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March 30, 2009

VIA COURIER AND RESS

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON
M4P 1E4

Dear Ms. Walli:

**EB-2009-0038 – Ontario Power Generation Inc. Motion to Vary -
Reply Submission**

Please find attached, OPG's Reply Submission and a Supplemental
Compendium of Evidence for its Motion to Vary, EB-2009-0038.

Pursuant to the Board's Procedural Order #1, I am providing two (2)
hardcopies and one electronic copy in searchable PDF format filed
through the Board's web portal (RESS).

Yours truly,

[Original signed by]

Andrew Barrett

Attach.

cc: Michael Penny (Torys) via e-mail
EB-2009-0038 Intervenors via e-mail

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by Ontario Power Generation Inc. pursuant to section 78.1 of the *Ontario Energy Board Act, 1998* for an Order or Orders determining payment amounts for the output of certain of its generating facilities;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

**OPG Reply Submission Re Notice of Motion to Vary
Dated January 28, 2009**

Introduction

1. OPG's Argument in Chief on this motion was submitted with the Notice of Motion on January 28, 2009.
2. The OEB's Notice of Motion and Procedural Order No. 1 directed that an oral hearing take place on April 3, 2009 "at which the threshold question of whether OPG's Motion raises a substantial question as to the correctness of the Decision, and the merits of the Motion, are considered concurrently." The Procedural Order provided for written submissions from intervenors. Intervenor arguments were received from PWU, the EDA, Board Staff, CME and SEC.
3. PWU, EDA and Board Staff support OPG's request for a tax loss variance account. SEC, although admitting that it would have been "better" had the Decision created a tax loss variance account, opposes the motion as does CME. CME, however, takes the position that the OEB has the ability, in a future case, without a tax loss variance account, to determine how much of the \$342 million embedded in test period payment amounts is properly attributable to consumers.

4. The OEB's Procedural Order provided for a reply submission from OPG. This is OPG's reply submission.

The Prematurity Issue

5. CME and SEC rely, in their submissions, on the review panel's dismissal of OPG's first motion without a hearing on the basis that it was premature.

6. CME, for example, submits that the "essence of OPG's complaint remains as described in the Review Decision." However, neither CME nor SEC have demonstrated, or attempted to demonstrate, how or why this is correct. Nor has either of these intervenors responded to OPG's arguments which lead to the opposite conclusion – that OPG's complaint is not about a potential interpretation that might be placed on the Decision by a future panel, but about the propriety of findings and conclusions that were made by the OEB in the Decision itself and which directly affect the test period revenue requirement.

7. The OEB was very clear in its decision on the NGEIR Motion to Vary that an "error" sufficient to warrant reconsideration included: 1) findings that are contrary to the evidence; 2) where the panel failed to address a material issue; and 3) inconsistent findings. It is the core of OPG's motion, and concern, that the Decision in respect of the tax loss and mitigation issue makes findings that are both wholly inconsistent with the evidence and which are internally inconsistent. Further, these findings have a material impact on OPG's test period revenue requirement and its ability to earn the fair rate of return approved by the OEB.

8. Based on its misapprehension of OPG's motion, CME has suggested that the OEB issue a clarifying supplement to the Decision confirming that the OEB did "not intend to permit customers to receive credit twice for the same prior period tax loss amounts." While such a clarification would be helpful in dealing with the potential for double jeopardy in the future, it does not answer the fundamental issues raised in this motion which, as noted, is about remedying an error that exists in this case.

9. As noted in OPG's initial submission, at paragraphs 12-18 and 26-49, the double jeopardy problem was only one of four issues raised in the original motion. The other three issues were not addressed by the review panel's decision.

10. There is, in fact, more at stake in the OEB's disposition of the tax loss issue than the risk of double jeopardy in a future proceeding. This is because the \$342 million of "simple" mitigation which the OEB ordered does not reflect the specific directions that the OEB made in the Decision concerning the calculation of the interim period tax losses themselves.

11. The most significant example of this relates to the Bruce nuclear generating stations ("NGS") lease costs. The Bruce stations were not prescribed assets, but O. Reg. 53/05, in paragraphs 6(2)9 and 6(2)10, requires that the OEB consider Bruce lease revenues and costs in determining the payment amounts. How Bruce lease revenues and costs were to be handled in determining OPG's payment amounts was a contentious issue in the hearing. A chapter of the Decision (Chapter 6) is devoted to this issue.

12. OPG's proposal had been to treat the Bruce assets (including nuclear waste and decommissioning obligations) as a regulated rate base and to recover costs associated with the Bruce NGS nuclear waste and decommissioning obligations, through the return on that rate base.

13. This proposal was rejected by the OEB. The OEB held that the cost of nuclear liabilities associated with the Bruce NGS be calculated in accordance with GAAP, not using OPG's proposed rate base method (Compendium, p. 118).

14. Under OPG's approach, regulatory tax losses associated with the Bruce NGS (resulting primarily from contributions to the segregated funds to cover increased Bruce NGS nuclear liabilities) were used to offset taxes otherwise payable in its forecast revenue requirement and to further reduce the revenue requirement for the prescribed facilities. The OEB rejected this approach and directed OPG to include an income tax provision in its computation of Bruce lease costs (Compendium, p. 118).

15. OPG's calculation of regulatory tax losses also included revenues and expenses related to the Bruce NGS. Because the OEB held the Bruce stations were not prescribed facilities and were not regulated, the OEB directed OPG to "exclude revenues and expenses related to the Bruce lease in any calculation of tax losses in respect of the prescribed facilities" (Compendium, p. 129).

16. The existing record makes it clear, however, that contributions to the nuclear waste and decommissioning funds in respect of the Bruce NGS were a significant contributor to the accumulation of tax losses during the interim period (Compendium, p. 80).

17. Once the tax losses associated with Bruce NGS are removed from the equation, as directed by the OEB, the amount of tax losses available to offset taxable income from prescribed facilities will be reduced by approximately half of the amount proposed by OPG and the resulting revenue requirement impact will be significantly less than the \$342 million reduction embedded in OPG's test period payment amounts.

18. Similarly, OPG's original calculation of the regulatory tax losses captured all losses associated with the prescribed assets, including losses associated with an operating loss attributable to nuclear generation in 2007.

19. The OEB held, however, that consumers were not exposed to the risk of revenue shortfalls due to operating losses in 2007 because the payment amounts had been set in 2005 on a forecast basis. Accordingly, the OEB held that "none of the tax benefit of that loss should accrue to customers" either (Compendium, p. 130). However, the \$342 million of revenue requirement reduction ordered by the OEB clearly reflects the tax loss carry forwards associated with the 2007 operating loss (Compendium, pp. 20, 73-74).

20. On the one hand, the OEB found that tax losses associated with the Bruce stations and 2007 operating losses should not accrue to consumers. On the other hand, the OEB has ordered a revenue requirement reduction which reflects the tax losses associated with both these items, without provision for a variance account to enable subsequent adjustments to the test period revenue requirement in accordance with the OEB's direction. These findings of the OEB are internally inconsistent.

21. Neither of these items relates to the potential for double jeopardy against OPG in a future case. Without a variance account to record the difference between the tax losses embedded in rates and those calculated in accordance with the OEB's directions, OPG will have credited too much to customers in the test period and will have no way to recover the amount of that excess.

22. OPG estimates (subject to finalization and review in the appropriate proceeding) that removing the Bruce-related tax losses and the 2007 operating loss-related tax losses from the tax loss calculation, together with other adjustments directed by the OEB, will reduce available tax losses from \$990 million to approximately \$140 million and will reduce the \$342 million revenue requirement reduction required by the OEB's Decision in the test period to approximately \$65 million.

23. Accordingly, CME's proposal that the OEB issue a clarifying supplement to eliminate the potential for double jeopardy, while welcome, does not address the fundamental concerns raised in this motion: firstly, that the OEB's Decision purported to delink the imposed mitigation of \$342 million from any calculation of regulatory tax loss; and, secondly, that the OEB made inconsistent findings that the tax loss calculation was overstated by the inclusion of Bruce losses and operating losses, among other factors, yet ordered a revenue requirement reduction resulting from OPG's calculations, which includes those tax losses.

The Sufficiency of the Evidence

24. SEC argues that OPG's present circumstance is the result of having filed "inadequate evidence" and having failed to request a variance account in the first place.

25. OPG's evidence was neither inadequate nor found to be so by the OEB. Further, OPG, had no reason to ask for a variance account at first instance. Neither its proposals nor the issues raised at the hearing necessitated a tax loss variance account.

26. OPG, in fact, filed quite detailed evidence on the derivation of its tax losses from the interim period (Compendium, pp. 14-22; 24; 29-35; Supplemental Compendium, pp. 8-23). Contrary to SEC's allegation, a year-by-year reconciliation was, in fact, presented for those tax losses (Compendium, pp. 20-22; Supplemental Compendium, pp. 22-23).

27. SEC, among others, was quite content with OPG's proposal, as originally structured. The OEB specifically noted at pp. 168-169 of the Decision (Compendium, pp. 128-129) that SEC and others supported OPG's approach, there was no intervenor opposed to it and, as a result, OPG's tax calculations did not receive "much scrutiny" during the proceeding. This is also clear from the arguments filed by the intervenors at the time (Supplemental Compendium, pp. 1-7).

28. The OEB never found OPG's evidence to be "inadequate." The OEB, however, after the hearing was over, obviously concluded that OPG may not have taken the right approach to the calculation of tax losses and that, for example, the inclusion of regulatory tax losses associated with the Bruce stations or with operating losses in 2007 should not accrue to consumers (Compendium, pp. 129-130).

29. When the OEB said, therefore, that it did "not have the information necessary to determine the tax benefits which should be carried forward to offset payment amounts in 2008 and later periods," it was, in OPG's submission, making this observation in the context of its findings on at least two material adjustments to issues that had an impact on OPG's tax loss calculations.

30. Had these adjustments been raised during the hearing, no doubt OPG would have made additional submissions on the "link" between the proposed revenue requirement reduction and regulatory tax losses, the inconsistency embedded in the OEB's approach as outlined above, and the need, given the OEB's concerns, for a variance account to enable the tax loss calculations and associated revenue requirement for the test period to reflect the OEB's determinations.

31. While it is easy to say, with the benefit of hindsight, that the OEB did not have the evidence it needed to make certain calculations in light of findings that were made known for the first time in its Decision, there is no basis for SEC's claim, and no support in the OEB's Decision itself, that OPG is somehow responsible for having filed "inadequate" evidence or failed to ask for a variance account in the first place.

32. The need for a variance account only became apparent once the OEB's Decision and directions on how the tax loss calculations "should be" done and that they should be reviewed again in a subsequent hearing became known.

33. Indeed, it is part of OPG's complaint that, having decided tax losses associated with the Bruce NGS and operating losses in 2007 should be excluded from the calculations, the OEB purported to sever any connection between OPG's mitigation proposal and tax losses and then still required OPG to implement what was, effectively at that point, an arbitrary revenue requirement reduction based on a slightly amended version of OPG's original proposal.

34. As OPG argued in its initial submission on this motion, once the OEB decided that it was not satisfied there were regulatory tax losses, that they had not been correctly calculated, or that there was not sufficient evidence to determine the amount of those regulatory tax losses in accordance with principles the OEB believed applicable, the proper response was not to require OPG to proceed to reduce its revenue requirement by approximately \$342 million in any event. Rather, the proper course should have been either to remove the impact of the tax losses from any calculation of the revenue requirement for the test period and remit the matter for further consideration in the future or, to establish a variance account to record the difference between the revenue requirement reduction of \$342 million embedded in the test period payment amounts and the amount of regulatory tax losses recalculated in accordance with the OEB's directions.

Form Over Substance

35. SEC in its submission admits that the Decision, by not establishing a tax loss variance account, failed to fashion "the optimum remedy," and that the use of a variance account as proposed in this motion would make it a "better decision." Indeed, SEC admits that its biggest concern is not one of substance or the relief sought on the motion at all, but purely a concern over procedure. In essence, SEC's real concern, it says, is that because OPG's first motion to vary was dismissed (albeit without a hearing), it should not, purely as a matter of procedure, be allowed to seek further review or relief from the OEB.

36. SEC argues that by allowing OPG to argue the current motion, the OEB has "lost control of its own process" and undermined "the principle of finality of decisions," such that "no decision is ever final."

37. This argument does not stand up to scrutiny: it is not founded on the facts; it relies on highly exaggerated and speculative extrapolations as to implications for the future; and it is not responsive at all to the particular circumstances of this case.

38. The circumstances of this case are highly unique. This was OPG's first payment amounts application before the OEB. Indeed, this case involved the first application by any generator to have payment amounts set by the OEB. The manner in which the OEB dealt with tax loss carry forwards was never raised during the hearing, such that neither OPG nor intervenors ever had the

opportunity to address the OEB's approach. Additionally, the amounts at issue are very material - a revenue requirement impact in the test period of approximately \$342 million.

39. In addition to the unique aspects of OPG's situation, there are two very significant additional facts: (i) OPG was denied the opportunity to be heard on the threshold issue by the review panel in its first motion; and (ii) the review panel did not address three of the four issues raised in OPG's first motion.

40. SEC itself submits that it would have been "better if the Board panel on that motion had allowed submissions, at least on the threshold issue," and that the OEB "should be reluctant to dispose of a matter without hearing from the parties except in the most glaringly obvious cases."

41. Further, the OEB's rules of procedure are not so rigid as SEC's submission urges. The fact that there is no specific provision for further review of a review motion is, as Board staff points out, not dispositive of anything, because the OEB's Rules of Practice are a means to an end, not an end in themselves.

42. That end is the just disposition *on the merits* of every proceeding before the OEB. Rule 1.03 provides:

The Board may dispense with, amend, vary or supplement, with or without a hearing, all or part of any Rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.

43. Rule 2.01 provides:

These Rules shall be liberally construed in the public interest to secure the most just, expeditious, and efficient determination on the merits of every proceeding before the Board.

44. Rule 2.02 provides:

Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

45. Finally, Rule 5.01(a) provides:

Where a party to a proceeding has not complied with a requirement of these Rules or a procedural order, the Board may:

- (a) grant all necessary relief, including amending the procedural order, on such conditions as the Board considers appropriate;

46. These procedural rules provide ample flexibility to the OEB to hear and determine OPG's current motion. These rules have been in place and applied for many years, without undermining the integrity of the OEB's processes.

47. In OPG's view, the OEB has applied, and can continue to apply, its rules appropriately, having regard to the demands of each case, as the rules contemplate, where it is in the public interest to do so and where it will enable the OEB to secure "the most just, expeditious and efficient determination *on the merits*" [emphasis added] of every proceeding before it.

48. Finally, the arguments of both SEC and CME, to the effect that OPG has no procedural right to a further hearing on this motion, are now moot. The OEB has, in its Notice of Motion and Procedural Order No. 1 in this proceeding, already decided to hold an oral hearing "at which the threshold question of whether OPG's Motion raises a substantial question as to the correctness of the Decision and the merits of the Motion, are considered concurrently." The alleged procedural bar relied on by SEC, therefore, has already been removed by Procedural Order No. 1. With the OEB having issued Procedural Order No. 1, the threshold issue, and the merits, must be considered afresh. The review panel's decision to dismiss the original motion without a hearing on preliminary grounds is simply not relevant.

The Need for a Variance Account

49. Both SEC and CME oppose the relief sought, relying exclusively on the review panel's decision, that the singular purpose of OPG's motion is to avoid a "potential" interpretation of the Decision by a future panel of the OEB that would result in "double jeopardy." As discussed above, this argument is incorrect. The motion is, as the initial submission makes clear, concerned with errors in the Decision itself.

50. What CME and SEC have failed to address is that the finding in the Decision reducing the test period revenue requirement by \$342 million is final. If not varied by the introduction of

a tax loss variance account, the OEB's findings will be a permanent revenue requirement reduction in the test period, not reviewable in a future case as a result of the legal prohibition against retroactive rate making.¹

51. While OPG appreciates, at some level, the sentiment expressed by CME and SEC that the extent to which the prior period tax losses allocated to consumers is materially greater or less than \$342 million "will be determined" in future proceedings, it is OPG's view that this cannot, as a matter of law, be so in relation to the test period in the absence of a variance account.

52. In fact, if CME genuinely believes, as it represents in its argument, that "the extent to which the prior period tax losses allocated to rate payers is determined to be materially greater or less than \$342 million will be determined in those proceedings," then it should have no objection to the creation of the tax loss variance account proposed by OPG, because that will enable the future panel to do precisely what CME says it should.

53. Similarly, OPG is also appreciative of the acknowledgement of CME and SEC's counsel that the Decision cannot reasonably be interpreted by a future OEB panel as involving any potential risk of double jeopardy with respect to the application of interim period tax losses. However, counsel and parties' positions may change. Further, CME and SEC are only two of the many potential intervenors in a future OPG payment amounts case.

54. The Decision contains clear language that the OEB was "not convinced that regulatory tax loss carry forwards existed at the end of 2007," that there is "no connection" between the proposed (and now enforced and implemented) revenue requirement reduction of \$342 million and any interim period regulatory tax losses, that OPG had effectively agreed to "absorb" whatever tax provision would otherwise have been required in the test period and that OPG's proposal to reduce the revenue requirement was "simply mitigation." The Decision, is therefore, open to the interpretation that, as a result of these findings, all interim period tax losses remain available as an offset against taxable income in future years. The arguments of CME and SEC, in characterizing OPG's concerns as being overly "nervous," gloss over the plain words of the

¹ The issue of retroactive rate making was reviewed extensively in OPG's motion for interim rates earlier on in this proceeding.

Decision. On the basis of the Decision, it appears to be open to others to take a contrary view and to argue for further revenue requirement reductions based on re-calculated interim period tax losses.

Decision Not Consistent with the Evidence

55. At paragraphs 1.2.2 and 2.2.5(b) SEC, while arguing that the Decision was not “optimal,” claims that the Decision was nevertheless “reasonable and consistent with the evidence.” This is not the case.

56. In OPG’s submission, the Decision on tax losses and mitigation was incorrect precisely because it was *inconsistent* with the evidence, as extensively substantiated in OPG’s initial submission on this motion and in paragraphs 10 to 20 above. Neither SEC nor CME have addressed this aspect of OPG’s submissions at all. Neither of these intervenors has offered any justification for the OEB’s conclusion in the Decision that the \$342 million had nothing to do with tax losses. Indeed, both CME and SEC appeared to assume, in arguing that “double jeopardy” should not be of future concern to OPG, that the revenue requirement reduction imposed *was* based on a calculation of interim period tax losses.

57. That, as noted above, is not what the Decision says - quite to the contrary. The Decision says OPG’s mitigation proposal was “simply mitigation” in respect of which there was “no connection” to regulatory tax losses and that OPG merely agreed to “absorb” any taxes otherwise payable in the test period. It is these findings which OPG claims are unsupported by any evidence.

58. Similarly, in paragraphs 2.2.5(a) and 4.1.4 of its argument, SEC claims that the OEB gave OPG “roughly” what OPG had proposed in the first place. This is a wholly erroneous and unsupported statement.

59. OPG’s proposal to apply regulatory tax loss carry forwards was made in a context where the Bruce station assets, including the asset recovery cost (“ARC”) of nuclear waste and decommissioning obligations, were treated in the same manner as regulated rate base.

60. In addition, as noted above, the OEB changed many of the fundamental premises upon which OPG's regulatory tax loss proposal was based, including OPG's proposal to credit tax losses to customers associated with the Bruce station assets and nuclear operating losses in 2007.

61. Finally, as noted above, OPG's test period revenue requirement proposal was based, however calculated, on a conception of regulatory tax losses available to be carried forward. The OEB held, in the Decision, that there was no linkage.

62. The fact that adjustments to OPG's proposals on these issues would change the calculation of regulatory tax losses was explicitly highlighted by OPG during the hearing. For example, in its Reply Argument, OPG pointed out that:

There are complex interactions among some of the components of the payment amount calculation, for example, the calculation of tax losses during the test period and the associated impact on the payment amounts, and OPG is best positioned to correctly perform these calculations within the parameters set by the OEB. This approach is analogous to that used in rate hearing where the OEB directs the applicant to file a draft rate order reflecting the Board's findings.

(Compendium, p. 105)

63. It is simply not true, therefore, that the OEB gave OPG "roughly what it proposed in the first place."

Denial of Natural Justice

64. With respect to the question of natural justice, SEC tries to characterize the issue as one of "fashioning a remedy that was not something any of the parties proposed." OPG's concern is not that the OEB resolved the issue of tax losses in a manner that differed from any of the specific choices advanced by the parties. OPG's concern is that the tax loss and mitigation issue was disposed of on a basis that was well beyond the scope of *any* discussion at the hearing, and in respect of which neither OPG, nor any other participant in the hearing, had an opportunity to be heard.

65. As argued by the PWU, it is a denial of natural justice, and therefore an error of law, for a tribunal to decide a case on a ground that was not advanced by the parties and which they have not been given an opportunity to address.

Amacon Property Management Services Inc. v. Dutt, 2008 BCSC
889 (Can LII)

*International Woodworkers of America, Local 2-69 v.
Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282

66. That is what happened here. There was never any suggestion during the hearing that even if the OEB did not agree with OPG's calculation of tax losses available to reduce the revenue requirement, OPG should nevertheless be required to give effect to those reductions on the basis that they were "simply mitigation" with "no connection" to the tax losses and that OPG had merely agreed "to absorb" any provision for taxes payable during the test period.

67. Had such suggestion been made, OPG would have advanced precisely the arguments it is advancing on this motion - that there was no evidence to support such a conclusion, that requiring OPG to reduce its revenue requirement by \$342 million without legal justification is beyond the OEB's jurisdiction and that the only proper way to deal with the OEB's concerns around calculation issues would be to create the tax loss variance account that is being sought now.

68. The circumstances cited by SEC in its argument involving "compromise positions" are, by definition, circumstances in which all parties have already had an adequate opportunity to be heard and on which there has been a full debate. SEC's examples do not involve circumstances in which the ultimate disposition, as it was here, involves an outcome which has no basis in evidence and which was never raised or contemplated during the hearing at all.

OEB or Court Review?

69. SEC also makes the argument that OPG's motion should be rejected because the grounds, error of law and excess of jurisdiction, are "more appropriate to a court appeal than a motion for review." This argument fails for two reasons.

70. First, SEC's argument is directly contradicted by express findings made by the OEB in respect of Mr. Thompson's motion for review of the NGEIR decision. There, as OPG outlined in its initial submission, the OEB found that its powers of review were not limited to items enumerated in Rule 44 but extended to errors of law and jurisdiction including natural justice/procedural fairness issues. The OEB itself has already found, therefore, that the argument SEC has advanced on this point is not correct.

71. Second, it would be an odd result for the OEB to say, on the one hand, it agrees that a serious issue has been raised as to the correctness of an OEB decision but, because it is an error of law or jurisdiction, a remedy is only available from the Divisional Court. In OPG's submission, if there is a way for the OEB to fix a decision itself, without the costs and delays associated with an appeal to the Divisional Court, it is a better solution. It is more efficient and, so long as the OEB has jurisdiction, the preferable procedure where possible.²

Board Staff Submission

72. OPG agrees with the conclusion of Board staff's submission – that there is merit in OPG's request for a variance account, the disposition of which would be reviewed in a future proceeding.

73. OPG does not necessarily accept all of staff's summary of the law relating to the requirement to set a fair return but, in light of staff's ultimate agreement with OPG's request, it is not necessary for the OEB to consider these differences at this time.

74. OPG does, however, wish to respond to staff's submission on pages 4 and 5 to the effect that OPG "did not raise concerns that by crediting consumers with the tax losses by deducting them from the revenue requirement, it was affecting the opportunity to earn its approved return which had been set by the Board at 8.65%."

75. OPG's original proposal was based on its calculation of regulatory tax losses attributable to the prescribed assets under O. Reg. 53/05. It was OPG's view that its tax loss and mitigation

² SEC's allegation that OPG's motion is simply a device to extend the time for an appeal is effectively an argument of bad faith. Such allegations should not be made without the clearest of evidence. In this case, the allegation is baseless and should be ignored.

proposal had no impact on its ability to earn its approved return since the reduction in payment amounts was used to satisfy a regulatory liability from a prior period.

76. For essentially the same reason, OPG also disagrees with staff's characterization of the issue for determination on this motion. Staff says the issue is "whether, when the OEB adopted OPG's proposal to effect mitigation through a reduction in revenue requirement, it affected the opportunity of the utility to earn the fair return it had earlier determined to be 8.65%."

77. First, it is not correct to say that the OEB "adopted" OPG's proposal as discussed in more detail in paragraphs 55 to 63 above. OPG's proposal would have resulted in the regulatory liability that the prior period tax losses represented being satisfied. The OEB, by delinking the "mitigation" from the regulatory liability represented by the tax losses, simply reduced OPG's ROE while leaving the regulatory liability from the prior period tax losses untouched. This can be seen clearly in Table 1 of OPG's submission dated January 28, 2009 which demonstrates that the \$342 revenue requirement reduction unrelated to tax loss carry forwards results in a revenue deficiency and an ROE of 4.1% rather than the fair return of 8.65% determined by the OEB. By delinking the revenue requirement adjustment from the tax losses, there is no regulatory liability that is being paid down and in fact, the regulatory liability associated with tax losses remains to be determined in the next hearing.

78. In OPG's view the key issues in this motion are:

- 1) whether there was any evidentiary support for the OEB's conclusion that the revenue requirement reduction associated with OPG's mitigation proposal was "not connected" to regulatory tax losses and that the proposal was "simply mitigation" under which OPG had merely agreed "to absorb" whatever taxes might otherwise have been payable; and
- 2) whether, having made the finding that OPG's mitigation proposal was "not connected" to regulatory tax losses, there was no longer any legitimate basis to order the revenue requirement reduction at all because, in the absence of any legitimate basis, the reduction would have the effect of denying OPG the opportunity to earn its regulated return.

79. OPG wishes to be clear that these issues are, in effect, in the alternative. If there was no basis for the finding which delinked the revenue requirement reduction from the regulatory tax losses, the finding should be set aside and a variance account established to enable the mitigation (tax loss) amount to be adjusted in accordance with other findings and directions of the OEB in the Decision.

80. If the OEB maintains the view that there is no connection between the revenue requirement reduction and regulatory tax losses, then the OEB lacks any legitimate basis upon which it could order the reduction, and a variance account should be established to enable the entire mitigation amount of \$342 million to be reversed and returned to OPG.

Conclusion

81. For the reasons set out in OPG's Submission dated January 28, 2009 and this Reply Submission, OPG requests that the relief requested in its Notice of Motion dated January 28, 2009 be granted.