

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 and Order or Orders
determining payment amounts for the output of certain
generating facilities.

Submission of the Power Workers' Union

1. These are the submissions of the Power Workers' Union ("PWU") in respect of Ontario Power Generation's ("OPG") motion for review and variance of the Ontario Energy Board ("OEB" or "Board") panel's Decision with Reasons dated March 10, 2011 in EB-2010-0008 (the "EB-2010-0008 Decision").
2. Rule 45.1 of the OEB Rules of Practice and Procedure sets out that the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting a review on the merits of the motion. In Procedural Order No.1, dated April 15, 2011, the Board determined to consider the threshold question for OPG's motion and invites parties to make submission on both the threshold issue and the ultimate merits of the Motion.
3. The PWU was an intervenor and active participant in EB-2010-0088. The PWU supported OPG's application, including its position with respect to the subject matter of this motion.
4. The PWU's submissions are in response to the Board's request to the parties to make submissions on both the threshold issue and ultimate merits of OPG's motion.

The OPG Motion

5. In the Factum dated May 6, 2011, OPG sought, by way of its motion, an Order:

- a. Varying Board's finding in the EB-2010-0008 Decision that the Pre-filed Evidence was the best evidence in respect of OPG's pension and other post-employment benefits ("OPEB") costs for the test period on the record.
- b. Establishing a variance account to record the difference between the pension and OPEB costs reflected in the EB-2010-0008 Decision and the resulting payment order and OPG's actual pension and OPEB costs for the test period and associated tax impacts.
- c. In the alternative to the variance account outlined in b) OPG requested for a finding that the updated pension and OPEB costs, filed in EB-2010-0008 on September 30, 2010 as Exhibit N, Tab 1, Schedule 1 ("Update"), provided the best evidence of OPG's pension and OPEB costs for the test period and therefore the appropriate amount to be used in determining the pension and OPEB costs underpinning OPG's test period revenue requirement. To give effect to this alternative, OPG proposed establishing a deferral account to record the difference between the pension and OPEB costs in the Pre-filed Evidence and the Update, including the associated tax impacts, over the 22 months from March 1, 2011 to December 31, 2012. OPG submitted that that difference will result in an opening balance for the deferral account of \$207.3 million.

6. As outlined by OPG in its factum, in the Pre-filed Evidence, filed on May 26, 2010, OPG provided comprehensive evidence to support its request to recover forecast pension and OPEB costs for the test period in the amount of \$633 million including the methodology and assumptions used to determine these costs. By way of the Update, OPG indicated that its forecast of pension and OPEB costs had increased over the initial test period forecast of \$633 million set out in the Pre-filed Evidence by \$251.5 million for nuclear and \$12.7 million for regulated hydroelectric, respectively, for a total of \$264.2 million.

7. In the Update, OPG stated that the \$633 million pension and OPEB cost forecast included in the Pre-filed Evidence was based on, among other things, discount rates (Ex. F4-T3-S1, Chart 8) forecast during the 2010-2014 business planning process which

was finalized during the fall of 2009. OPG noted that since the beginning of 2010, these discount rates had declined significantly. Pension and OPEB costs are also based on fund performance and the Update provided updated information on pension fund performance.

8. OPG identified the decline in discount rates and improved fund performance, factors that are beyond OPG's control, as the primary factors resulting in the net increase in the forecast pension and OPEB costs for the test period. In addition, the forecast of pension contributions for 2011 and 2012 had changed. The Update reflected these changes to forecast pension contributions. As indicated in Exhibit H1, Tab 3, Schedule 1, the Update was based on a projected actuarial accounting assessment of OPG-wide pension and OPEB costs for the test period provided by OPG's external actuaries, Mercer (Canada) Limited, using data as of August 2010 ("Actuarial Assessment").

The Threshold Issue

9. Rule 42.02 of the OEB Rules of Practice and Procedure states that any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision, while Rule 44.01 states that a motion under Rule 42.02 is required to set out the grounds that raise a question as to the correctness of the order or decision.

10. As noted by OPG the threshold question was articulated in the OEB's Decision on a Motion to Review in the Natural Gas Electricity Interface Review Decision ("NGEIR Decision")¹. In that decision the Board determined that the threshold question requires the motion to review to meet the following tests²:

- the grounds must raise a question as to the correctness of the order or decision;

¹ Paragraph 20, EB-2011-0090 OPG Factum.

² Page 9-10, Ontario Energy Board, EB-2009-0038, Decision and Order on Motion to Review and Vary, May 11, 2009.

- the issues raised that challenge the correctness of the order or decision must be such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended;
- there must be an identifiable error in the decision as a review is not an opportunity for a party to reargue the case;
- in demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature; it is not enough to argue that conflicting evidence should have been interpreted differently; and
- the alleged error must be material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

11. The PWU is of the view OPG has raised the question as to the correctness of the Board's finding in the EB-2010-0008 Decision in respect of the allowance for pension and OPEB expenses. The PWU submits that in its factum OPG clearly demonstrates that there is an identifiable error in the EB-2010-0008 decision. This Motion to review therefore is concerned with this error and not a review to reargue the case.

12. OPG's submission in this motion for review is not limited to the argument that conflicting evidence should have been interpreted differently. In demonstrating that there is an error, the PWU submits that the Board's finding that 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 yield is not supported by the record of the evidence in EB-2010-0008. The PWU notes that the Update incorporated the assumptions and methods used in the projected actuarial accounting assessment of OPG-wide pension and OPEB costs for the test period provided by OPG's external actuaries, Mercer, and filed by OPG on October 8, 2010, as Exhibit H1, Tab 3, Schedule 1, Attachment 1 ("Actuarial Assessment").

13. The PWU also notes that at page 9 of Exhibit H1, Tab 3, Schedule 1, OPG reported that the OPG-wide projection was assigned to the prescribed facilities using the same methodology used in EB-2007-0905 and in the Pre-filed Evidence, as described in EB-2010-0008 at Exhibit F4, Tab 3, Schedule 1, page 24. Furthermore, the Affidavit of Mr. Nathan Reeve contained in the Notice of Motion filed by OPG on March 30, 2011 confirms that in deriving the projected pension and OPEB expenses for the test period, provided in the Update, OPG considered underlying assumptions and made changes where warranted based on the Actuarial Assessment in an internally consistent fashion.

14. In demonstrating that there is an error, the PWU also submits that a finding indicating that the Update was a selective update is inconsistent with Rule 11.02 of the OEB's Rules of Practice and Procedure. That rule provides that where a party becomes aware of new information that constitutes a material change to evidence already before the OEB before a decision or order is issued, that party must file appropriate amendments to the evidentiary record based on the new information. The PWU is of the view that the pension and OPEB cost forecast for the test period provided in the Update constituted new information and a material change to the evidence.

15. In addition, the PWU agrees with OPG that once the finding is corrected, the outcome in respect of the pension and OPEB costs for the test period will be materially different than what the Board determined in the EB-2010-0008 Decision.

16. The PWU concludes that OPG's motion meets the requirement of the threshold question as set out in Rule 44.01 and in the NGEIR Decision.

The Merits of the Motion

17. The PWU submits that the Board should decide whether the panel in the EB-2010-0008 erred in finding that the allowance for pension and OPEB costs in the pre-filed evidence is appropriate, as it is the best evidence on this matter.

18. The PWU is of the view that if the Board decides that the finding related to the allowance for pension and OPEB costs is in error, the Board should determine the

appropriateness of the remedies sought by OPG, as filed in the Notice of Motion, dated March 30, 2011; and in the Factum of May 6, 2011.

OEB's Error in Fact

19. In the EB-2010-0008 Decision the Board found:

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.

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.

20. The PWU submits that the allowance for pension and OPEB costs included in the Update provided the "best evidence". The PWU agrees with OPG that the Update did not exclusively rely on the update of only one variable (i.e. the AA bond yields). The evidence on the record in EB-2010-0008 showed that there was no change in the Update as to the manner in which the allowance for pension and OPEB costs were calculated relative to the calculations of these costs included in the Pre-filed evidence. The PWU submits that the Update evidence was based on a set of internally consistent assumptions as confirmed indicated in the Affidavit of Nathan Reeve that the relevant assumptions used in the Update are supported by the assumptions used in the Actuarial Assessment for OPG-wide pension and OPEB costs for the test period. The Affidavit also confirms that the key assumption changes reflected in the Update were consistent with the analysis of assumptions and methods outlined in the Actuarial Assessment.

21. Board staff, in supporting the pre-filed evidence on the pension and OPEB costs for the test period as the best evidence based on a set of internally consistent assumptions in its May 17th, 2011 submission, noted that such evidence before the Board was supported by a business plan which was developed in a coordinated internal

process and approved by OPG's Board of Directors. That observation is correct. However, the PWU submits that what is relevant with respect to the requirement that the evidence relies on a set of internally consistent assumptions is that the evidence in the EB-2010-0008 and in this proceeding support the conclusion that OPG considered the assumptions used in the pre-filed evidence and in the update in an internally consistent manner. The evidences also support the conclusion that OPG reviewed, in the pre-filed evidence as well as in the update, an identical set of variables with the same degree of rigor.

22. The PWU agrees that the fact that the pre-filed evidence was underpinned by pension and OPEB costs approved as part of the 2010-2014 business plan provided assurance that the analysis of assumptions and methods used in the forecasts were performed on an internally consistent basis. In the PWU's view, the reference made by Board staff to Exhibit F4, Tab 3, Schedule 1, page 21, speaks to the fact that for business planning purposes, it is necessary to make projections on the pension and OPEB costs, which results in the costs included in the business plan as placeholders. In approving the business plan, the OPG Board approves the analysis of assumptions and methods used to derive the projections. The Update, which was derived using this analysis of assumptions and methods, is therefore internally consistent, and further updates will provide the assumptions incorporated in the subsequent business plan. As indicated at paragraph 13 in the Affidavit of Mr. Nathan Reeve, the forecast of pension and OPEB costs in the Update formed the basis of OPG's 2011-2015 business plan and therefore followed the same rigorous process as that used for the forecast of pension and OPEB costs in the Pre-filed Evidence that was based on the assumptions used for the 2010-2014 business planning process..

23. The PWU submits that the reliance on the pre-filed forecast to the 2010-2014 business plan approved in November 2009 does not provide assurance that pre-filed evidence was the best evidence as it did not incorporate new information that constituted a material change. The PWU agrees with OPG that the Update was based on a complete analysis as it incorporated the updated information on the evidentiary record filed by OPG in EB-2010-0008.

24. As noted by OPG at paragraph 18 of its factum, Rule 11.02 of the OEB's Rules of Practice and Procedure provides that 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 is required to serve and file appropriate amendments to the evidentiary record, or serve and file the new information. The PWU submits that the Update constituted a material change to the evidence and met the requirement of Rule 11.02 of the OEB Rules and Procedure.

25. The PWU also agrees with OPG that the Board panel's rejection of the Update as being a selective update is an error, given that the Update was filed in accordance with the Rules of Practice and Procedure and as result of a thorough review which considered both increases and decreases in cost.

26. The PWU submits that the Update is the best evidence relative to the pre-filed evidence as it incorporated new information. The PWU notes that the pension and OPEB cost for the test period was forecasted at \$633 Million in the pre-filed evidence, at \$897.2 Million in the Update as of August 2010, and at \$840.7 Million in the latest update as of February 2011 provided in the Factum. The differences between the costs forecasted in the pre-filed evidence and the Update, as well as between the pre-filed evidence and the latest update (i.e. February 2011) illustrate the significant variability in these costs. As can be seen, the difference between the pre-filed evidence and the Update (at 42%), is a material change. This materiality requires updates in the forecast and confirms that the updated forecast provides the best evidence in EB-2010-0008 on the pension and OPEB costs.

27. Board Staff submitted that the fact that the 2010 pension and OPEB cost forecast in the pre-filed evidence is similar to the actual cost recognized in the 2010 Year-end Results indicates that the net effect of the suite of assumptions in the pre-filed, evidence, was similar to that at year end 2010.³ The PWU notes that a material difference between the forecasted costs reported in the pre-filed evidence and actual pension and OPEB costs for 2010 would not be expected because the weighted average assumptions for the costs for the year for 2010, as reported in OPG's 2010

³ At page 6 of Board Staff Submission filed on May 17, 2011.

Year-end Results⁴ do not significantly differ from the assumptions projected in the pre-filed evidence⁵.

28. The PWU notes that according to OPG's 2010 financial results, the discount rate used for determining 2010 actual pension and OPEB costs is better reflective of market conditions as at December 31, 2009 rather than the conditions as at December 31, 2010. Accordingly, the PWU is of the view that the similarity between the forecast in the pre-filed evidence and the actual cost recognized in the 2010 Year-end Results does not provide any indication that the net effect of the suite of assumptions used in the pre-filed evidence are more reliable than the assumption used in the Update.

29. For these reasons, the PWU agrees with OPG that the Board panel erred in its finding that the forecast included in the Pre-filed Evidence was more rigorous than the Update, and that the Update provides the best evidence with respect to OPG's allowance for pension and OPEB expenses for the test period.

Remedies Sought by OPG

30. The PWU supports the remedies sought by OPG in the motion, as submitted in Section E of the Factum. Specifically OPG sought:

(a) a variance account that records the difference between the pension and OPEB costs reflected in the Decision and the actual pension and OPEB costs and associated tax impacts; or

(b) in the alternative, a deferral account to record the difference between pension and OPEB costs in the Pre-filed Evidence and the update, including tax impacts, for the 22 month period from March 1, 2011 to December 31, 2012. OPG believes either remedy would resolve the error and ultimately provide just and reasonable payment amounts.

31. The PWU agrees with OPG that a variance account is an appropriate vehicle because of the material amount of these costs, the variability of the material amount of these costs, the variability of the factors underlying them and the fact that the variability was not under OPG management's control.

⁴ Ontario Power Generation Reports 2010 Financial Results, at page 113.

http://www.opg.com/investor/pdf/2010_Q4_FullRpt.pdf

⁵ Eb-2010-0008, Exhibit F4, Tab 3, Schedule 1, Chart 8.

32. The PWU also agrees with OPG that denying OPG either a variance account or, in the alternative, the forecasts of its pension and OPEB costs for the test period based upon the best evidence (i.e. the Update) will mean that OPG will not be able to recover its reasonable and prudently incurred costs.

Conclusion

33. As a result, the OPG motion meets the requirement with respect to the threshold question and identifies errors in the EB-2010-0008 Decision; and that it is appropriate for the Board to vary its decision in the manner submitted by OPG.

34. The PWU also supports OPG request for establishing a variance account to record the difference between the pension and OPEB costs reflected in the EB-2010-0008 Decision and the resulting payment order and OPG's actual pension and OPEB costs for the test period and associated tax impacts.

ALL OF WHICH IS RESPECTFULLY SUBMITTED