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**BY EMAIL**

November 11, 2008  
Our File No. 2080422

Ontario Energy Board  
2300 Yonge Street  
27<sup>th</sup> Floor  
Toronto, Ontario  
M4P 1E4

**Attn: Kirsten Walli, Board Secretary**

Dear Ms. Walli:

**Re: Electricity CDM Input Assumptions – EB-2008-0352**

We are counsel for the School Energy Coalition. The Board has proposed, in its letter of November 4, 2008, to replace its CDM “Assumptions and Measures List” with an express reference to the similar list issued February 15, 2008, and to be updated annually, from the Ontario Power Authority. These are the comments of the School Energy Coalition with respect to that proposal.

We preface our comments by noting that the underlying goal – removing duplication and allowing those best suited to the task to have responsibility in common areas – is one that SEC strongly supports. In the long term, we believe that if the OPA has the resources and the expertise to carry out tasks like establishing and updating input assumptions, the Board should seek to avoid duplication by allowing that task to be done once, and relied on by all. For the Board to plough that same ground is, as the Board clearly already sees, wasteful, and inconsistent with the Board’s general approach to efficient regulation.

That having been said, we are concerned with the implications of the Board’s proposal in the broader regulatory context. Our concerns stems from the following logic:

1. The Board’s mandate and responsibility with respect to CDM input assumptions flows directly from its responsibility to set just and reasonable rates. Because some part of CDM budgets, as well as SSM and LRAM payments, are in rates, the issue of CDM input assumptions is a ratemaking issue.

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2. In setting just and reasonable rates, the Board has the responsibility to determine the facts and parameters on which revenue requirement (and any other components of charges to ratepayers) is determined. Sometimes these are based on past data, and sometimes on forecasts, but in all cases it is the Board's duty to be the independent judge of the facts that form the foundation of amounts charged to ratepayers. That principle would apply to the CDM input assumptions, as material facts affecting rate decisions.
3. In our submission, there are in general only two circumstances in which the Board can establish rates based on facts that the Board has not independently reviewed/assessed:
  - (a) Situations in which the government, by legislation or regulation, has either predetermined a fact, or expressly assigned responsibility for verifying a fact to some other body. For example, if the Board's legislation, or that of OPA, stated expressly that CDM assumptions were the responsibility of OPA, that would be the end of the matter. The Board would have neither the responsibility nor the right to review those assumptions. A recent example of that is the regulatory restrictions placed on the Board in setting OPG's Payment Amounts for Prescribed Assets. Certain facts had to be accepted/assumed, because the government made that legislative decision.
  - (b) Situations in which the Board adopts the facts found by an independent third party that is generally accepted to be the authority on that category of facts. For example, the Board uses GDP IPPI FDD as the inflation escalator in IRM, and does not carry out any independent verification of this inflation figure to see whether it is being calculated correctly, because StatsCan is accepted as an authority on inflation measurement in Canada.
4. The CDM Input Assumptions published by OPA do not fall in the first category above, so in our view it is only appropriate for the Board to accept them without independent review if the OPA could be considered the authoritative source of this category of information.

In our submission, OPA may well in the future become the authoritative source for CDM information. However, this is their first foray into preparing input assumptions, and they have not yet established any track record as to the quality of their finished product. Note that, in saying this, we are not in any way commenting on the quality of the OPA's work in this regard. These may be the best input assumptions ever produced, anywhere in the world. Or, the opposite may be true. Without reviewing the assumptions, it is impossible to say, and that is not the point anyway. The question for this consultation whether it is appropriate for the Board to assume that the OPA's work is of the highest quality, and factually strong, without any investigation by the Board. In our submission, that is not appropriate in these circumstances.

We believe that the Board should carry out a proceeding, following its standard, thorough approach, to test this, the first OPA set of input assumptions. We would hope that the result of that proceeding would be the Board reaching an independent conclusion that the OPA input assumptions are good enough to be relied on by the Board. This does two things. First, it allows the Board to fully exercise its jurisdiction while still making a decision to use those assumptions rather than duplicate the efforts of the OPA. Second, it is an important step in establishing the OPA as the authoritative source of that category of information in Ontario. As a bonus, it is likely that such a proceeding

would bring to light ways that the OPA work could be improved, thus assisting them to increase the quality of their subsequent iterations of the OPA's Measures and Assumptions List.

We are conscious of the fact that this may seem like quite a narrow area in which to have the process driven by an analysis of mandate. It is submitted that the Board should be concerned about the broader implications of accepting the OPA numbers without review. It could, for example, be seen as an invitation for stakeholders to ask the Board to decline jurisdiction on other issues where there are third parties – particularly government agencies - active in the area.

The Board has been very rigorous, in recent years, in insisting that it understand both the limits of its jurisdiction, and the extent of that jurisdiction. When determination of a fact or other parameter is a necessary part of a Board mandate – such as setting just and reasonable rates – the Board has ensured that its practices and procedures give it a full opportunity to make that determination. We believe it is unwise for the Board to introduce a chink in that armour, particularly where, as here, it is relatively simple to avoid that problem by reviewing the first OPA Measures and Assumptions List with an independent eye.

All of which is respectfully submitted.

Yours very truly,

**SHIBLEY RIGHTON LLP**

A handwritten signature in black ink, appearing to read "Jay Shepherd", written in a cursive style.

Jay Shepherd

cc: Bob Williams, SEC (email)  
Wayne McNally, SEC (email)  
Alison Cazalet, OEB (email)  
Corinne Bassett, IEAI (email)