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### **BY EMAIL and RESS**

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Our File No. 20120002

Ontario Energy Board  
2300 Yonge Street  
27<sup>th</sup> Floor  
Toronto, Ontario  
M4P 1E4

### **Attn: Kirsten Walli, Board Secretary**

Dear Ms. Walli:

### **Re: EB-2012-0002 – OPG 2013-2014 Payment Amounts – Niagara Tunnel Proposal**

We are counsel for the School Energy Coalition. Further to the Board's letter dated March 26, 2012, these are SEC's submissions with respect to the proposed procedure for review of the Niagara Tunnel Project.

In preparing these submissions, we have benefitted from the filing of Staff's submissions yesterday, and we have agreed with their analysis in some key respects.

### **Advantages**

SEC agrees with OPG and Staff that separating the prudence review of the Niagara Tunnel Project from the rest of the 2013-2014 Payment Amounts application is an appropriate prioritization of a \$1.6 billion project. The project is not only large and complex, spanning several years, but it has already had some controversy associated with management decisions and cost overruns. Prudence has the potential to be a contentious issue.

Further, trying to complete the prudence review in 2012 in order to have new payment amounts in place early in 2013 could place a substantial burden on the Applicant, the Board, and other parties this year. That is especially true given the rebasing applications already filed for both major gas utilities, and a number of other major proceedings likely to go on in 2012. Resources of all involved will already be stretched. Including NTP exacerbates this problem, and creates a risk that there will be insufficient resources to complete a review as thorough as it should be.

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This is especially problematic given that a decision on NTP is not necessary in order to set 2013 Payment Amounts.

Therefore, SEC believes that diverting the NTP review to a separate activity – however that is best accomplished – is a good idea and should be accepted by the Board.

**Disadvantages**

SEC sees four potential disadvantages that could arise from the separation of the NTP review in the manner proposed by OPG:

- **Legal Test.** The effect of the proposal is to defer consideration of some of the NTP costs until they have been incurred, thus invoking the legal test of prudence for past costs (the presumption of prudence) as opposed to the more usual reasonableness test of prudence used for future costs. The Board will be aware that OPG has in the past resisted review of the NTP as being premature. Delaying the review another year could result in several hundred million dollars of additional costs being treated as past costs to which the more restricted prudence test would apply.
- **Continuity.** The NTP does not take place in a vacuum. As can be seen from the Staff comments, there are numerous ways in which NTP will interact with other costs and benefits that go into the calculation of revenue requirement. Having a separate proceeding creates the potential of a different Board panel, or a different evidentiary record, producing inconsistent results when final NTP costs are integrated with the remaining components of revenue requirement. This is particularly true since some of those interactions may not even be identified until the NTP details have been filed (SBG, for example). There is every possibility that some of those interactions will in fact be unearthed during interrogatories on NTP, and certainly the Board should not in advance be preventing those interrogatories from being asked.
- **Jurisdiction.** The Board does not appear to have a separate jurisdiction to consider an application for recovery of the costs of a specific generation project. The Board's jurisdiction is to establish payment amounts (with quite detailed rules in the statute and regulations setting a framework for that jurisdiction), meaning that the NTP review application that gives final approval for recovery must necessarily be a payment amounts application. Once a payment amounts application (for example for 2014) is made, there would be a high threshold to be met before material aspects of 2014 costs could be excluded from consideration. Staff has raised one issue in which the question of updating certainly could arise – cost of capital. One can think of many others.
- **Precedent.** While this is a special situation, it is likely that some other utilities would see this as a precedent allowing the consideration of specific projects separate from the related rate applications. The Board has generally followed the well-accepted and prudent course of insisting that all aspects of revenue requirement be considered together (the Enbridge Customer Care agreement being a notable



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exception), and it would in our view be a dangerous precedent if utilities could routinely separate aspects of their spending program for regulatory convenience.

In SEC's view, these disadvantages can all be removed by a modified approach to the OPG procedural proposal, along similar lines to the alternative proposed by Staff.

**Alternative Proposal**

Staff has proposed that the NTP review take place as a second phase in the EB-2012-0002 2013-2014 Payment Amounts Application. This has a number of benefits.

First, phasing the proceeding does no serious violence to the filing requirements. It is not unusual for an application to have some information on particular activities filed later than the initial application. In this case, it could be done with the Board's prior approval. The Board has used this control of its process in the past to manage complex areas, so this is nothing new. In the end, all aspects of the 2013-2014 revenue requirement would be filed in that specific proceeding, as the filing requirements contemplate.

Second, the same Board panel would hear the entire 2013-2014 Payment Amounts case. There is no danger of inconsistency, nor will a new Board panel have to hear once again foundational evidence relating to the NTP's relationship with other aspects of the revenue requirement. The decision-maker will already be attuned to the issues, and the NTP will be considered within the proper context.

Third, as phase two in the payment amounts proceeding, the NTP review is being considered by the Board as part of its jurisdiction to set payment amounts. No issue of limiting the review arises, because the NTP review is an integral phase of a more comprehensive review of all aspects of revenue requirement and rates.

Fourth, the phased approach changes the precedent aspect of the procedure. The Board has always considered in major cases whether phasing was an efficient approach, and that would not change. If other utilities want to propose the same thing, that is something that is already available to them, and the Board panel seized with their rate application can, as it can now, weigh the potential efficiency benefits of phasing.

SEC therefore proposes that the Staff alternative, a phased payment amounts proceeding, be adopted by the Board, subject to two additional comments:

- ***Interim Rates.*** It does not appear to SEC to be necessary for the Board to declare the payment amounts interim at the outset. The NTP is not expected to affect 2013 payment amounts at all. The Board panel can therefore set 2013 payment amounts on a final basis, but it does not need to set 2014 payment amounts prior to consideration of NTP. While the work in 2013 would presumably include most aspects of revenue requirement for 2013 and 2014, only the 2013 payment amounts need be set. The outstanding issue – NTP – can then be considered by the Board during 2013, and payment amounts for 2014 ordered once that review is complete. It is only if that review is delayed beyond the end of 2013 that consideration of



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interim rates (either at the 2013 rates, or using partial information for 2014) needs to occur. In our view, this is best done by the Board panel at that time. Hopefully it will not even be necessary, and 2014 payment amounts inclusive of NTP can be established in a timely manner.

- **Legal Test.** This leaves the potential impact of the different legal test applying to past expenditures vs. future expenditures. In our submission, the Board should make clear to OPG that none of the expenditures after 2007 associated with the Niagara Tunnel Project will, if they would have been considered unreasonable as forecast costs, be approved solely because they are past expenditures and therefore presumed to be prudent. It is submitted that OPG has had ample opportunity to present the Board with NTP costs on a forecast basis. Having resisted doing so, it cannot after the fact argue that the management decisions associated with the project must be presumed to be prudent. This is particularly true for all costs incurred from the time of the filing of the 2013-2014 Payment Amounts Application in May 2012 until the in-service date of the NTP, since that is the time that the forecast costs should be filed for an in-service date in the Test Period.

**SEC Recommendation**

In light of the above, SEC believes that the goal sought by OPG can best be achieved by the Board providing that the NTP review will take place as a second phase within the EB-2012-0002 2013-2014 Payment Amounts proceeding. After the first phase, 2013 Payment Amounts can be set on a final basis. The second phase then could be completed in time to set the 2014 Payment Amounts inclusive of all NTP impacts.

All of which is respectfully submitted.

Yours very truly,  
**JAY SHEPHERD P. C.**

Jay Shepherd

cc: Wayne McNally, SEC (email)  
Andrew Barrett, OPG (email)  
Interested Parties (email)