BY COURIER (2 COPIES) AND EMAIL

SUBMISSIONS
OF LAKE ONTARIO WATERKEEPER
TO THE ONTARIO ENERGY BOARD

RE:	**INTEGRATED POWER SYSTEM PLAN AND PROCUREMENT PROCESSES BOARD FILE NO. EB-2007-0707 - PHASE 1**
DOCUMENT:	**OPA DRAFT ISSUES LIST**
SUBMISSION DATE:	**DECEMBER 10, 2007**

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto, Ontario M4P 1E4

Please find enclosed Lake Ontario Waterkeeper's submission regarding the Ontario Power Authority's proposed Issues List. Thank you for the opportunity to participate in this important process.

Sincerely yours,

[*original signed*]

Mark Mattson
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EB - 2007 - 0707

Does the list capture what you feel needs to be reviewed by the Ontario Energy Board?

1. No. Lake Ontario Waterkeeper submits that the OPA's draft issues list is fundamentally flawed and that a number of clarifications from the Board are required **before** a final issues list can be determined.
2. **First** and foremost, it is not clear what the purpose of the IPSP review hearing is. Consequently, it is not clear what the role of the Board is, what authority the Board has, what the role of the OPA is, or what the scope of the hearing should be.
3. In trying to establish the role of the Board, two alternatives present themselves. The Board could (a) perform a review as if for a publicly owned corporation under direct government control (per its relation to Hydro pre-partition) or, (b) act as the regulator of private enterprise (per its relation to the gas industry).
4. In the first alternative, it is the Minister (not the OPA) who has the ultimate authority over the IPSP and PP. The Board's role, accordingly, would simply be one of review, advising the Minister of the Board's position at the end of the process. As mentioned, this model is akin to the model followed by the Board in the days of Ontario Hydro. At that time, the Board was required by law to review the electricity rate-change proposals. This process permitted "a kind of public review of most aspects of Hydro's activities including facilities costs. However, it is important to note that Hydro [was] not required to testify if the questioning [was] not related to rates… the OEB [had] only the power of public embarrassment, since Hydro [was] not legally obliged to obey OEB recommendations".[1]
5. In the second alternative, the Board has the ultimate authority of approval. This model follows that of Ontario's gas industry "where the process is on the public record; it can take as long as is necessary; the OEB has full statutory power and its decisions the force of law; and the exercise is essentially impersonal, known and open to all".[2]

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[1] Mervin Daub (1992), *Regulation of Private Enterprise vs. Direct Control of Crown Corporations: A Comparison of Gas and Electricity in Ontario*, on behalf of Energy Probe, p.9.

[2] *Ibid.*

6. It is crucial to note that neither scenario grants the OPA, a quasi-private corporation, the ultimate authority. Either the authority rests with a Minister who takes full responsibility for final decision-making after being advised by the Board, or final authority rests with the Board itself.

7. **Second,** the OPA makes a number of claims that are unfounded and have great impact on the scope of the hearing (and thus, the issues list). Waterkeeper submits that the following OPA claims are unfounded: (a) that the OPA represents the public interest, (b) that the OPA has a claim to deference, and (c) that the OPA has a claim to the presumption of prudence.[3]

8. Once the purpose of the hearing has been defined and the Board's role is clarified, the scope of the hearing can be established. In the meantime, Waterkeeper submits that the OPA's scope is too narrow to satisfy either purpose. In the event that the Board's role is as advisor to the Minister, the scope of the hearing should be a broad review of the plan. In the event that the Board is the ultimate decision-maker, the Board may define its jurisdiction. In either case, the Board, and not the OPA, sets the scope of the hearing.

9. **Third**, the Board should define the terms "economic prudence" and "cost effectiveness". Without a common understanding of the meaning of these terms, miscommunication and misrepresentation may occur.

10. **Fourth,** the Board should assess whether the Minister's Directives and the IPSP have fulfilled the Ministry of Energy's Statement of Environmental Values. Consideration of the Ministry's Statement of Environmental Values is particularly important in light of the Government of Ontario's decision to exempt the IPSP from the environmental assessment process.

11. **Fifth,** the OPA makes a false distinction between the Minister's seven-point Directive and the review for economic prudence and cost effectiveness. By separating compliance with the Directive from the matters of economic prudence and cost effectiveness, the OPA again limits the scope of the hearing and steers the issues list away from meaningful analysis and towards a superficial, "rubber-stamp" style review.

What issues should be added to the list?

12. Fluctuations in the value of the Canadian dollar. A higher Canadian dollar will have significant impacts on cost analyses, imports, demand and other variables that affect the supply mix advice.

[3] See Appendix A for a more thorough response to the OPA's claims.

13. Inserting the words "How well" before each issue would better meet the intent of the review.[4] Currently, the OPA's issues list is coloured by its position on the issue of nature and scope of the hearing. The issues are framed to invite a simple Yes or No answer and to exclude analysis of how effective the OPA's plans are in addressing the issue. This, of course, is consistent with the OPA's argument that it needs only to show that it has addressed each element in the Supply Directive and the Regulation and should not be subject to any quality measures on its work. Framing the issues this way will ensure a more comprehensive and intelligent review of the IPSP. It would, for instance, allow comparison of these minimum targets for peak reduction with what has been achieved elsewhere and permit the Board to weigh whether or not better performance than these minimum targets is likely to occur in Ontario. That insight is necessary to judge whether or not the long-term commitments in the plan for nuclear power are prudent or cost effective.

Regarding Directive #1 (Conservation)

14. Why did the OPA not include geothermal heating and cooling load reduction initiatives, solar heating, fuel switching, or net metering in the IPSP, as recommended in the Minister's directive?

15. What role would decoupling of electricity consumption from profits play in meeting or exceeding conservation targets?

16. What impact would market transformation have on conservation?

Regarding Directive #2 (Renewables)

17. Are the OPA's "renewable energy" projects sustainable and prudent?

Regarding Directive #3 (Baseload & Nuclear Power)

18. Did the OPA overestimate the need for nuclear power?

19. Did the OPA correctly define "baseload"?

20. How will reliance on nuclear power affect conservation targets and achievements through 2025 and beyond?

21. Is the IPSP correct in concluding that nuclear power is the best alternative to supply any shortfall in baseload requirements?

22. Is the OPA's comparison between the economics of nuclear power and the economics of gas-fired generation reasonable?

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[4] For example, Issue #1 would become: "How well does the IPSP define programs and actions which aim to reduce projected peak demand by 1,350 MW by 2010, and by an additional 3,600 MW by 2025?"

Regarding Directive #4 (Gas)

23. Did the OPA correctly interpret the Minister's directive to maintain the ability to use natural gas capacity at peak times?

Regarding Directive #7 (Regulation 424/04)

24. Does the IPSP indicate which projects will require provincial environmental assessments?

25. Does the IPSP include a sound rationale for every project that will require an environmental assessment within 5 years of the Plan's approval, as described in *Ontario Regulation 424/04*?

Procurement

26. Is it reasonable that only nuclear power suppliers will be able to meet baseload capacity shortages?

What issues should be deleted from the list?

27. All references to the OPA having a public interest mandate and/or deserving deference from the Board.

28. Reference to the terms "act of original jurisdiction" and "first order type of power", which are used to distinguish between the power the Board exercises when reviewing rate cases from the power it will exercise when it reviews the IPSP.[5] These terms are unfamiliar to Waterkeeper in describing a regulator's powers. There is no reference in the *Electricity Act*, the *Ontario Energy Board Act ("OEB Act")*, the *Statutory Powers Procedure Act*, the Ministerial Directive or the Regulation to the terms "first order" and "act of original jurisdiction". Waterkeeper has been unable to find any legal authority for these terms and wonders where they came from and what their basis is in law.

29. The OPA's statement that Section 2 of the *OEB Act* has changed.[6] This statement is incorrect.

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[5] Ontario Power Authority, *Submission*, Exhibit A Tab 2 Schedule 2 on page 6.

[6] *Ibid.* at page 13, lines 19-20 reads, "[T]he language in objective 2 of the OEB Act has changed from 'economic efficiency and cost effectiveness' to 'economically prudent and cost effective'."

DATED AT TORONTO, ONTARIO THIS 10th DAY OF DECEMBER 2007

[*original signed]*

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Appendix A

Waterkeeper respectfully submits that at least some of the OPA's prejudicial positions must be challenged in order for this hearing process to serve the public interest and comply with Ontario's regulatory norms.

For example:

1. The OPA's claim to represent the public interest is unfounded.

The OPA claims to represent the public interest[7] and argues that this should result in increased deference for its plans from the Board. Waterkeeper disputes the OPA's position for the following reasons:

- Nowhere in the *Electricity Act* (the OPA's enabling legislation), *Ontario Regulation 424/04* (dealing specifically with the IPSP), or *Ontario Regulation 426/04* (dealing with OPA procurement processes) does the legislation refer to the OPA as representing the public interest. By contrast, where the Legislature intended an agency to act in the public interest it has used language in that agency's enabling legislation to make its intention clear. For example, in the case of the Board, both the *Electricity Act* and the *OEB Act* make reference to the public interest in relation to the Board's mandate and deliberations.[8]
- The Government of Ontario, by definition, can be presumed to act in the public interest. By extension, agents of the Government can be presumed to also act in the public interest. Section 25.3 of the *Electricity Act* specifically states that the OPA is not an agent of the Crown despite the *Crown Agency Act, 1990*. By contrast s. 4(4) of the *OEB Act* specifically states that the Board is an agent of the Crown.
- If the legislature had intended that the OPA be accorded deference as a defender of the public interest it would surely have mentioned the public interest somewhere in the OPA's enabling legislation and/or made it an Agent of the Crown. Since it did neither, we have only the OPA's statement that it represents the public interest.

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[7] *Ibid.* at page 2.

[8] *Electricity Act*, s.33(8), 36(5), 37.3(1) and *Ontario Energy Board Act*, s.29.1, s.52, s.74(1), s.96(1), s.96(2), 99(5), 101(3).

- Waterkeeper submits that it is not reasonable to accept that the applicant represents the public interest in the absence of any objective supporting evidence. It is particularly questionable in the present case where the applicant is using the public interest argument in an effort to limit public scrutiny of its plans.

2. The OPA's claim to deference is unfounded.

The OPA argues throughout its application that it should be granted deference for a variety of reasons. Deference is to be granted only to the Minister. At no point must the Board defer to the judgment of a quasi-private corporation. Recognizing this important distinction affects the very purpose of the hearing and the role of the Board within it.

More specifically, the OPA argues that because it has a broader mandate than the Board and specific expertise in technical matters like system planning, it should be shown deference by the Board. This argument is flawed for the following reasons:

- In all applications before the Board, the onus is on the Applicant to prove its case. The Board makes reference to this in its report on its review of the IPSP. The Board states that in "the Board's IPSP review proceeding, the onus will be on the OPA to demonstrate to the satisfaction of the Board that the IPSP complies with the IPSP directives and the IPSP regulation, and that it is economically prudent and cost effective".[9] The level of deference being sought by the OPA would have the effect of reversing the onus so that parties opposing the application would have to prove that it is does not satisfy the review criteria.
- The Board's mandate in reviewing the IPSP requires it to determine economic prudence and cost effectiveness of the plan. Technical decisions by the OPA have profound influence on the overall cost and economic impacts of the plan. If these decisions were accepted without scrutiny, the Board would not be able to render an informed decision on either the economic prudence or cost effectiveness of the plan.

The Board routinely deals with technical information in its electricity and gas rates hearings in which it may have no specific expertise. This reality does not exclude scrutiny or excuse the applicant from having to prove its case on those matters for lack of comparable technical expertise.

[9] *Guideline Report* at page 12

3. The OPA's claim to presumption of prudence is unfounded.

The OPA argues that the Board's prudence review should be constrained by a presumption of prudence and by a restricted standard of review. The applicant directs the Board to one of its previous decisions in which it stated that "*[d]ecisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds*."[10]

Waterkeeper submits that the context of this quote is the management of a gas distribution utility. Managers of these utilities make many types of decisions including technical decisions, administrative decisions, financing decisions, managerial decisions etc. Utility managers are assumed to have greater expertise than the Board in making those kinds of operational judgments. It is for that reason that the Board may accord deference to a Utility and presume prudence subject to rebutting evidence. However, those are not the kind of judgments being reviewed by the Board in the IPSP. There the Board is specifically considering "economic prudence". Economic judgment is the very expertise that the Board is acknowledged as having. Therefore, there is no reason for it to accord any deference to an applicant whose expertise in economic matters is inferior to its own.

The OPA goes on to argue that it is entitled to at least the same deference as a Utility and so its decisions should likewise be presumed to be prudent. However, it does not want its decisions challenged "*on reasonable grounds*". It quotes a National Energy Board decision that approves a comment of a Michigan regulator stating that prudence will be presumed in Utility expenditures absent "*evidence showing mismanagement, inefficiency or bad faith*".[11] The OPA continues with a quotation from a book on rate policy in which the authors advocate that costs should only be found to be imprudent if they are "*fraudulent, unwise or extravagant*".[12] The OPA then draws the conclusion that the legislators intended the presumption of prudence to apply and that the standard to be met by those opposing the application should be proof that it "acted fraudulently, unwisely or extravagantly".[13]

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[10] *Supra* at page 14, lines 4 to 7.

[11] *Ibid.* at line 12.

[12] *Ibid*. at line 16.

[13] *Ibid.* at line 20 to 21.

Waterkeeper disagrees with this position for the following reasons:

- The Board is not bound by its own previous decisions, those of the National Energy Board, or an American regulator. It is free to consider what standard of review applies in any given application and what if any deference it is willing to afford the applicant.
- Scholarly works may provide the Board with commentary on a subject but they are not authorities or precedents which the Board is required to take notice of.
- There is no legislative or regulatory support for the OPA's conclusion that the legislature intended a presumption of prudence to apply. The OPA has reached this conclusion through circular reasoning.[14]

On matters of technical judgment it may be appropriate to accord deference to the OPA. In that case the Board's standard of "presumed to be prudent unless challenged on reasonable grounds" may be appropriate if the challenging referred to can be accomplished by cross examination of the OPA on its evidence. Requiring intervenors to introduce expert rebuttal evidence to meet the standard of challenging on reasonable grounds would be too great a burden for the limited time and resources available to them.

4. The Board's mandate is broader than the OPA suggests

The OPA seeks to limit the Board's review of the plan to compliance with Ministerial Directive(s), regulation(s) and narrowly defined issues of economic prudence and cost effectiveness. Waterkeeper disagrees with the OPA's analysis and conclusion on the Board's mandate for the following reasons:

- The OPA argues that the Board's power to review the IPSP differs from its power when it reviews utility rate cases. It makes reference to the terms "act of original jurisdiction" and "first order type of power" to distinguish between the power the Board exercises when reviewing rate cases from the power it will exercise when it reviews the IPSP.[15] It states later that the Board "is exercising a power of review, not a first order statutory power" and characterizes this as one of "two legal concepts that are relevant to the interpretation of the Board's mandate with respect to the IPSP".[16] The terms "first order" and "act of original jurisdiction" are

[14] *Ibid.* at line 17 to 21.

[15] *Ibid.* at page 6.

[16] *Ibid*. at page 10, lines 12-14.

unfamiliar to Waterkeeper in describing a regulator's powers. There is no reference in the *Electricity Act*, the *OEB Act*, the *Statutory Powers Procedure Act*, the Ministerial Directive or the Regulation to the terms "first order" and "act of original jurisdiction". Waterkeeper has been unable to find any legal authority for these terms and wonders where they came from and what their basis in law is.

- The OPA incorrectly states that the *OEB Act* changed, but no such change occurred. It is possible that the OPA intended to suggest s. 25.30(4) of the *Electricity Act*, which sets out some criteria for the Board's review of the IPSP, trumps Board objectives, which are set out in the s. 2 of the *OEB Act*. Waterkeeper agrees that the Board is required to review the IPSP in accordance with the criteria in s. 25.30(4). If this is the case, Waterkeeper asserts that s. 2 of the *OEB Act* still applies. Section 25.30(4) does not say that these criteria are the only ones that the Board should or can take into account. If the legislature had intended to limit the Board's review in this way, it would have been simple enough to say so explicitly in the section. Given the importance of the IPSP to Ontario, Waterkeeper submits that it is unlikely that the legislature simply overlooked the matter. Waterkeeper also notes that choosing to exclude provisions of one statute over another may be necessary when there is a conflict of laws. However, in this case, the provisions of the *Electricity Act* and those of the *OEB Act* are not conflicting but rather are complementary. For example, ensuring "economic prudence" of the IPSP as required by the *Electricity Act* is not at odds with the Board objective of promoting "economic efficiency" in the *OEB Act*.
- The OPA suggests that socio-economic and environmental factors are beyond the authority of the Board to review.[17] Later it specifically states that environmental performance and societal acceptance are outside the Board's review mandate.[18] Waterkeeper believes that the OPA's position conflicts with the Board's position expressed within its *Guideline Report* on the review of the IPSP where it states:

> *"The Board is particularly concerned that environmental costs, such as those associated with air emissions, be considered in the development of the IPSP as such costs are not reflected fully in the cost of electricity. The Board will wish to understand how the OPA took environmental externalities into account in considering alternative ways of achieving the goals set out in the Supply Mix Directive."*[19]

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[17] *Ibid.* at page 2, line 12 to 16.

[18] *Ibid.* at page 3, lines 1 to 3.

[19] *Guideline Report* at page 12.

- The *Ontario Regulation 424/04* provides further support for the Board's legitimate interest in environmental issues. This Regulation requires that the IPSP must contain a sound rationale for every project that will be subject to the provincial environmental assessment process. "Sound rationale" includes an analysis of the impact on the environment of the electricity project and an analysis of the impact on the environment of a reasonable range of alternatives to the electricity project. The OPA acknowledges it is subject to *Ontario Regulation 424/04* in its issues list.
- Case law also supports the Board's jurisdiction to review environmental factors. For example,

    - *Re Board and the Queen in the Right of Ontario et al.* (1986) O.J. No. 1140, in which the Ontario High Court of Justice answered the question relating to the Board's jurisdiction to assess whether a project is in the public interest. This assessment was deemed to include: "taking into account the physical, social, economical, cultural and natural environment, including the effects on the air, land and water; and, the economic feasibility of the project".
    - *Toronto (City) v. Goldist Properties Inc.* [2003] O.J. No. 3931, in which the Ontario Court of Appeal stated at paragraph 28 that "the Ontario Energy Board had jurisdiction to decide the boundaries of its own jurisdiction and, also, could seek the assistance of the Divisional Court on this question".

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