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BY EMAIL and RESS

September 18, 2014
Our File No. EB-2013-0321

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2013-0321 OPG Payment Amounts – Reply Argument

We are counsel for the School Energy Coalition. We have completed our review of the Applicant's Reply Argument in this proceeding, and wish to provide the following comments to the Board.

First, the Applicant has purported to file new evidence on two issues.

With respect to the Niagara Tunnel, the Applicant has filed the full text of the Geotechnical Baseline Reports Suggested Guidelines, plus an affidavit of their expert witness providing further opinion evidence. SEC does not object to the filing of the Guidelines, as they are a publicly available document referred to in the evidence. Of course, filing further expert opinion evidence in reply is not allowed, and we know the Board is already aware of the legal rules prohibiting consideration of "evidence" of this nature.

With respect to the accounting treatment of pensions and OPEBs, the Applicant at page 185 purports to describe conversations with unnamed individuals at Ernst & Young LLP stipulating an accounting result related to intervenor proposals. This is not allowed for the same reasons, and also because it is unattributed hearsay on which we only have the Applicant's characterization. Even if it were offered in the hearing phase, it would presumably be given little



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weight unless the accountant appeared before the Board to present their conclusion and be questioned.

If either of these items of evidence are sufficiently important to the Applicant, it is open to them to request that the Board re-open the evidentiary phase of the hearing, so that new evidence can be filed and tested. They have chosen not to do this, and in our submission cannot introduce it by way of reply argument. This is not the same as looking at the facts, and arguing by way of analysis that particular conclusions should be drawn from them. We therefore believe that the Board must ignore them in reaching its decision in this matter.

Second, and of more importance in our view, the Applicant has put forward three new legal arguments:

- At p. 131 et seq. the Applicant seeks to characterize the legal effects of the Memorandum of Understanding between the Applicant and the province.
- At p. 187, the Applicant argues that allowing recovery of pension and OPEBs on a cash basis rather than accrual basis would breach the fair return standard.
- At p. 234 et seq. the Applicant argues that, as a matter of law, the condition the Board routinely places in orders setting interim rates – i.e. that interim status is not determinative of the effective date of new rates – is contrary to law and invalid, and the effective date must in law be January 1, 2014.

SEC makes no comment on whether inserting these legal arguments into reply is proper or not. However, in each of these cases the Board does not have the opportunity to hear the opposing legal arguments. SEC, for example, disagrees with the legal conclusions reached by the Applicant on these points, and we are sure others would have submissions as well. The Board does not have those submissions because these points were not raised until reply.

To ensure that the Board has full submissions on these material legal issues, SEC proposes that the Board convene a single day for oral submissions by all parties on these legal issues. That would be the fastest and most efficient way to ensure that the issues are fully aired, and the Board has a complete set of legal arguments on which to base its decision.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.

Jay Shepherd

cc: Wayne McNally, SEC (email)
Interested Parties