TORYS LLP

79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2 Canada
P. 416.865.0040 | F. 416.865.7380
www.torys.com

Charles Keizer
ckeizer@torys.com
P. 416.865.7512

September 22, 2014

EMAIL

Kirsten Walli
Board Secretary
Ontario Energy Board
27th Floor, 2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: EB-2013-0321 OPG Payment Amounts: Response to SEC

We were counsel to Ontario Power Generation in the above-noted matter. Counsel for the School Energy Coalition's letter of September 18, 2014 has been referred to us for response.

SEC's letter can be broken into two parts. In the first part, SEC seeks a day for oral sur-reply in relation to three issues, where no right of reply exists or is warranted. In this regard, OPG's reply submissions relate directly to the matters raised by the intervenors in their submissions and, as such, there are no new issues raised by OPG on reply. The Board appropriately has the benefit of complete submissions from OPG and the intervenors with respect to the matters before the Board. In the second part, SEC comments about OPG's response to improper argument made by SEC and AMPCO in their own submissions regarding the Niagara Tunnel Project, and OPG's response to Board Staff's supposition in relation to USGAAP.

SEC's request for sur-reply and its commentary should be rejected by the Board.

1. No right to sur-reply

At page 2 of its letter, SEC asks for the opportunity to make oral sur-reply argument in relation to the following legal issues: (1) the effect of the memorandum of agreement ("MOA") between OPG and the Province; (2) the impact of a proposed move to cash recovery of pension and OPEB costs on the fair return standard; and (3) the effective date for payment amounts.

SEC makes its request despite making "no comment" on the propriety of OPG's reply and as such this should be taken as SEC's acknowledgement that OPG's reply is properly made. In effect, SEC's request is simply a plea to say what it or others have already said, but slightly differently, when it already had a full opportunity to do so. The parties before the Board are experienced and are well aware of the requirement to make full and complete submissions in accordance with the parameters of the Board's practice and the timing established by the Board. As discussed below, there is no basis for SEC's request.

OPG properly replied to arguments made by parties in their submissions. Unlike in a civil proceeding in which applicants and respondents alike are required to set out their case in pleadings, before the Board, parties opposite to the applicant (Board staff and intervenors) have the luxury of not revealing their positions until argument. The applicant's obligation then is to present its own case; nothing more.

The MOA. In argument, some parties premised their submissions for substantial disallowances in connection with issues 6.3 and 6.4 on the assertion that the MOA creates obligations for OPG and on assertions as to the specific nature of the alleged obligations. For example, as OPG pointed out in its reply:

> With respect to benchmarking and the MOA, the arguments of Board staff and the intervenors are a combination of, (i) OPG being "contractually committed" (CME argument, paras. 5, 6 and 7) to perform to the level of the top quartile; (ii) OPG "required" by its Shareholder to target to achieve top quartile (Board staff argument, pp. 70 – 71), and; (iii) OPG is "required" by its Shareholder to "perform to top quartile standards"(GEC argument, p. 9).

It was entirely appropriate for OPG to respond to these arguments in reply and it had no obligation, nor in fact any opportunity, to do so earlier.

The fair return standard. The fair return standard is well-known to the Board. It is discussed throughout OPG's Argument-in-Chief. In reply, OPG made the following point in response to Board staff's submissions regarding pension and OPEB recovery:

> For perspective, the reduction in income of $350M [proposed by Board staff] would erode about 40 per cent of the requested test period return on equity (Ex. J11.12, Attachment 1, line 1a). Other possible options suggested by Board staff would erode over 60 per cent of return. Clearly reductions of this nature will not afford OPG a reasonable opportunity to earn its authorized rate of return.

To say that the reductions proposed by Board staff would affect OPG's return and thus have impact on OPG's ability to "earn its authorized rate of return" is to state the obvious. Again, there is no issue as to the propriety of OPG's reply.

Effective Date. In connection with Issue 12.1, OPG set out in considerable detail its position that, having made payment amounts interim basis on January 1, the Board is legally obliged to set payment amounts effective as of that date. OPG based its argument on the Supreme Court of Canada's decision in *Bell Canada v. Canada (Canadian Radio and Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 and quoted extensively from that decision. In response, some parties, notably Board staff, attempted to distinguish the case. It was entirely appropriate for OPG to reply to those attempts to distinguish the case, and that is what it did. In fact, what makes SEC's request improper in relation to this issue is that SEC itself failed to address the *Bell* case at all in its argument. It should not get another "kick at the can". In any event, other parties did make submissions on the point.

2. No proper basis for SEC's commentary

The first comment made by SEC is in relation to OPG's argument regarding the Niagara Tunnel Project. Attached to OPG's reply is the full text of the Geotechnical Baseline Reports for Construction - *Suggested Guidelines* ("Suggested GBR Guidelines") together with an affidavit sworn by Roger Ilsley which discusses those guidelines.

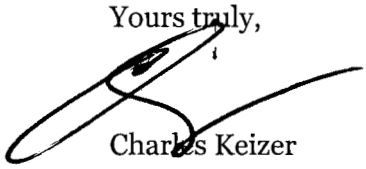
While SEC "does not object" to the Suggested GBR Guidelines, it does complain about the Ilsley affidavit. What SEC fails to call to the Board's attention is that: (1) it was SEC that first raised the Suggested GBR Guidelines in its own argument (along with AMPCO); (2) that it did so despite failing to adduce the Suggested GBR Guidelines in evidence; (3) that it compounded this failing by attaching only a selective extract of the Suggested GBR Guidelines; and (4) that its submissions, based on this extract, were not put to Mr. Ilsley in cross-examination, were entirely untested and had no basis in the record before the Board. In the circumstances, it was entirely appropriate for OPG to respond as it did, and necessary so that the Board could have the benefit of an informed response from a qualified expert.[1]

With respect to SEC's comment about OPG's argument in relation to the consequences of a move suggested by some parties to cash recovery for pension and OPEB costs, it misstates OPG's reply. At page 186, OPG responds to Board's staff supposition that "there is some leeway in USGAAP not identified by OPG for the OEB's consideration that will allow the cash basis for recovery for pension and OPEBs". In J13.7 OPG highlighted a possibility that it may have to reverse up to $3 billion in regulatory assets related to pension and OPEBs, if the OEB were to move away from the accrual basis of recovery. Given the magnitude of this reversal, OPG quite properly continued to analyze this issue. It determined that a reversal will be necessary.

Contrary to SEC's letter, this determination has nothing to do with E&Y; OPG is responsible for its own financial statements and the determination was OPG's. Having said that, it is a determination with which E&Y agrees.

As noted, there are no new issues raised by OPG's reply and the Board has the benefit of complete submissions with respect to the matters before the Board.

Yours truly,



Charles Keizer

c: Board Staff
Intervenors
C. Mathias
A. Barrett
C. Anderson

---

[1] As an additional point, contrary to SEC's suggestion, whether the Suggested GBR Guidelines are publicly available completely misses the point. What matters is whether a document has been adduced as evidence, not whether it could have been adduced (easily or otherwise). Here, the Suggested GBR Guidelines were not.