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BY EMAIL and RESS

December 9, 2013
Our File: EB20130159

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2013-0159– Oakville Hydro Electricity Distribution Inc. – Draft Issues List

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Procedural Order No. 1, these are SEC's submissions with respect to the Draft Issues List.

Since the Board is using a generic Draft Issues List for each new 2014 cost of service application, SEC adopts its submissions filed previously in EB-2013-0160 (Orangeville Hydro Limited) for the purposes of this proceeding. Please find a copy of those submissions appended to this letter.

All of which is respectfully submitted.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicant and Intervenors (by email)

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Appendix

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BY EMAIL and RESS

December 3, 2013
Our File No. 20130160

Ontario Energy Board
2300 Yonge Street
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Toronto, Ontario
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2013-0160 – Orangeville Hydro Limited

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #1, these are SEC's submissions with respect to the Draft Issues List.

SEC notes that it has benefitted, in preparing these submissions, from the session held by Board Staff on November 18th, at which the new draft issues list was discussed. We have also been greatly assisted by reviewing the November 29th submissions of Energy Probe and VECC in EB-2013-0155 - Niagara-on-the-Lake 2014 Rates.

Legal Requirements

SEC has a number of general concerns about the new standardized issues list for electricity distributor cost of service applications, on which the Draft Issues List in this case is based.

Our primary concern is that the issues list does not appear to start from a strong foundation, i.e. the legal mandate of the Board in these cases.

In rate cases, there is actually only one main issue, i.e. "Are the proposed rates just and reasonable?" Sometimes there are unrelated secondary issues, where the rate application is also the vehicle for seeking other approvals (e.g. approval of a Green Energy Act plan). But, on the main reason for the Application, there is one single issue, drawn from the legislation giving

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the Board the responsibility for approving rates. The Board does not have any flexibility in this respect, as failure to decide this issue negates the legal basis for the proceeding entirely.

Because a single issue would not be particularly helpful, the Board normally seeks to make it more granular by listing the components of the single issue as separate issues of their own. This traditionally follows a specific structure, because the Board's exercise of its statutory mandate takes place within a well-known legal and regulatory framework.

Under the "fair return standard", a utility seeking rates set on a cost of service basis is entitled to an opportunity to recover its reasonably incurred costs of service, plus a fair return on its assets. This is a legal requirement and, subject of course to various interpretations of that standard, it must in law form the basis of the Board's analysis in a cost of service rate case. The issues list will therefore include, as it has in every past case, each of the components of cost of service and fair return. Of course, how cost and return are recovered from ratepayers is also included, as the Board's mandate is still centred on rates.

At the next level of detail, the Board will usually also include sub-components of the cost, return and rates components. For example, a major cost will be OM&A, but the Board will usually also include as separate issues things like affiliate charges, personnel costs, depreciation, etc. Identifying these separately helps organize the proceeding.

Finally, the Board will also usually include issues that, while not directly underpinning cost, return or rate design, are nevertheless relevant to those central questions. These can be things like economic assumptions, adherence to past Board directions, service quality, etc.

SEC's concern is that the new issues list is not based either on the Board's statutory mandate, or on the components of that mandate (like the fair return standard) that have been determined by the courts and by past Board practice. By elevating the importance of non-cost, non-rate issues (Sections 1-6 of the new issues list), the Board appears to be rejecting the fundamental legal basis for cost of service rate-setting. While each of those new issues in those six sections may well be a valuable addition, and worthy of investigation in a rate proceeding, none of them are based on the statutory mandate and legal requirements applicable to the Board's work.

On the face of it, this issues list appears to be saying that rates will be set based on whether the utility has engaged its customers the way the Board wants, or whether the utility is showing continuous improvement, or whether it has timed its spending appropriately. While all of those things are certainly of interest, setting rates on that basis would be contrary to the current legal requirements. (Indeed, this issues list goes so far as to omit entirely any consideration of whether the level and components of OM&A spending are appropriate.)

It may well be that some rethinking of the recovery of costs/fair return paradigm for rate-setting should take place. To the best of our knowledge, that has not taken place yet, and there may be some question as to whether it is the Board, or the government, that should initiate and/or

supervise such a process. In any case, it is not appropriate in individual rate cases to do a basic review of that overall paradigm.

At this point, our concern is that, in promulgating a standardized issues list that is inconsistent with the legal requirements, the Board is inviting parties – particularly applicants – who don't like the outcome to appeal to the court system. They may win, they may not, but whether or not those who appeal actually succeed in court is not the point here.

By putting forth a new basis for setting rates that is inconsistent with past practice, court decisions, and the statute, the Board risks creating a period of rate and policy uncertainty when that is the last thing the industry needs. With all of the other things affecting the industry right now, instability in rate-making policy is, in our submission, an unnecessary and inappropriate addition to the changes the industry is facing.

Questions vs. Tests

Following from the first problem, SEC notes that a number of the new issues appear to build in new tests. This is unlike the Board's previous approach to issues lists, in which the test was usually not part of the issue being addressed. By building in a new test, the Board indirectly signals a change in policy.

A good example is proposed Issue 4.2: "Are the Applicant's proposed OM&A expenses driven by appropriate objectives?" The question the Board is required to address is whether the level of OM&A for the test period is reasonable. That is not only about WHY, but also HOW MUCH. In this issues list, nowhere does the Board direct itself to the question of whether the amount of the OM&A is reasonable. The issue as written instead implies that the utility can spend as much as they want, as long as it is for the right reasons.

Another example is proposed Issue 4.1: "Does the Applicant's distribution system plan appropriate support continuous improvement in productivity, the attainment of system reliability and quality objectives, and the level of revenue requirement requested by the Applicant?" By implication, the distribution system plan is therefore only tested by three things:

- Continuous improvement in productivity;
- Attainment of system reliability and quality objectives; and
- Consistency with revenue requirement.

The first two points are laudable attributes of a distribution system plan, but they are not the whole story by any means. The plan must also ensure that new customers are served, the utility is responsive to local priorities (road widening, for example), the system is safe and environmentally responsible, due consideration is given to new technologies, etc. etc. The third point is anomalous, because revenue requirement relates only to the test period, but the costs in the plan relate to a much longer period.

Most egregious, the issue as worded makes clear that the overall amount being spent is not a criterion. The Board's oft-cited principle of capital spending – i.e. utilities should generally have a regular level of spending to which they adhere, and live within it – appears to be out the window.

One of particular concern is Issue 2.1. This issue declares that, for the first time, the Board will be rendering a decision on past performance by the applicant. While certainly the Board has always considered past performance as an important context for setting rates going forward, this issue now appears to require that the Board deliver a report card on the past four years. For example, the Board under this issue would have to go back to the previous cost of service decision, and see what was expected of the utility: spending levels, FTEs, capital plans, etc. The Board would then compare what actually happened to the Board's last approval. The Board would also have to benchmark that past performance, presumably to other LDCs, and the applicant would have to explain why they came up short, or they did well, in any given area.

SEC believes that reviewing past performance is a useful exercise, but believes that, until the Board has some experience with the new scorecard approach to performance analysis, this issue in its current form is premature. It establishes a set of formal performance tests after the fact, covering a period in which the utility would not have been aware they were being judged on this basis.

Issue 4.3 is another issue of considerable concern. As worded, the issue implies a) that rates must always increase, and never decrease, and b) that the test of whether rates are reasonable is the timing and pacing of spending, not the absolute costs being incurred. If this is not what is intended, the wording should be fixed. If this is what is intended, in our view it is contrary to law.

We could go on. There are a number of other examples of tests built into the issues. In each case, we believe that is counter-productive.

Scope – Practical Implications

Many of the issues on the new issues list build in new or modified tests that either expand or restrict the basis on which rates are set by the Board. In our view, this is not helpful to the process, and may well add confusion, making the process longer and more resource intensive.

Some of the obvious expansions of scope required by the new issues list are the following:

1. ***Customer engagement and feedback review.*** Interrogatories and other steps in the process would have to explore the methods used to engage customers, and the success the Applicant had in doing so. If the Applicant did not have good responses, as is often the case, it may be impossible for the Board to even answer Issues 1.2 and 3.1. Alternatively, both might have to be answered in the negative, raising the question of what impact that has

on the Board's ability to approve the requested rates, or some modified rates. Is effective customer engagement now a pre-condition to getting a rate adjustment?

2. ***Pacing and prioritization of spending.*** This express addition requires that the intervenors and the Board explore not only the proposals for the test period, but also the period beyond, since pacing can only be determined in context. In addition, the generally accepted view that, once the revenue requirement is set, the utility can spend as they see fit, would appear to be overturned. Now, the Board would have to look at past spending, and determine whether it was consistent with the spending plan approved in the last cost of service proceeding. If it was not, then unless the utility had solid reasons for changing its plans, the Board would have to consider disallowing recovery of some of that spending. Likely this would mean reconsideration of the presumption of prudence for past spending. *Prima facie*, a change in priorities relative to the prioritization approved by the Board would be imprudent, unless substantial new evidence was presented. As a practical matter, in the future LDCs that want to make material changes to their prioritization of spending would be well advised to come back to the Board to approve those changes, thus potentially leading to a plethora of new proceedings, and the potential for a kind of "micromanagement" that neither utilities nor ratepayers want to see.

3. ***Government mandated obligations.*** Issue 5.1 stipulates an inquiry into consistency of the Application with government mandated obligations. Utilities will, of course, argue that only legal requirements placed on them by the government are covered by this. We think that parties – including now potentially environmental groups – will have to explore consistency of the Application with all aspects of stated government policy. Do the Applicant's plans for system configuration make it easy enough for the attachment of new renewable energy? Do the Applicant's rates send the proper price signals for conservation? Is the Applicant ensuring that business development in their community is encouraged? Is the Applicant being a good corporate citizen in its interactions with the community? All of these things may be good lines of inquiry, and so might the many other policy-related questions that could be posed. The question is whether questions like these related to government policy should be given a priority role in a rate application.

4. ***Spending objectives***. Issue 4.2 asked whether OM&A spending is driven by "appropriate objectives". This necessarily requires an investigation into what objectives the Applicant has, and whether those or other objectives would be more appropriate. This may bring in some of the government policy questions discussed above, but may also raise questions as to the motives of municipal owners, the tendency of management of some companies (including the odd utility) to protect their own interests, the structure of compensation plans, etc. By way of example, this would certainly mean a review of bonus plans for many utilities, since the objectives of those plans often include maximization of net profit, customer survey results, local development, and many other contentious items.

These are only four examples in the new, two-page list. There are others.

Jay Shepherd Professional Corporation

The obvious related question is whether some of these issues are capable of settlement. For example, it would seem unlikely that Issue 2.1 could be settled for most utilities. Unless the utility's performance was truly stellar, intervenors would be ill-advised to agree in writing that performance was excellent on most of those tests. On the other hand, what utility is going to agree that its performance was substandard? This appears to us to be a built-in area of disagreement, very hard to avoid.

The same thing could be said for Issue 6.2, dealing with sustainable operational effectiveness. Given the likelihood that at least some savings initiatives will be unsuccessful, why would intervenors agree that all are demonstrated to be sustainable unless the utility makes binding commitments (such as variance accounts, or building forecast savings right into rates)? Conversely, why would the utility take the risk that some of its initiatives will not work out? Doesn't this force LDCs to avoid all innovation, opting instead for only tried and true planning?

Conclusion

The new issues list appears to have been developed internally at the Board, in a relatively short time frame, and without any attempt to ask either the utilities or the ratepayers for input. Perhaps for these reasons, in SEC's view the new list has fundamental flaws: potential legal concerns and uncertainty, implicit establishment of new tests and policies, and unnecessary expansion of the rate application process.

SEC is aware that VECC has proposed an alternative issues list, for consideration by the Board in this and other electricity distribution cost of service proceedings. While we do not believe that list is perfect, by any means, it would address most of the concerns we have raised in these submissions. We therefore submit that the Board should adopt that list for this proceeding, with a view to developing a comprehensive new issues list, with input from all stakeholders, over the next several months.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.

Jay Shepherd

cc: Wayne McNally, SEC (email)
Interested Parties