

ONTARIO ENERGY BOARD

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.

NOTICE OF MOTION

Ontario Power Generation Inc. (“OPG”) will make a motion to the Ontario Energy Board (“OEB”) at its offices at 2300 Yonge Street, Toronto on a date and time to be fixed by the OEB.

The Motion is for:

1. a review and variance of the OEB’s Decision with Reasons dated March 10, 2011 in EB-2010-0008 (the “Decision”) at page 91 in which the OEB did not accept OPG’s update of the pension and other post employment benefits (“OPEB”) costs, provided to the OEB by way of Ex. N-T1-S1 (the “Update”), for purposes of establishing OPG’s revenue requirement for the test period and did not accept OPG’s request for a variance account covering the cost of pension and OPEB and associated tax impacts;
2. an Order that OPG satisfies the “threshold test” in Rule 45.01 of the OEB’s Rules of Practice and Procedure;
3. an Order for an oral hearing of the Motion on the merits;
4. an Order:

- (a) varying the finding that the pension and OPEB costs filed on May 26, 2010 as part of OPG's original pre-filed evidence (the "Pre-filed Evidence") was the best evidence of such costs on the record;
- (b) establishing a variance account to record the difference between the pension and OPEB costs reflected in the Decision and the resulting payment amounts order and the actual pension and OPEB costs for the prescribed facilities and associated tax impacts;

or, in the alternative to subparagraph (b) above,

- (c) finding that the Update was the best evidence of the pension and OPEB costs for the test period and presents the appropriate amount for the pension and OPEB costs in OPG's test period revenue requirement;
- (d) and as a method to give effect to (c) above, given the OEB's pending payment amounts order, establishing a deferral account to record the difference between the pension and OPEB costs in Pre-filed Evidence and the Update, including the associated tax impacts, over the 22 months from March 1, 2011 to December 31, 2012, with an opening balance of \$207.3 million, with such account to be disposed of in OPG's next payment amounts proceeding.

The Grounds for the Motion Are:

Pension and OPEB Update

1. In the Pre-filed Evidence, OPG sought the recovery of the forecast pension and OPEB costs based upon the assumptions set out in Ex. F4-T3-S1, section 6.3.2. The amount sought for the test period was \$633 million (Ex. F4-T3-S1 Chart 9, p. 25).
2. By way of the Update, OPG indicated that the forecast of pension and OPEB costs had increased over the initial test period forecast of \$633 million by \$251.5 million for nuclear and \$12.7 million for regulated hydroelectric. In the Update, OPG stated that discount rates had declined significantly relative to those set out in the Pre-filed Evidence and that discount rate declines, together with the offsetting impact of improved fund

performance, were the primary factors in the net increase in the forecast pension and OPEB costs for the test period.

3. In conjunction with the Update, OPG requested approval to establish a new variance account “to record the revenue requirement impact of differences between forecast and actual pension and OPEB costs.” (Ex. N-T1-S1, pages 3 and 4). The operation of the proposed variance account, which was to be called the Pension and Other Post Employment Benefits Cost Variance Account, was discussed in an amendment to Ex. H1-T3-S1 filed on October 8, 2010. This account would have recorded the difference between the pension and OPEB costs reflected in OPG’s approved payment amounts, which would have been based on the Pre-filed Evidence forecast of \$633 million, and the actual pension and OPEB costs and associated tax impacts during the test period for the prescribed facilities.
4. In proposing the variance account, OPG recognized the need to recover the updated pension and OPEB costs. It was OPG’s view that a variance account was an appropriate vehicle for their recovery because of the material amount of these costs, the variability of the factors underlying them and the fact that the variability was not under management’s control. In addition, OPG noted that the Update was introduced when the hearing process was already well advanced and that incorporating the updated costs into payment amounts may have impacted the progress of the hearing (Transcript, Vol. 15, p. 100).
5. In support of its request, OPG filed a projected actuarial accounting assessment of OPG-wide pension and OPEB costs for the test period. This assessment was provided by OPG’s external actuaries, Mercer (Canada) Limited (“Mercer”), using data as of August 2010. The letter from Mercer (the “Mercer Report”) setting out the updated OPG-wide projection was presented in Attachment 1 to Ex. H1-T3-S1. The costs in the Update were based on this actuarial assessment.
6. OPG’s actual pension and OPEB costs for the test period have not finally been determined. Costs for 2011 are subject to the final determination of the contribution levels (expected in May 2011) and costs for 2012 are subject to final determination of the

contribution levels and the year-end 2011 actuarial assessment (Transcript Vol. 10, pp. 182-183; Transcript Vol. 15, pp. 100-101).

7. Given the request for a variance account in the Update, OPG did not request an increase to the test period revenue requirement to reflect the increase in pension and OPEB costs. However, in its response to parties objecting to the establishment of a variance account for pension and OPEB costs, OPG stated in its Reply Argument (p. 134) that if the OEB were to reject the requested variance account, OPG's revenue requirement for the test period should incorporate the most current estimates of its test period pension and OPEB costs, which were presented in the Update.

The OEB's Decision

8. In its decision the OEB stated (p. 91):

The request for a variance account is denied. Pension and OPEB costs should be included in the forecast of expenses in the same way as other OM&A expenses, and then managed by the company within its overall operations. The Board finds that the forecast included in the pre-filed evidence was more rigorous because it was based on a set of internally consistent assumptions, while the update is based on the AA bond yields which will change. Accordingly, the Board finds that the allowance for pension and OPEB expenses in the pre-filed evidence is appropriate, as it is the best evidence on this matter.

9. The OEB also stated (p. 91):

The Board is reluctant to make selective updates to the evidence. The bond yields have changed, and will continue to change, as noted by the actuary in the updated statement. Further, the Board notes that the financial market conditions are variable and have indeed improved since the impact statement was filed. The Board concludes that an adjustment to the allowance is not warranted.

Factual Error

10. The OEB's decision appears to be premised on the following aspects:
 - (i) a conclusion that the Pre-filed Evidence is somehow different or better than the Update because it is based on a more rigorous analysis that is internally consistent;

- (ii) a view that the Update reflects the change of only one variable, i.e., AA bond yields, and is not a complete analysis; and
- (iii) a conclusion that OPG's Update was selective rather than addressing material changes to all costs.

The OEB erred in fact in concluding that: (a) the Update was less rigorous and not internally consistent and that it reflected the change of only one variable, such that it was not the best evidence of OPG's forecast pension and OPEB costs for the test period, and (b) the Update was a selective update.

11. The errors of fact raise material questions as to the correctness of the OEB's decision in respect of pension and OPEB costs and should be corrected by granting the relief sought above. The findings are contrary to the evidence that was before the panel. Once corrected, the pension and OPEB costs for the test period will be materially different than that set out in the Decision. As such, OPG satisfies the threshold test in Rule 45.01 of the OEB's Rules of Practice and Procedure.
12. In establishing just and reasonable rates, the OEB is obliged to permit the recovery of, and OPG is entitled to recover, reasonable and prudently incurred costs. Because of the errors in fact, the Decision does not permit the recovery of reasonable and prudently incurred costs in respect of pension and OPEB costs for the test period and as such the payments amounts are not just and reasonable.

Update Provides the Best Evidence

13. The OEB incorrectly concludes that the updated pension and OPEB cost evidence is not a complete analysis and was not performed on an internally consistent basis.
14. On the basis of the evidence on the record, the analysis underpinning the Update was the same analysis as that presented in the Pre-filed Evidence. As such, the Update is both internally consistent and rigorous. In fact, the Update provides a more accurate forecast because it was based on more current information and developed closer to the date of the final determination of pension and OPEB costs for the test period.

15. Ex. F4-T3-S1, section 6.3 discusses how pension and OPEB costs were determined for the Pre-filed Evidence and identifies the main assumptions (Chart 8). There was no change in the Update to the methodology used to calculate pension and OPEB costs. Both were based on an actuarial assessment in which the values for all parameters were considered. Section 6.3.2 deals with the manner in which the specific assumptions underlying the calculations of the costs are established. By examining each of these key assumptions in Pre-filed Evidence the Update, it is clear that the methodology described in Section 6.3.2 was also used in developing the update to pension and OPEB costs.
16. Attached to this Notice of Motion is the affidavit of Mr. Nathan Reeve, Vice President, Financial Services at OPG. As indicated in Mr. Reeve's affidavit the analysis and methodology employed by OPG with respect to the Pre-filed Evidence was the same as that employed in preparing the Update.
17. Included in Mr. Reeve's affidavit is a table in which each of the main assumptions used to develop the pension and OPEB cost forecast identified in the Pre-filed Evidence is compared between the Pre-filed Evidence and the Update. As demonstrated in that table, the Update incorporated updated information with respect to discount rates and pension fund performance, consistent with the manner in which the forecast costs were calculated in the Pre-filed Evidence. For example, the OEB was incorrect in the Decision (p. 91) when it states that only changes in AA bond yields were considered in the Update. As a review of the evidence shows and Mr. Reeve's affidavit confirms, OPG did not selectively update only this one variable. It considered each assumption used in the actuarial assessment and made changes, where warranted, in an internally consistent fashion. Thus, contrary to the OEB's Decision, the Pre-filed Evidence and the Update were prepared using identical methodologies and with the same degree of rigour.
18. The OEB incorrectly concludes that pension and OPEB costs can be forecast in the same way as other OM&A costs and that any variance can be managed within OPG's overall operations. The Update demonstrates that pension and OPEB costs vary primarily based on changes to the discount rate and the performance of the pension fund. Neither of these factors is subject to the control of OPG's management. Denying OPG either a variance

account or, in the alternative, a reasonable forecast of its pension and OPEB costs (based upon the analysis included in the Update) will necessarily mean that OPG will not be able to recover reasonable and prudently incurred costs.

Updates Were Not Selective

19. The Board's Rules of Practice and Procedure state at section 11.02:

Where a party becomes aware of new information that constitutes a material change to evidence already before the Board before the decision or order is issued, the party shall serve and file appropriate amendments to the evidentiary record, or serve and file the new information.

20. The rule sets out an obligation on applicants that OPG fully met. Based upon the evidence on the record, OPG established \$10 million as the materiality threshold and canvassed the business units for information on all such changes. Using this process, OPG found only three areas where updates were warranted - CNSC fees, management compensation and pension and OPEB costs (Transcript, Vol. 15, p. 104-106).

21. It is unfair and incorrect for the OEB to reject the Update as being a "selective update" when the Update was filed in accordance with the OEB's own rules and as part of a thorough review by the applicant that addressed both increases and decreases in costs. Exemplifying the unfairness and inconsistency of the Decision is the fact that the OEB readily accepted the updates to the CNSC fees and management compensation also described in Exhibit N-T1-S1 (Decision, p. 49) even though those updates were derived from the same process.

22. The OEB's Rules of Practice and Procedure; and

23. Such further grounds as counsel may advise and the OEB may permit.

The Following Documentary Evidence will be used at the motion:

1. the Affidavit of Mr. Nathan Reeve, Vice President, Financial Services;

2. materials from the record in EB-2010-0008, including those referred to in the Affidavit of Mr. Nathan Reeve and accompanying exhibits;
3. the Decision;
4. OPG's submissions on this Motion to be delivered in accordance with the OEB's procedural order or orders; and
5. such further evidence as counsel may advise and the OEB may permit.

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