

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

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APR 08 2011

BETWEEN:

ONTARIO ENERGY BOARD
OFFICE OF THE BOARD SECRETARY

POWER WORKERS' UNION,
CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1000

Appellant

- and -

THE ONTARIO ENERGY BOARD and
ONTARIO POWER GENERATION INC.

Respondents

APPEAL MADE UNDER the
Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, s. 33

NOTICE OF APPEAL

THE APPELLANT APPEALS to the Divisional Court from the decision with reasons (the "Decision") of the Ontario Energy Board (the "OEB or the "Board"), dated March 10, 2011 in Board proceeding EB-2010-0008 (the "Proceeding") made at Toronto, Ontario, which approved the 2011 and 2012 payment amounts for the output of certain of Ontario Power Generation Inc.'s ("OPG") generating facilities, pursuant to the *Ontario Energy Board Act, 1998*.

THE APPELLANT ASKS that the Appeal be allowed and orders be granted as follows:

1. An order the Board's determination regarding OPG's revenue requirement with respect to the compensation component of Operations, Maintenance and Administration ("OM&A") and the payment amounts arising therefrom be set aside and that the matter be remitted to a differently constituted panel of the Board for a new hearing with respect to these issues, with such directions as the Court considers just;
2. In the alternative, an order that the Decision be set aside in its entirety and that the matter be remitted to a differently constituted panel of the Board for a new hearing, with such directions as the Court considers just;
3. Costs to the Appellant on the appeal; and
4. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

1. In EB-2010-0008, OPG applied to the Board for orders pursuant to s. 78.1 of the *Ontario Energy Board Act, 1998* for an order or orders determining 2011 and 2012 payment amounts for the output of certain of its generating facilities.
2. On a payment amount application, payment amounts are determined on the basis of the annual revenue requirement for the applicant as approved by the Board. The applicant is entitled to recover, and the Board is required to approve the applicant's prudently incurred costs. The failure to permit an applicant to recover its prudently incurred costs is a legal error.

3. A major category of costs that OPG sought to recover in EB-2010-0008 was its OM&A costs in relation to its prescribed nuclear facilities (“Nuclear OM&A”). In particular, OPG sought recovery of \$2,021.2MM for 2011 and \$2,067.9MM for 2012 for Nuclear OM&A. OPG’s Nuclear OM&A request was a significant issue in the proceeding.

4. A major component of OPG’s Nuclear OM&A pertains to compensation costs. In particular, out of the total Nuclear OM&A OPG sought to recover in the 2011 and 2012 payment amounts were compensation costs of \$1,196.23MM and \$1,210.84MM for 2011 and 2012 respectively (the “Nuclear Compensation Costs”). The Nuclear Compensation Costs issue was a significant issue in the proceeding.

5. In the Decision, the Board disallowed a portion of the Nuclear Compensation Costs. In particular, the Board reduced OPG’s claim in respect of Nuclear Compensation Costs by \$55MM for 2011 and \$90MM for 2012. In doing so, the Board erred in law by applying the incorrect legal test to determine the prudence of the Nuclear Compensation Costs claimed by OPG. In particular, the Board:

- (a) Erred by concluding that a different legal test for prudence was applicable for future costs and historical costs;
- (b) Erred by failing to recognize that the vast majority of the Nuclear Compensation Costs claimed by OPG were historical costs and not future costs;

- (c) Erred by considering irrelevant and extraneous considerations in determining whether the Nuclear Compensation Costs were prudently incurred, including customer bill impacts;
 - (d) Erred in concluding that the Nuclear Compensation Costs were not prudent based collectively bargained compensation rates in the absence any finding or any evidence that OPG had any reasonably available alternative option which would have allowed them to reduce compensation rates which they did not pursue;
 - (e) Erred in concluding the Nuclear Compensation Costs were not prudent by virtue of benchmarking evidence suggesting that OPG had excess headcount in its radiation protection function, without regard to OPG's expertise in and statutory obligations to maintain nuclear safety and security by determining the appropriate complement of qualified personnel and;
6. Such further and other grounds as this Honourable Court may deem just.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. The *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B, s. 33 provides a right of appeal to the Divisional Court from any Order of the Board on questions of law or jurisdiction;
2. Leave to appeal is not required under section 33 of the *Ontario Energy Board Act*, 1998; and

3. Such further grounds as counsel may advise and this Court may accept.

THE APPELLANT requests that this appeal be heard at Toronto, Ontario.

April 8, 2011

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POWER WORKERS' UNION et al
Appellant

- and -

Court File No.
THE ONTARIO ENERGY BOARD et al

**ONTARIO SUPERIOR COURT OF
JUSTICE
(Divisional Court)**

Proceeding commenced at Toronto

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