11 February 1974

Hon. A.B.R. Lawrence,
Provincial Secretary for Resources Development,
Queen's Park,
Toronto, Ontario.

RE: Ontario Energy Board Proceedings

Dear Mr. Lawrence:

Our association has recently had occasion to view the progress of the Ontario Energy Board proceedings inquiring into the Ontario Hydro application for expansion of facilities for the period 1977-1982.

As a result of our attendance, we have noted a number of practices which can only be described as totally unsatisfactory and clearly contradictory of the letter and spirit of the concept of public participation to which the present Ontario government has so often, at least in words, committed itself.

Our criticisms, however, are of substantive policy gaps as well as of procedural inadequacies, which we feel are in your purview to rectify.

Notice in the Ontario Gazette for November, 24, 1973 read in part:

> Environmental matters, including the siting of power stations and transmission corridors which are or will be subject to review or regulation through other processes, are also to be excluded.

Environmental matters include more than the choice of one location rather than another for a particular facility, or even whether that facility should be built at all. The broad policy areas now being considered by the Ontario Energy Board are environmental matters. Decisions which the Ontario Energy Board makes as a result of the present hearings will have the most profound effect on subsequent environmental policy options. If they have the effect, as they almost certainly will, of speeding up contracting and procurement, any later environmental impact study and criticism of the entire Hydro programme will look like, and will probably be, a futile attempt to obstruct something which is going to take place in any case.

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First energy and economics, then, if there is time, the environment -- this seems to thethe government's policy. What we were watching at the hearings was, in effect, environmental policy being determined by experts in economics and energy. Where were the government's experts on the environment?

Plans and programmes of the scale and magnitude of Ontario Hydro's cannot be looked at in a piecemeal fashion. So long as there is no strong Environmental Review Board, officials responsible for the environment should be at the Ontario Energy Board hearings now, sitting on the Board, helping to assess the long-term environmental policy implications of the Hydro application. This would make much more sense than for them to wait until later, and be left merely to determine which parts of the Ontario environment should be sacrificed.

Alternatively -- assuming that the government is not prepared to halt or delay the hearings and turn the Ontario Energy Board into the Ontario Environmentaaand Energy Board -- the section of the notice quoted above refers to "other processes" of review and regulation which will give the spokesman for the environment a chance to be heard. We presume that among these "other processes" are the impending impact amendments to the Environmental Protection Act, which would make the environmental impact of the application subject to assessment. But it is quite possible that the Ontario Energy Board will approve the Hydro five-year plan before such legislation is passed. Is the government prepared to guarantee that the environmental assessment requirements will be retroactively applied to the entire Ontario Hydro programme, and to specific projects therein?

Moreover, will the Environmental Review Board have veto or semi-veto power over the entire Hydro application, should it find circumstances which would warrant such a decision? Environmental assessment should deal not only with questions of where power stations and transmission corridors should be located, but also with whether the resources and bio-spheres involved can tolerate such exponential proliferations of those and other facilities thatHydro's growth projections would bring about. Otherwise, I am sure you would agree that the Environmental Review Board would be worse than useless.

In an attempt to fill the void left by the absence of environmentally responsible officials at these hearings, a number of environmental groups versed in the complexities of energy impact filed intentions to intervene in the Hydro application. This was done despite the ambiguity in the notice's suggestion that environmental matters were not to be discussed, presumably because critical environmental policy was not to be affected during these hearings.

However, a number of potentially devilitating procedural obstacles have been thrown at these groups. We can only regard these mechanisms as deliberate discouragement to active public input in policies affecting the public interest.

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We note, for example, the Ontario Energy Board order dated December 24th, 1973 (see Appendix A to this letter) sent to all groups registering a notice to intervene. Section 7 of the order reads: "All witnesses shall be subject to cross-examination as the Board shall direct." There is no indication whatsoever that what "the Board shall direct" was to be contained in section 2 of that same order, which contains no reference to limitations onccross-examination, as it does to examination in chief.

Section 2 of the December 24th order reads:

> The evidence in support of any such submission to be presented to the Board shall, with respect to power system expansion policies and practices, be reduced to writing and shall be filed with the Board at its offices, Suite 910, 790 Bay Street, Tro Toronto, no later than at the commencement of the hearing on January 21st, 1974, unless such date is enlarged by Order of the Board. The said supporting evidence shall set out in detail and not in summary form, what shall be presented to the Board by a witness or witnesses on behalf of the person making the submission. The said written evidence shall be accompanied by any charts, maps, diagrams or supporting material to be used in support of such evidence. No evidence and no material shall be heard by the Board unless so filed, unless otherwise ordered by the Board.

To the extent that section 2 was being construed by the Board and Board counsel as a limitation properly placed on cross-examination as well as on examination in chief, sections 2 and 7 are in conflict, thereby rendering the order of December 24th misleading to those intervening groups with limited resources but an acknowledged expertise in the area who might have wished to cross-question Hydro witnesses on their planning assumptions, but not to bring forth witnesses and evidence of their own.

It should be noted that one group which gave notice of intention to interv vene, Pollution Probe, subsequently found a full-blown submission a strain on its time and resources - in part because of other commitments, including the Federal Court appeal involving the National Energy Board and Ontario Hydro (see Appendix B). In an enlightened tribunal system, if an intervenor is, by his intervention, performing a social function of some importance, ways would be found of easing his task. This is not a novel position. In other areas of the law, procedural aids have developed to ease the burden on the "underdog." For example, in criminal law, the prosecutor has an independent duty to disclose exculpatory evidence to the defendant.

It would seem that, given the far-ranging implications of the Hydro application, wide latitude should have been given to those groups wishing to examine it and expose potential flaws in its assumptions. Instead, what Probe discovered at each step of the process was a greater and greater circumscription and attenuation of the quality of its intervention by Board rulings and Board and Hydro counsel objections. Because Probe had made no formal submission, it was denied the right to independently cross-examine the Hydro witness.

What it was given was the right to submit its questions in advance to Board counsel (see January 21, 1974 Ontario Energy Board Order S.7, Appendix C), who would ask the questions instead. This Probe did, but on January 30th the Board counsel, Mr. R.W. Macauley, who was poorly prepared for these questions, proceeded to ask them of the Hydro witness in a most unsatisfactory manner. They were asked in a rambling and desultory fashion, with many deletions and no follow-up in depth -- hardly a cross-examination worthy of the name. In fairness, he had little time to analyze them -- all the more reason to allow Probe to conductithe cross-examination itself.

It must be reiterated here that the December 24th order made no mention of the filing of a submission as a condition precedent to the right of independent cross-examination. Not even publication of the order of January 21st (the opening day of the hearing) describing the donduct of the hearings, made that connection at all apparent. That was a full month later.

Yet a subsequent ruling of the Board, on February 5th, 1974, reaffirmed that Probe would not be allowed to independently cross-examine <u>any</u> Hydro witnesses during Phase I (load forecasting phase) of the hearings. It should be noted that Hydro counsel is, in section 4(b) of the January 21st order, explicitly given the right to cross-examine witnesses for intervenors.

All of this raises certain questions in our minds.

Does the present government of Ontario really mean to permit full public participation in decisions which affect the public?

If so, the rules of procedure of the Ontario Energy Board hearings, and others like them, should be interpreted -- or, as the case may be, made -- accordingly. It is quite clear to anyone attending the hearings that the Board has consistently ruled so as to frustrate Pollution Probe's attempts to give it the benefit of its knowledge, not because it has to but because it wants.to.

Moreover, the number of times the Board members alluded to the "unusual" time constraints they were under suggests strongly that environmental review of the Hydro application will be given even greater limitations.

Does the present government of Ontario really intend to give full consideration to environmental factors?

If so, procedures such as the Ontario Energy Board hearings should include input on the environment from the Ministry of the Environment, from outside groups, or, preferably, from both.

May we have your answers to the following questions:

When an Environmental tribunal is established, what is it envisioned that

its powers will be?

What is the government's position on retroactivity of environmental assessment requirements for those projects and programmes approved before environmental impact legislation is passed?

Is the government prepared to make it possible for organizations acting in the public interest to cross-examine witnesses at Ontario Energy Board and other tribunal-type hearings?

We look forward to your reply in this matters.

Yours sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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