# Jay Shepherd

Professional Corporation
2200 Yonge Street,
Suite 1302
Toronto, Ontario  M4S 2C6


**BY EMAIL and RESS**

October 3, 2016
Our File No. 20160152

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

**Attn:  Kirsten Walli, Board Secretary**

Dear Ms. Walli:

**Re:  EB-2016-0152 – OPG 2017-2021 Rates – Expert Evidence**

We are counsel for the School Energy Coalition.  We are writing to express our concern about the Board's decision, as set out in its letter of September 28, 2016, denying a number of intervenors the ability to file evidence challenging the proposals of the Applicant.  Since parties that did not sponsor evidence themselves were not given the normal opportunity to make submissions on this important issue, and so this is the first opportunity SEC has to comment on the value of this expert evidence.

Our concerns centre around the potential reasonable apprehension of bias which may arise here, in several related contexts.

At the most basic level, the fact that the Board will allow the Applicant to file evidence on key issues, and OEB Staff, who are assumed to be neutral, but will prohibit the filing of evidence by the ratepayers, the very people footing the bills for everyone, suggests that the interventions on behalf of the ratepayers are being treated as less important to the Board.

That, however, could be overly simplistic, depending on the totality of the evidence before the Board. This leads to the second concern, i.e. that the only experts the Board proposes to hear from on these key issues are firms that have only worked for utilities, or, in one case, utilities and regulators.  These are firms that rely for their survival on satisfying utilities they will produce "good" reports (i.e. convincing, but also pro-utility). Even the one firm that has done work for regulators does the vast majority of their work for utilities.


Tel:  (416) 483-3300  Cell: (416) 804-2767  Fax: (416) 483-3305
jay.shepherd@canadianenergylawyers.com
www.canadianenergylawyers.com

Contrast that with the firms proposed by the intervenors. On cost of capital, Dr. Booth has no history of being paid by utilities. On the risks of complex megaprojects, the proposed experts from Oxford are world-renowned independent academics specializing in that field. Unlike both the OPG and OEB Staff experts, the intervenor experts do not rely on utilities to pay the bills.

The third factor here is that, although the nominal reason for excluding the intervenor evidence is to save the ratepayers money, in fact the intervenor studies are significantly less costly than either the utility or OEB staff studies. If the desire is to save money for the ratepayers, cutting out some of those studies would be a more effective tactic. The ratepayers are paying for all of the studies, after all, and everything else that is being done in this proceeding.

Alternatively, the ratepayers could be saved even more money by cutting out both the intervenor and the utility studies. The fact that the Board did not appear to consider that option increases the potential for a perception of bias.

SEC does agree that expert costs should be considered by the Board, and that is why we believe the Board's new requirement of requiring a letter to be filed in advance stating the purpose of the evidence, and the incremental costs of preparing it, is a good idea, as a means of ensuring only reasonable costs are incurred. We would, in fact, like to see that expanded to include utility evidence as well.

The fourth component of this is the order of proposals. The Board has in its decision given no reason to reject intervenor studies instead of rejecting OEB staff or OPG studies. It appears that the underlying reason was that the OPG studies and the OEB staff studies were already being done, so the intervenors, being last in line, were the ones whose evidence was considered incremental. The problem is that the Board sets the procedure, and had the intervenors been able to propose their evidence before OPG or OEB staff, then either OPG or OEB Staff studies would have been the incremental evidence. To an outsider, this could look like the ratepayers – who are picking up the tab – are somewhat of an afterthought when it comes to the Board's procedures.

The fifth issue is how the decision was made. This is a decision of considerable importance, tying the hands of ratepayers in opposing the largest long term rate increases in Ontario history. Normally, the Board would seek input from the parties on the pros and cons of excluding this evidence, usually through written submissions. In this case, it heard from the proponents of the evidence, but not from the other parties. It rejected the evidence from the ratepayers without hearing from all of those affected on the value of that evidence.

There are two obvious responses to these concerns.

The first is that the Board did not prohibit the intervenor evidence; it simply denied cost recovery for that evidence. If the intervenors want to file the evidence, they can. They will have to pay for it out of their own pockets.

This, unfortunately, is for all practical purposes the same as refusing to hear the evidence at all. The evidence from the utility, and from OEB staff, is paid for by the same people that pay for the intervenor evidence – the ratepayers. Denial of rate recovery for the OEB Staff evidence would most certainly result in that evidence not coming forward. Denial of rate recovery for the utility might not prohibit the evidence, but would likely change the nature and extent of the evidence.

And that hides a more practical reality. OPG can in fact afford to pay for their own evidence, even some millions of dollars, and not really notice the cost. The ratepayer groups, with much more modest proposals, and much more modest resources, cannot afford to pay that cost, and the Board knows that. The result, within the knowledge of the Board, is that the denial of cost recovery for this evidence is a full

prohibition against that evidence, every bit as much as if the Board told OEB Staff that they would not be able to recover for their studies. It is a decision, sight unseen, not to accept this proposed evidence.

The second response is that the OEB Staff evidence is in the "public interest", and therefore balances evidence being provided by the Applicant. The theory is that expert evidence is supposed to be unbiased, so even if the OPG evidence has some bias, the OEB Staff evidence will not, which solves the problem. While nominally an adversarial process, rate cases at the OEB are much less adversarial than a typical court case, and that justifies a somewhat different approach to evidence.

That is undoubtedly true, but relying on the OEB Staff evidence to somehow balance any OPG expert bias is, in our submission, unrealistic. As much as OEB Staff will try to ensure their experts are unbiased, in fact those experts work primarily for utilities (with only a few exceptions), and they may not be able to provide that balance. Further, while Board Staff represent the public interest, that includes a much broader set of considerations than those of ratepayers. Ratepayers must be represented independently, and that must include the ability to also file its own expert evidence, or the necessary balance is not achieved.

The OPG rate case is the biggest rate case in Canadian history, and probably also one of the most complex. SEC is concerned that rejection of intervenor evidence, without even seeing it, while accepting evidence from the utility and OEB Staff in the same circumstances, may create a reasonable apprehension of bias, and thus reversible error in law. More than that, part of the Board's role is to be seen, publicly, to be dealing with regulatory issues independently and without bias. If the impression given to the public, even inadvertently, is that the Board is favouring the utility in this major case, that could do irreparable harm to the OEB as an independent regulator.

SEC is not proposing any action in this letter. We are not sponsors or co-sponsors of this evidence, although we were fully aware of it, and planned to rely on it. Like others, our participation will be disadvantaged by this decision, but that is not the entirety of our purpose for these comments. We believe more evidence is better than less, especially with respect to issues such as significant changes in the cost of capital, and the $12.8Bn Darlington Refurbishment Project.

What we are expressing is our serious concerns about the Board's decision, and the potential impacts on this case and going forward.

All of which is respectfully submitted.

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

Jay Shepherd

cc: Wayne McNally, SEC (email)
Interested Parties