



EB-2011-0090

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 a motion by Ontario Power Generation Inc. pursuant to Rule 42 of the Ontario Energy Board's *Rules of Practice and Procedure* for an order or orders to vary the Decision with Reasons EB-2010-0008 dated March 10, 2011.

BEFORE: Paul Sommerville
Presiding Member

Cathy Spoel
Member

Karen Taylor
Member

DECISION AND ORDER ON MOTION

INTRODUCTION

Ontario Power Generation Inc. ("OPG") filed an application with the Ontario Energy Board (the "Board") on May 26, 2010. The application was filed under section 78.1 of the *Ontario Energy Board Act, 1998*, S.O 1998, c. 15 (Schedule B) (the "Act"), seeking

approval for payment amounts for OPG's prescribed generation facilities for the test period January 1, 2011 through December 31, 2012, to be effective March 1, 2011. The Board assigned the application file number EB-2010-0008. The Board issued its Decision with Reasons ("Decision") on March 10, 2011. On April 11, 2011, the Board issued the final Payment Amounts Order establishing the payment amounts effective March 1, 2011.

On March 30, 2011, OPG filed a Notice of Motion to review and vary the Decision in relation to certain findings with regard to the pension and other post employment benefits ("OPEB") costs, and in relation to OPG's request for a variance account for pension and OPEB costs. The Board assigned the motion file number EB-2011-0090.

The Board issued a Notice of Hearing and Procedural Order No. 1 on April 15, 2011. The procedural order provided for submissions on the threshold question and merits of the motion, and for an oral hearing. On April 18, 2011, OPG filed correspondence with the Board requesting the opportunity to file a full factum to support the motion, and the opportunity to file written reply on the submissions of Board staff and other responding parties. On April 21, 2011, the Board issued Procedural Order No. 2, which made provision for the filing of a factum, and amended the schedule for the filing of submissions.

In addition to the factum filed by OPG, the Board received written submissions from Board staff, the Power Workers' Union ("PWU"), the Vulnerable Energy Consumers Coalition ("VECC"), Canadian Manufacturers & Exporters ("CME"), and the School Energy Coalition ("SEC"). The oral hearing in this matter took place on June 2, 2011.

THE MOTION

In the EB-2010-0008 proceeding, OPG filed an Impact Statement (the "Update") on September 30, 2010, which updated, among other things, the forecast pension and OPEB expense for the 2011-2012 test period, which had originally been filed on May 26, 2010. The Update projected a \$264.2 million increase in expenses for the test period, and was supported by a report from an external actuary (the "Mercer report") which was filed on October 8, 2010. OPG did not propose to revise the proposed payment amounts, but requested a variance account to record the revenue requirement impact of differences between forecast and actual pension and OPEB costs.

The Decision denied the request for a variance account and found that the 2011-2012 payment amounts would be based on the pension and OPEB expenses forecast in the pre-filed evidence.

OPG submitted that the Board erred in fact in concluding that the Update was less rigorous and not internally consistent so that it was not the best evidence of the forecast pension and OPEB costs for the test period. OPG's Notice of Motion was supported by an affidavit from Mr. Nathan Reeve, OPG Vice President, Financial Services. That affidavit included a summary table¹ of seven key assumptions (e.g. discount rate, salary schedule) underpinning pension and OPEB forecasts. The summary table listed the references for the key assumptions for the pre-filed evidence and for the Update, for ease of comparison as the sources of the information are in several places. OPG asserted that the pre-filed evidence and the Update were both prepared on the same basis and used the same methodology. OPG asserted that the discount rate, and hence AA bond yields, was among the seven assumptions reviewed, but not the only assumption reviewed. OPG also noted that there was cross examination in the EB-2010-0008 proceeding on whether a variance account should be established but there was no cross examination or argument about whether the Update was less rigorous or about the methodology used to determine the Update expenses.

With respect to the best evidence, OPG submitted that the Update was prepared closer in time to the test period and is inherently more reliable.

OPG asserted that the Update was the product of a non-selective process. OPG canvassed the business units and corporate groups about material changes prior to the commencement of the oral hearing, and three changes were identified.

OPG submitted that the errors in fact in the Decision were material and that failing to permit OPG to recover the forecast costs in the Update would not result in just and reasonable rates.

Updates are not unprecedented. At the oral hearing, OPG cited a Union Gas case² in which an update based on Union's annual forecasting process was filed part way through that proceeding. OPG noted that the filing included an update to pension and OPEB, which the Board ultimately accepted.

¹ OPG Notice of Motion, March 30, 2011, Tab 2, Exh. B.

² OPG Supplementary Motion Materials, Tabs 2-4.

OPG seeks an order

- varying the finding that the pre-filed evidence was the best evidence of OPG's pension and OPEB costs for the test period on the record; and
- establishing a variance account to record the difference between (i) the pension and OPEB costs reflected in the Decision and the resulting payment amounts order, and (ii) OPG's actual pension and OPEB costs for the test period and associated tax impacts.

In the alternative, OPG seeks

- a finding that the Update was the best evidence of OPG's pension and OPEB costs for the test period and was therefore the appropriate amount to be used for purposes of determining the pension and OPEB costs in OPG's test period revenue requirement; and
- to give effect to the above, 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, with an opening balance for the deferral account of \$207.3 million.

THRESHOLD ISSUE

OPG stated in its Factum³ that the errors in findings of fact raise a material question as to the correctness of the Decision in respect of pension and OPEB expenses. In its view, the findings are contrary to the evidence that was before the original panel. Once corrected in accordance with the Update, the test period expenses will be materially different than those set out in the Decision. Accordingly, it is OPG's position that the motion satisfies the threshold test in Rule 45.01 of the Board's *Rules of Practice and Procedure*.

Both OPG and Board staff referred in their submissions to the Board's analysis of Rule 45.01 in the *Natural Gas Electricity Interface Review Decision* ("NGEIR Review Decision").⁴ Board staff submitted that the motion passes the threshold test as OPG alleges that the Decision findings improperly determined that the pre-filed evidence was better evidence than the Update – in other words that the panel misapprehended the

³ OPG Factum, May 6, 2011, para. 20-22.

⁴ Motions to Review the *Natural Gas Electricity Interface Review Decision*, EB-2006-0322/0338/0340, May 22, 2007, p. 18.

evidence - and there is a material impact. However, Board staff is ultimately of the view that the motion should be dismissed. The PWU also submitted that the motion passed the threshold test, stating that an identifiable error was made and characterized the review function of the Board as a “get it right” function.

SEC submitted that for a motion to review to proceed based on error of fact, the test should be whether the Board appears to have believed a fact to be true, that could not reasonably be true. In SEC’s view, the motion appears to be nothing more than OPG disagreeing with the original panel’s interpretation of conflicting evidence, and that the motion should fail the threshold test. In its oral submission, SEC differentiated between errors and the exercise of judgement. In SEC’s view, the original panel exercised its judgement and the decision on the facts was not demonstrably unreasonable. In such a case SEC argued, the reviewing panel should not overturn the findings.

CME submitted that there are two reasons supporting its position that the threshold test has not been met.

First, CME stated that there has been no *prima facie* demonstration that the Board made a factual error in preferring the pre-filed evidence to the Update. CME submitted that there must be an arguable case that there was no evidence to support the use of the pre-filed evidence. CME argued that OPG cannot possibly demonstrate that there was no evidence to support the pre-filed evidence and that therefore the threshold test has not been met.

Second, CME noted that OPG’s current appeal to Divisional Court relating to the Decision findings on forecast compensation expenses, is substantively the same issue OPG raises in the current motion. CME submitted that the Board should not consider the motion to review when OPG is appealing the same Decision on similar grounds before Divisional Court. CME’s position is supported by the Consumers Council of Canada. OPG replied that the motion is a matter for Rule 42 of the Board’s *Rules of Practice and Procedure*, while the appeal before Divisional Court is a matter under section 33 of the Act.

Board Findings

In the Board's view, a motion to review must meet the following tests, as set out in the NGEIR Review Decision:

- the grounds must raise a question as to the correctness of the order or decision;
- 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 merely reargue the position it took in the original case; and
- 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, or that the panel failed to address a material issue. The applicant must be able to show that the panel made findings that were inconsistent with the evidence, not merely that the Board interpreted evidence in a manner that was different than was urged upon it by the applicant in the original case.

In its argument CME asserted that mere allegations that the tribunal had made an error of fact, or a mere allegation that a finding was contrary to evidence does not justify the holding of a review. It must go further, in CME's submission, and show that there was no relevant evidence in the record capable of supporting such a finding.

The Board disagrees with this assertion and notes that it is inconsistent with the NGEIR Review Decision tests set out above. It is the Board's view that if it is reasonably arguable that the original panel erred, and that the error is of sufficient materiality to result in a reversal, variance or suspension of the original decision, the threshold is met.

As will be seen below, it is the Board's view that the evidence in this case is to the effect that the original panel misapprehended in a material way the evidence that was before it. Specifically, and this will be dealt with in greater detail in subsequent portions of this decision, that the original panel came to an erroneous conclusion respecting the best evidence in relation to the pension and OPEB forecast. The original panel concluded that the Update was prepared using a methodology that was different and less rigorous than that which produced the pre-filed evidence and that OPG had produced the Update by varying only one parameter of the original methodology. The original panel's characterization of the pre-filed evidence as the best evidence on the subject flowed directly and explicitly from this erroneous finding.

In the Board's view this is an identifiable and material error and as such, entitles the moving party to a consideration of its motion on the merits. The evidence in the case does not support the finding made by the original panel, and is in fact inconsistent with its finding.

As noted above, CME urged the Board to find that it was inappropriate and improper for OPG to bring this motion for review at the same time as it has commenced a proceeding in the Divisional Court respecting the same decision by way of judicial review.

In the Board's view, these are distinct remedies available to parties and the prosecution of one in most cases will not have any implications for the prosecution of the other. An exception could arise if the identical subject matter was made the centerpiece of both review processes. That is not the case here.

In this case, OPG asserts that the original panel made an error of fact respecting the methodology used to support the Update, and did not accept the Update explicitly on that basis. The appeal to the Divisional Court, to which the Board is a party, addresses an entirely different issue, which is concerned with the extent to which the Board has jurisdiction to make findings that are inconsistent with the labour relations arrangements in place between OPG and portions of its workforce. The Board finds that there is no incompatibility respecting these respective review proceedings.

MERITS OF THE MOTION

The Test on the Merits

The appropriate test on the merits of the motion, as proposed by OPG, is found in the Board's decision in proceeding EB-2009-0038⁵, which also refers to the NGEIR Review Decision. In OPG's submission, if the reviewing panel finds that the Decision is in error in a material way, then the appropriate remedy is to award a variance account or defer recovery.⁶

⁵ Motion Hearing, Exh. K1.2.

⁶ Tr. Motion Hearing, p. 22.

In oral submissions, Board staff stated that the original panel heard the entire case directly and was in a much better position to judge the quality of evidence overall.⁷ As stated in the Board staff submission, “Only if the review panel determines that the finding reached by the Decision panel was not within the range of reasonable alternatives should its decision be overturned.” In Board staff’s view, it is not the task of the reviewing panel to substitute its own judgement for that of the original panel unless it is convinced that the original panel made a clear and material error, and that the original panel clearly misapprehended the evidence. Similarly, SEC stated that “unless it’s obvious that the original panel made a mistake, you should defer to their broader view and their better ability to assess the facts, because they saw everything.”⁸

CME submitted that the phrase “best evidence” was the original panel’s expression of its preference for the pre-filed evidence instead of the Update. CME maintained that an expression of preference is not necessarily a finding of fact.

Pre-Filed Forecast and Update Forecast

The PWU stated that the Board misapprehended the nature of the Update on pensions and OPEB. While the biggest changes occurred with AA bond yields, there was a complete reassessment of seven factors used to forecast pension and OPEB expenses. The PWU noted that there was no finding that the updated AA bond yield was an inferior input.

SEC observed that of the seven factors, two were changed for the Update, but one of them had negligible effect. SEC argued that the original panel did not misdirect itself as the AA bond yields were the primary driver of the Update.

Board staff submitted that the Decision references to “rigorous”, “internally consistent” and “selective” update, were references by the original panel directed to the application overall and not merely the input assumptions respecting the pension and OPEB forecast.

The Business Plan underpinned the entire application and is referenced throughout the evidence. While OPG canvassed the business units for material changes prior to filing the Update, Board staff suggested that this is far from comparable to the integrated

⁷ Tr. Motion Hearing, p. 47.

⁸ Tr. Motion Hearing, p. 68.

business planning process that underpinned the application as a whole. Staff also noted that the Update was filed after the Minister's request to OPG that it review the application to find cost savings. It was also after OPG's review and response, which ultimately extended the recovery period for a large balance in a tax variance account. It is not known whether a similar review including the Update on pension and OPEB expenses might have impacted the application as a whole.

SEC also argued that the Update was selective in the context of the overall application. SEC also noted that OPG did not give consideration in the Update to discount rate changes and the effect on major cost items such as nuclear waste decommissioning costs and asset retirement obligations.

OPG responded that there is no reference to the business planning process in the Decision findings on pension and OPEB. OPG also argued that pension and OPEB expenses are inputs to the business planning process and are not outputs.

Board staff noted that the caveats and assumptions in the Mercer report are itemized over 3 pages, while those appearing in the pre-filed evidence are less prescriptive and considerably briefer. Notwithstanding OPG's assertion that both pre-filed and Update forecasts were subject to the same caveats, staff submitted that the original panel recognized that some of the assumptions were changing, as noted in the Decision reference to financial market conditions.

Board staff compared the actual 2010 registered pension plan performance⁹ with that forecast in the Mercer report, and found that the plan performed much better than Mercer had forecast, supporting the original panel's observation that market conditions had improved since the Update was filed. OPG replied that the Decision did not state that the caveats were the basis for rejecting the Update. In OPG's view, the caveats are more telling with respect to the pre-filed evidence because the information is older.

CME commented that the impression the original panel formed from the pre-filed evidence and the Update rests with OPG. The detailed affidavit of Mr. Reeve was not before the original Panel. OPG argued that there is nothing in paragraphs 1 to 17 of Mr. Reeve's affidavit that is not on the record of EB-2010-0008.

⁹ Motion Hearing, Exh. K1.3.

Variance Account Requested in Update

Board Staff, VECC, SEC and CME submitted that the original panel made no reviewable error in denying the variance account which OPG had requested in connection with the Update. Board staff submitted that OPG is making the same arguments it made in the original hearing in this motion and is merely hoping for a different outcome. SEC noted that the Board has consistently denied variance accounts for pension and OPEB expense, with only one narrow exception.

CME observed that OPG did not provide a revenue requirement impact related to the Update, and that the only relief OPG requested in connection with the Update was to seek permission to establish a variance account. CME also observed that the Board denied the same request in the previous payment amounts proceeding, EB-2007-0905. OPG did not appeal or seek a review of the previous decision, and in CME's submission, it is not open to OPG to seek a variance account without a convincing demonstration there has been a substantial change in circumstances since the prior decision – specifically demonstrating a substantial change in circumstances with respect to forecastability.

At the oral hearing on this motion, OPG referred to its reply argument in EB-2010-0008 in which it stated that if the Board were to reject the variance account request, that the revenue requirement should incorporate the Update forecast. The original panel denied the request for a variance account and preferred the pre-filed evidence. OPG clarified at the oral hearing that it is not seeking to reargue the establishment of the variance account. The motion concerns the Board's rejection of the Update, and seeks to simply remedy that error.

Options Before the Reviewing Panel

As noted in the Notice of Motion and Factum, if the Board is satisfied that a material error was made in the Decision, OPG seeks an order varying the finding that the pre-filed evidence was the best evidence with respect to the pension and OPEB costs, and an order establishing a variance account. In the alternative, OPG seeks an order that the Update is the best evidence and to give effect to that finding, an order establishing a

deferral account, with an opening balance of \$207.3 million, i.e. \$264.2 million and the associated tax impacts, for the 22 month period March 1, 2011 to December 31, 2012.¹⁰

In the event that the reviewing panel accepts the deferral account option, OPG submitted at the oral hearing that it would be more correct to use OPG's February 2011 projection of 2011 and 2012 pension and OPEB expenses of \$207.7 million as a starting point for the opening balance of the deferral account.¹¹ The starting point would be lower than \$207.7 million following adjustments for associated tax impacts.

Board staff and the responding parties, except the PWU, have submitted that the motion should be dismissed. In the event that the reviewing panel determines that there is an error of fact in the Decision, SEC submitted that the matter should be referred back to the original panel.

Board Findings

The Board agrees with the submissions made by the parties who argued that a reviewing panel should only interfere with an original finding of fact in the clearest of cases. The law has generally afforded original findings of fact considerable deference.

The Board's consideration of this motion to review rests almost exclusively on its interpretation of the following portions of the original Decision where the original panel made its findings with respect to the Update.

The Decision stated¹²:

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

¹⁰ OPG Notice of Motion, March 30, 2011, Tab 2, Exh. C.

¹¹ Tr. Motion Hearing, p. 33.

¹² Decision with Reasons, EB-2010-0008, p. 91.

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.

In making this assessment, the Board is guided by the modern rules of interpretation, which essentially consist of giving the passage a plain and purposive reading.

It is clear to the reviewing panel that the original panel made several findings which led, by necessary implication, to its decision to reject the Update and to base its decision on the pre-filed evidence.

Those findings were:

First, that the Update had been performed according to a methodology which was different than that which produced the pre-filed evidence.

Second, that OPG had produced the Update by varying only one parameter of the original methodology, namely the AA bond yield.

Third, that as only one parameter had been updated, this methodology was less rigorous than that used to produce the pre-filed evidence.

Fourth, that because the Update was the product of a less rigorous methodology, the pre-filed evidence was the best evidence respecting the pension and OPEB forecast.

However, none of these findings is supported by the evidence. The evidence supports OPG's position that the Update was conducted using the same methodology as was used to prepare the pre-filed evidence, that more than the AA bond yield was reviewed to arrive at the Update, and that the Update does represent the best evidence respecting the forecast, given that it is based on data that is more recent.

Having found that there is an identifiable and material error, and based on the Board's NGEIR Review Decision, the appropriate test to apply in this case was expressed in the Board's decision in EB-2009-0038, a previous OPG motion for review, which was filed as Exhibit K1.2.

In that case, the Board said the following at page 15:

If the reviewing panel is satisfied that an identifiable error that is material and relevant to the outcome of the reviewed decision has been made, the Board may vary, suspend, or cancel the order or decision, or if they find it appropriate, remit the matter back to the original panel.

Accordingly the Board will grant the motion for review.

In order to assess the key foundational finding, which concerns the extent to which the Update was subject to the same methodology as the originally filed evidence, the original panel had to look at the details of the pre-filed evidence and the Update. While the Mercer report which supported the Update is an important source of information for this analysis, it was also necessary for the original panel to look at various other portions of the evidence to confirm that the Update was conducted using the same methodology and was no less rigorous than the pre-filed evidence. Unfortunately, no detailed mapping of the pre-filed evidence and the Update was provided by OPG or any other party in their submissions to the original panel.

OPG did provide such a detailed mapping of the pre-filed evidence and the Update in support of this motion. This mapping is attached as Exhibit B to the Affidavit of Mr. Reeve.

As can be seen from that Exhibit, the Mercer report provides a good deal of information with respect to the methodology used to prepare the Update. The results of the Mercer report, adjusted for the prescribed generation facilities, and other exhibits and references establish that the record in the original proceeding contains sufficient evidence to support OPG's position.

The Board hereby varies the Decision finding that the pre-filed evidence on OPG's pension and OPEB costs for the test period was the best evidence on the record. The

Board accepts the Update as evidence of OPG's pension and OPEB costs for the test period.

The Board also orders the establishment of a variance account called the Pension and OPEB Cost Variance Account the sole purpose of which is to remedy the error in the Decision. In this account, OPG shall record the difference between (i) the pension and OPEB costs, plus related income tax PILs, reflected in the Decision and the resulting payment amounts order, and (ii) OPG's actual pension and OPEB costs, and associated tax impacts, for the test period for the prescribed generation facilities. The entries in the variance account for 2011 and 2012 will be determined on the same basis and under the same circumstances as the pre-filed evidence. There will be no entries in the variance account related to changes in accounting standards, such as IFRS or US GAAP. There will be no principal entries posted to the variance account after December 31, 2012. However, the entries for the year 2012 may be adjusted when the year end accounting and contribution levels are finalized in early 2013.

In making this provision for a variance account, the Board is not reversing or commenting upon the finding of the original panel on this point, nor is the Board's consideration of a variance account intended to be a general remedy for the forecasting of pension and OPEB expenses. The variance account is being provided for at this time because it offers the most expeditious and simple method of correcting the error we have found was made in the original Decision with respect to the Update.

The Board notes that the establishment of a variance account to remedy the error in the Decision has two advantages versus the use of a deferral account. First, the variance account ensures rate payer symmetry, as both higher and lower pension and OPEB costs are captured over the period the account will be in effect, and second, a further update of forecast pension and OPEB costs is not required.

The clearance of this account will be reviewed in OPG's next payment amounts application hearing. The Board expects OPG to provide an independent actuary's report and an audit opinion which will describe the methodology followed, the assumptions made by management, and the amounts recorded in the account, and which will confirm that the evidence is consistent with the CGAAP standards and actuarial methods that were contained or reflected in the evidence for the 2011-2012 payment amounts application.

COST AWARDS

A decision regarding cost awards will be issued at a later date. Parties eligible for cost awards in the EB-2010-0008 proceeding are eligible for costs in the current proceeding. Eligible intervenors claiming costs should do so as ordered below. OPG shall pay any Board costs of and incidental to this proceeding upon receipt of the Board's invoice.

THE BOARD THEREFORE ORDERS THAT:

1. The Decision finding that the pre-filed evidence on OPG's pension and OPEB costs for the test period was the best evidence on the record shall be varied;
2. OPG shall establish a variance account called the Pension and OPEB Cost Variance Account to be effective as of March 1, 2011;
3. Intervenors eligible for cost awards shall file with the Board and forward to OPG their respective cost claims within 14 days from the date of this decision;
4. OPG shall file with the Board and forward to intervenors any objections to the claimed costs within 28 days from the date of this decision; and
5. Intervenors, whose cost claims have been objected to, may file with the Board and forward to OPG any responses to any objections for cost claims within 35 days of the date of this decision.

All filings to the Board must quote file number EB-2011-0090, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties shall use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available, parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary, and be received no later than 4:45 p.m. on the required date.

ISSUED at Toronto, June 23, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary