds to conclude that a rate increase will ultimately be granted, using the mechanism of an interim rate increase to mitigate the impact of the ultimate rate increase is in the best interests of consumers. In making that observation, we acknowledge that interim rate increases are typically granted in circumstances where the evidence in support of them has not been tested. However, given its concern about the impact of the imposition of any retroactive rate increase on consumers, the Council is prepared to state that, taken as a whole, the evidence proffered by OPG suggests that some increase in its rates are warranted and are likely to be granted. Whether the increases amount to half of the total requested by OPG cannot be known at this stage, without further information. However, any interim rate increase is, to some extent, based on an educated guess as to what rate increase will ultimately be granted. Given that, the Council has no objection to the amount of the rate increase proposed by OPG. In addition, a decision to approve an interim rate increase does not entail a decision on the merits of the ultimate application. The Council retains the right to challenge the prudence of the costs incurred by OPG and the accuracy of its forecasts of future costs before a decision on the merits of the application is made.

The real issue, in the Council's view, is whether the Board has the authority, under section 78.1 of the Act and the Regulation, to grant an interim rate increase and, if so, what constraints there are on the Board's authority to do so.

With respect to the first issue, set out in Procedural Order No. 1, the Council submits that the Board does have the authority to issue an interim Order. Subsection 21(7) of the Act authorizes the Board to make interim orders pending the final disposition of the matter before it. There is nothing in section 78.1 of the Act or in the Regulation which derogates from that power.

In addition, the Council submits that the use of the words "effective date" in section 78.1 of the Act suggests that the legislature contemplated the possibility that there would

be a difference in time between when rates became effective and when the Board's first order was granted. That suggests that the legislature allowed for the possibility of some form of interim order.

With respect to issue number 2, as set out in Procedural Order No. 1, the Council begins with the observation that section 78.1 of the Act permits the Board to make orders setting the rates which may be charged by OPG. Subsection 78.1(4) provides that, in making such orders, the Board must follow the rules prescribed by the regulations. Section 6 of the Regulation sets out those rules.

Subsection 78.1(4) of the Act is not limited to a "first order". Accordingly, whether an interim order is regarded as a first order, within the meaning of the Act, or not, the Board must follow the rules 1 through 4 inclusive, and 7 through 10, inclusive, in section 6 of the Regulation. Rules 5 and 6 of the Regulation are, by their terms, applicable only to a first order.

This analysis raises two questions. The first is whether an interim order is a "first order". The second is whether, given that the Board must follow at least some of the rules set out in section 6 of the Regulation, should do so without allowing the application of those rules to be tested in an oral hearing.

The Council submits that an interim order is not necessarily a "first order" within the meaning of the Act. The Council submits that a reasonable interpretation of the words "first order" is that it is the final order which determines what might be described as the first generation of rates set by the Board and not prescribed by the Regulation. An interim order can, by its nature, be time limited, and subject to whatever is determined in a final order.

The more significant question, for the Council, is whether the Board should grant an interim order, given that it is required to apply some of the rules in section 6 of the Regulation, and given that there will be no opportunity to assess, before an interim rate increase is granted, the matters described in those rules. This raises the question of how to strike the appropriate balance between, on the one hand, the integrity of the regulatory process, as measured by the importance of allowing interested parties, and the Board itself, to test the evidence before it, and, on the other hand, the need for a rate increase and the potential adverse impact on consumers from the retroactive position of a rate increase.

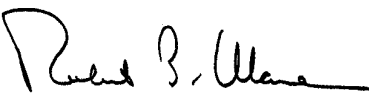
The Council acknowledges that the OPG has not demonstrated a specific need for an interim rate increase. However, and for the reasons described above, the Council thinks it reasonable to believe that some increase will ultimately be granted, and is concerned about the impact of the retroactive imposition of some portion of that increase. Accordingly, it is the Council's position that the Board can grant an interim rate increase on the basis that the Board will, before issuing a final order, allow a full examination of the applicability of the rules of

section 6 of the Regulation. Again, a decision to grant an interim rate increase is not a decision on the merits of the application.

Finally, the Council observes that the Board can make an interim rate order, and in the process say that it will be the effective date when a final order is issued. Doing so would get around the problem, identified in the submissions of the Board Staff, that the payments which the IESO would make to OPG would only be based on the Regulated Payment Amounts.

Yours very truly,

WeirFoulds LLP



Robert B. Warren

RBW/dh

cc: Ontario Power Generation
cc: Torys LLP
cc: Joan Huzar
cc: Julie Girvan
cc: All Parties

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