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**WeirFoulds**<sup>LLP</sup>  
BARRISTERS & SOLICITORS

December 13, 2007

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
Suite 2701  
2300 Yonge Street  
Toronto ON M4P 1E4

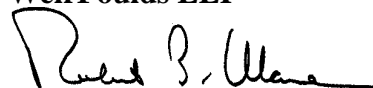
Dear Ms Walli:

**Re: EB-2007-0707**

We are counsel to the Consumers Council of Canada. On behalf of our client we enclose herewith its submissions on the Draft Issues List proposed by the OPA.

Yours very truly,

**WeirFoulds LLP**



Robert B. Warren

RBW/dh

cc: Ontario Power Authority  
Attention: Miriam Heinz  
cc: Bill Huzar, President, Consumers Council of Canada  
cc: Julie Girvan

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**ONTARIO ENERGY BOARD**

**IN THE MATTER OF sections 25.30 and 25.31 of the *Electricity Act, 1998*;**

**AND IN THE MATTER OF an application by the Ontario Power Authority for review and approval of the Integrated Power System Plan and proposed procurement processes.**

**SUBMISSIONS OF THE CONSUMERS COUNCIL OF CANADA  
ON THE ISSUES TO BE CONSIDERED BY THE  
ONTARIO ENERGY BOARD IN ITS REVIEW OF THE  
INTEGRATED POWER SYSTEM PLAN AND  
PROCUREMENT PROCESSES**

**I INTRODUCTION**

1. The Ontario Power Authority (the “OPA”) has filed an application with the Ontario Energy Board (the “Board”), seeking an order of the Board approving the Integrated Power System Plan (the “IPSP”) and certain procurement processes, pursuant to sections 25.30 and 25.31 of the *Electricity Act, 1998*, S.O. 1998, (the “Act”).

2. In its Notice of Application, dated November 22, 2007, the Board has invited parties to make submissions on the issues to be considered by the Board in its review of the IPSP and the procurement processes. The OPA has proposed an issues list for the Board’s review of the IPSP and the procurement processes.

3. These are the submissions of the Consumers Council of Canada (the “Council”) on the draft issues list prepared by the OPA. In making submissions on the draft issues list, the

Council is, necessarily, making submissions on what it regards as the proper scope of the Board's inquiry in its review of the IPSP and the procurement processes.

4. These submissions are in the following parts:
  1. An outline of the interests of the Council and of the constituency it represents;
  2. An analysis of the structure of decision-making, with respect to the IPSP, created by the Act, and a corollary analysis of the Board's jurisdiction in considering and approving the IPSP;
  3. A response to the OPA's submissions on the draft issues list and on the Board's jurisdiction;
  4. The Council's position on the proposed issues list.

## **II THE INTERESTS OF THE COUNCIL**

5. The Council represents the interests of the broad array of residential consumers in Ontario. Residential consumers are dependent on electricity for basic requirements such as light and refrigeration, and in many cases, for heat, air conditioning and cooking as well. The immediate interest of residential consumers is in the reliable supply of an essential service, delivered at a price which they can afford.

6. Residential consumers have diverse views on how electricity should be generated and from what sources. For example, residential consumers have diverse views on the extent to which the province should rely on nuclear power as a source of supply. At the same time, however, residential consumers share certain basic concerns. They are, for example, concerned that Ontario maintain a healthy, competitive economy. They are concerned that the supply of electricity not be achieved in a way which burdens them, and their children, with further, substantial debt. They are also, by and large, interested in ensuring that the electricity supply is generated and transmitted in a way which protects the environment.

7. While recognizing that its constituents have diverse views on how electricity should be supplied, the Council must respect the limits on the Board's jurisdiction to review the

IPSP, placed on the Board by the legislature. For example, and as discussed below, the responsibility for ensuring that the IPSP adequately protects the environment has been left to the Minister and the OPA, and not to the Board.

8. The Council believes that the Board should exercise its review powers in a cost effective way. It is not in the interests of residential consumers to have a repetition of the Demand Supply Plan (“DSP”) process of the early 1990s.

9. The Council also believes that the Board must recognize that there are practical limits on the exercise of its review authority. First, the Board must acknowledge that a number of contracts for the supply of power have already been entered into by the OPA. Second, this review is intended to be merely the first in a rolling series of reviews of supply plans. The OPA is required to file a new IPSP, within 3 years, something which will allow the Board to assess the effectiveness of the implementation of the first IPSP and to respond to changing circumstances. It would be counter-productive, and contrary to the legislature’s intention, to prolong this review well into the next planning cycle. These considerations, in the Council’s view, militate in favour of a narrowly-focussed, disciplined review by the Board of the IPSP.

### **III THE STATUTORY STRUCTURE**

10. The legislature has allocated responsibility for the creation, approval, and implementation of the IPSP among three entities: the Minister, the OPA, and the Board.

11. Section 25.30 of the Act requires the OPA to develop and submit to the Board an integrated power system plan to achieve certain goals. Subsection 25.30(2) allows the Minister to issue directives that set out the goals to be achieved during the period to be covered by the IPSP. The OPA is required to follow those directives in preparing its IPSP plans. The Board is to review each IPSP plan submitted by the OPA to, first, ensure that it complies with any directives issued by the Minister and, second, ensure that it is economically prudent and cost effective. The Board may approve a supply plan or refer it back with comments to the OPA for further consideration and re-submission to the Board.

12. In issuing directives, pursuant to subsection 25.30(2) of the Act, the Minister has set goals to be achieved during the period to be covered by the IPSP plan, including goals related to the following:

- (a) The production of electricity from particular combinations of energy sources and generation technologies;
- (b) Increases in generation capacity from alternative energy sources, renewable energy sources and other energy sources;
- (c) The phasing-out of coal-fired generation facilities; and
- (d) The development and implementation of conservation measures, programs and targets on a system-wide basis, and in particular service areas.

13. Pursuant to the authority granted to him, by subsection 25.30(2) of the Act, the Minister has issued a letter, dated June 13, 2006, to the OPA, providing direction for the preparation of the IPSP plan. That letter will be referred to herein as the “Supply Mix Directive”. The Supply Mix Directive is attached hereto as Appendix A.

14. Section 114(1.3) permits the Lieutenant Governor in Council to make regulations that, among other things, govern IPSP plans and procurement processes. Pursuant to that authority, the Lieutenant Governor in Council has issued O. Reg. 424(04), which will be referred to herein as the “IPSP Regulation”. The IPSP Regulation is attached hereto as Appendix B.

15. Section 2 of the IPSP Regulation requires the OPA to do certain things in developing the IPSP plan.

16. The effect of these statutory provisions is that, while the OPA develops the IPSP plan, a significant measure of direction as to the content, and indeed as to the means of implementation, of the IPSP comes from the Minister. It is the Minister who has established the Supply Mix. It is the Minister who has directed the OPA as to the matters it must consider in developing the IPSP plan. The discretion left to the OPA is in how it complies with the IPSP Regulation, and how it implements the IPSP.

17. The discretion left to the OPA is significant. It is the OPA, and not the Board, which has the expertise and the resources to engage in the kind of detailed planning which the development and implementation of the supply plan requires.

18. The Board's authority, under the Act, is both narrow and specific. It must ensure that the IPSP complies with any directives from the Minister, whether in the form of directives or regulations, which means determining whether it complies with the Supply Mix Directive and the IPSP Regulation. The Board must also determine whether the IPSP plan is economically prudent and cost effective.

19. Given the statutory regime, the Board cannot use its power of review to change the Supply Mix Directive. For example, even if the Board were to determine that it was more cost effective to rely on nuclear power rather than alternative energy sources to meet the targeted supply level, the Board cannot decline to approve the IPSP plan for that reason. The Board cannot, in other words, use findings about economic prudence and cost effectiveness as a basis for substituting its opinion for that of the Minister and the OPA on the Supply Mix.

20. The Board cannot interfere with the discretion granted to the OPA in following the IPSP Regulation. The Board can only determine whether the OPA has done the things which it is directed to do under the IPSP Regulation. The Board cannot substitute its view as to how the OPA has carried out the direction in the IPSP Regulation.

21. The legislature has given no direction as to what was meant, in this context, by the terms "economically prudent" and "cost-effective".

22. The concept of economic prudence may have several components, as follows:

- (a) The supply plan must respect the limits of what the Province can afford. It would not be economically prudent to secure supply in a way which burdened Ontario residents with amounts of debt which limited the ability of the Province to carry out other essential responsibilities, for example, providing adequate health care to its residents;
- (b) The supply plan must increase electricity rates unduly. The provision of an essential service must remain affordable for all Ontario residents;

- (c) The supply plan must allow for unforeseen contingencies that would, for example, significantly increase the cost of securing supply from any particular source.

23. The term “cost effective”, again understood in a common sense way, does not necessarily mean lowest cost. It means lowest reasonable cost, given the alternative ways to meet the Supply Mix Directive.

24. In interpreting a statute, the Courts may look at the objectives the legislature sought to achieve in enacting the provisions in question. The Council submits that the objectives of the IPSP provisions of the Act were the following:

- (a) to assign, clearly and precisely, responsibility for the design and implementation of each supply plan;
- (b) to ensure that there was an independent review of the cost of implementing each supply plan.

25. The Council submits that the legislature was trying to avoid the diffused responsibility and uncertain accountability that characterized supply planning in the past. Prior to the amendments that created the current version of the Act, responsibility for supply planning lay in part with the former Ontario Hydro and in part with the government, with the result that supply planning was, in some measure, ad hoc. The results, were, in part, planning decisions made without either disciplined cost-benefit analysis or clear accountability. One further result was supply planning that burdened Ontario residents with huge debt.

26. The legislature has, in the IPSP provisions of the Act, precisely defined the responsibility for supply planning and implementation. It would defeat the legislature’s objective were the mechanism to review the costs of implementing the supply plan used to either override the responsibility for supply planning and implementation or blur the lines of responsibility.

27. The Board’s review of the IPSP should not become, and should not be allowed to become, a repetition of the DSP process. That would not only defeat the legislature’s objectives, it would burden ratepayers with the cost of an unnecessary process.

28. Having said that, however, the legislature has assigned the Board an important, substantive responsibility, namely ensuring that the province and its residents can afford the supply plan.

#### **IV THE SUBMISSIONS OF THE OPA**

29. The OPA, in its submissions entitled “Scope of OEB Review and Effect of Approved Plan”, which is Exhibit A, Tab 2, Schedule 2 to the OPA’s application, argues that there are three interpretive tools which the Board must apply in its review of the IPSP plan.

30. The first of the interpretive tools is what the OPA terms the presumption of prudence. In the OPA’s view, the Board must presume that the OPA has developed the IPSP plan in an economically-prudent manner. According to the OPA, that presumption of prudence can only be overcome if it can be demonstrated that the OPA acted fraudulently, unwisely or extravagantly.

31. The second interpretive tool advanced by the OPA is that the Board must afford the OPA a higher degree of deference on the question of prudence than on the question of cost effectiveness.

32. The third interpretive tool is that the Board is exercising a review function, rather than a “first order” regulatory power.

33. The OPA offers no authority for the use, in this context, of any of these interpretive tools. The Council submits that using these tools is not helpful. Attempting to apply them will only lead to time-consuming arguments about their validity, and their relevance.

34. The OPA is using these interpretive tools in an attempt to circumscribe the Board’s authority in reviewing the IPSP. The Council does not believe that that is necessary. The Board’s authority is precisely circumscribed by the legislature. It is neither necessary nor appropriate to apply artificial interpretive tools to accomplish the goals sought for the OPA.

#### **V THE PROPOSED ISSUES LIST**

35. The OPA’s proposed issues list is divided into three sections. The first deals with the compliance with the Supply Mix Directive and the IPSP Regulation. The second deals with



questions of economic prudence and cost effectiveness. The third deals with the appropriateness of the OPA's procurement processes. We will address each separately.

**A. Issue 1 – Compliance with the Supply Mix Directive and the IPSP Regulation**

36. The Council agrees that questions 1 through 6 correctly capture the relevant issues. The important point, however, is that the Board cannot, in addressing these issues, enquire into the substance of how each component of the Supply Mix Directive has been addressed. The exercise for the Board, in addressing these issues, is the equivalent of completing a check list.

37. The Council agrees that question 7 frames the issue correctly. The important point will be the constraints which the Board imposes on how it addresses the issues. The Council submits that the following constraints should apply:

- (a) The Board should not embark upon an examination of the adequacy of the consultation with the listed interests. The only question is whether the representatives of those interests have had an opportunity to express their priorities and views;
- (b) The Board should not assess how innovative are the strategies proposed by the OPA to accelerate the implementation of conservation, energy efficiency and demand management measures. The Board should not embark on an enquiry into whether there are other or more innovative strategies that could be employed;
- (c) The Board should not assess whether there are other opportunities to use natural gas and high efficiency and high value applications in electricity generation, but merely whether the OPA has identified opportunities to do those things;
- (d) Again, the Board should not embark on an assessment of how innovative are the strategies the OPA proposes to encourage and facilitate competitive market-based responses and options for meeting overall system needs, or whether there are other or more innovative strategies;
- (e) The Board should not embark on an assessment of the adequacy of the safety, environmental protection and environmental sustainability measures which the Board has considered, but merely whether the Board has considered those matters;

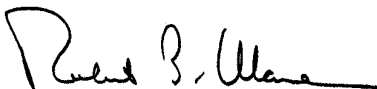
- (f) While the Board must ensure that there is a sound rationale for each electricity project recommended in the IPSP plan, the Board should not assess whether it agrees with the proposed rationale.

38. Issue 2 deals with the question of economic prudence and cost effectiveness. The Council agrees with the way that issue has been framed. In addition, the Council is in substantial agreement with the approach which the Board has proposed, in its December 2006 Report, to the assessment of economic prudence and cost effectiveness, as reflected in the observations on pages 8 and 9 of that Report.

39. Issue 3 deals with the question of the procurement process. The Council submits that the wording of the issue, proposed by the OPA, is too general, and needs refinement. The Council submits that the Board has to consider, among other matters, the following:

- (a) Whether the OPA's procurement process complies with the requirements of Ontario Regulation 426/04;
- (b) Whether the procurement process is open and transparent;
- (c) Whether the procurement process appropriately allocates risks, and whether these are adequate measures to protect the interests of the residents of the province.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**



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**Robert B. Warren**

**Counsel to the Consumers Council of Canada  
December 13, 2007**

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