



March 2, 2015

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

Re: Ontario Power Generation Inc.  
Board File No. EB-2014-0369

Dear Ms. Walli:

Attached please find AMPCO's submissions in the above proceeding.

Regards,

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Adam White". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Adam White  
President  
Association of Major Power Consumers in Ontario

Copies to: Ontario Power Generation  
Intervenors

## 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** 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-2013-0321.

### **SUBMISSIONS OF THE ASSOCIATION OF MAJOR POWER CONSUMERS IN ONTARIO IN RESPONSE TO THE MOTION OF ONTARIO POWER GENERATION TO REVIEW AND VARY THE DECISION OF THE ONTARIO ENERGY BOARD**

**March 2, 2015**

#### **PART 1 - OVERVIEW**

1. Ontario Power Generation Inc. ("**OPG**") seeks to vary the decision of the Ontario Energy Board (the "**Board**") (the "**Decision**") in EB-2013-0321.
2. In the Decision, the Board disallowed the addition to rate base of \$88.0M with respect to the Niagara Tunnel Project ("**NTP**") and required the reduction of certain income tax.
3. The Association of Major Power Consumers in Ontario ("**AMPCO**") was the lead intervenor with respect to the NTP and wishes to respond to the motion of OPG with respect to that issue alone.

4. The Board invited submissions on both whether OPG had satisfied the threshold question for a motion to vary a decision of the Board and on the merits of the motion itself.
5. AMPCO does not believe that OPG has satisfied the threshold question nor has it established that the Decision is not correct.

## **PART 2 - THE FACTS**

6. AMPCO agrees with the facts set out in paragraphs 4 and 5 of the submissions of OPG.
7. The tunnel began operation on March 9, 2013. The estimated total costs to completion are \$1,476.6M (\$1,472M capital + \$4.6M removal expense in 2014).
8. A study of the possible expansion of OPG's hydroelectric facilities began in 1982 resulting in Ontario Hydro's proposal for the then planned project design which consisted of two tunnels (500 m<sup>3</sup>/s each), a three-unit underground generating station and new transmission facilities between Niagara Falls and Hamilton; the Niagara River Hydroelectric Development (NRHD) project.
9. In 1998, Ontario Hydro made a decision to proceed with phase one of the HRHD and a Request for Proposal was issued for the construction of a single 500 m<sup>3</sup>/s tunnel using a Design-Build approach. A recommended bidder was identified, but the contract was never awarded due to the imminent reorganization of Ontario Hydro. AMPCO notes all of the qualified contractors in the 1998 bidding process proposed a closed tunnel boring machine with a precast segmental concrete liner. Shortly after OPG was formed, as one of the two entities emerging from Ontario Hydro, in 1999, OPG announced its decision to defer construction of the tunnel indefinitely.
10. In June 2004, OPG announced and the Government of Ontario endorsed the decision to proceed with a new water diversion tunnel and OPG conducted an RFP process in July 2004 for one tunnel.

11. Three proponents bid on OPG's RFP that was based on the conceptual design used in the 1998 bidding process. The conceptual design referenced the use of a closed (fully shielded) tunnel boring machine. Chapter 9.1 of the Owner's Mandatory Requirements in the RFP specifically called for a Shielded tunnel boring machine suitable for safely excavating the ground conditions as described in the geotechnical baseline report. Two unsuccessful proponents proposed a closed (fully-shielded) tunnel boring machine. The third bidder, Strabag AG (**Strabag**), considered both an open and closed tunnel boring machine and in the end proposed an open tunnel boring machine design that was accepted by OPG. A Design-Build Agreement using an open tunnel boring machine was signed by Strabag on August 18, 2005.
12. It was recognized from the beginning that the tunnel design and construction presented several challenges beyond the tunnel size including high horizontal stress, the presence of the St. David's Gorge, and time dependant deformation of the rock mass.
13. The RFP process included a geotechnical baseline report ("**GBR-A**") which was based on OPG's data from over 10 years of geotechnical investigation. Respondents were asked to include modifications to the GBR as part of their proposals (GBR-B) and the final GBR (GBR-C) was negotiated as part of the contract.
14. 81.25% of the total bored tunnel length was expected to be in the Queenston Formation. The Queenston Formation is characterized by alternating layers of stronger and weaker rock which are, in turn, characterized by a wide range of strength and anisotropic (material properties are different in different directions) stiffness and time dependent deformation behaviour. The rock mass behaviour along the tunnel is highly influenced by high horizontal stresses. Stress induced failure focused along the bedding planes in the crown resulted in extensive overbreak during the tunnel excavation. Strabag's open tunnel boring machine further exacerbated the overbreak.

15. Strabag anticipated only 15,000m<sup>3</sup> based on its proposed means and methods in the Queenston Formation. OPG estimated 45,000 m<sup>3</sup> of total overbreak (3 times as much as the contractor). The GBR set the total overbreak quantity at 30000m<sup>3</sup>, the average of the two estimates. In the end, the total overbreak quantity was vastly exceeded; 60,000 m<sup>3</sup>, 50,000 m<sup>3</sup> of which was in the crown. The final amount was two times the 30,000m<sup>3</sup> baseline in the GBR and four times what Strabag expected.
16. AMPCO agrees with the facts set out in paragraphs 9, 10, 11, 12, 15 and 18 of the submissions of OPG.

### **PART 3 - ISSUES TO BE ARGUED**

17. Did OPG meet the threshold purpose of a motion to review?
18. Was the Decision “correct”; did the Board make errors in fact?

### **PART 3 - ARGUMENT**

#### **The Threshold Question**

19. Rule 43.01 of the Board’s *Rules of Practice and Procedure* provides as follows:  
  
“In respect of a motion brought under Rule 40.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.”
20. Rule 42.01(a) of the Board’s *Rules of Practice and Procedure* provides as follows:  
  
“Every notice of motion made under Rule 40.01, ...shall:
  - (a) Set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
    - (i) error in fact;...”
21. The Board was correct in the Decision in EB-2013-0321.

22. The Decision exhibits no errors of fact and, therefore, OPG has not met its threshold onus.
23. The Board canvassed the issue of what must be established in a motion for review to satisfy the threshold question in the case of Natural Gas Electricity Interface Review Decision (“**NGEIR**” **Review Decision**”) (See footnote 1 in Board’s staff submission).
24. In that case, the panel asked to review the decision of a previous panel held as follows:

“[T]he grounds must raise a question as to the correctness of the order or decision. In the panel’s view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argue that there must be an identifiable error in the decision and that a review is not an opportunity for a party to re-argue the case.

In determining 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,... It is not enough to argue that conflicting evidence should have been interpreted differently.”

25. In this matter OPG is seeking to re-argue the case.
26. There is nothing new in any of the arguments OPG is presenting on this motion. It has all been argued previously in EB-2013-0321.
27. OPG has not met the threshold test.

**Was the Decision correct; Did the Board Make Errors of Fact?**

28. OPG submits in its motion that there are two broad areas of the Board’s Decision which exhibit errors or fact: its response to the Dispute Review Board’s decision

and recommendations, and its interpretation of the actions of OPG in entering into the Amended Design Build Agreement.

29. On the basis of its interpretation of the recommendations of the Dispute Review Board, the Board disallowed \$28.0M of the amount paid by OPG to Strabag to settle Strabag's claim associated with the issues in front of the Dispute Review Board.
30. Secondly, the Board disallowed \$60.0M claimed by OPG as part of the Amended Design Build Agreement it entered with Strabag.

### **Dispute Review Board**

31. The Board agreed with the recommendations of the Dispute Review Board that there should be some shared level of responsibility between OPG and Strabag. The Dispute Review Board determined that three of the five issues which were put before them were the responsibility of Strabag not OPG and the remaining two issues were shared responsibility. The Board accepted those findings and held that rate payers should not be responsible for those costs.
32. Strabag claimed \$90.0M and OPG settled that claim for a payment of \$40.0M.
33. The Board in properly applying a prudence review determined that \$40.0M was not prudently incurred. It found that there was no evidence to support that claim.
34. Instead, the Board deducted \$28.0M from that amount and justified that in an analysis which can be found at page 33 of the Decision.
35. That analysis included the following facts:
  - OPG's auditors found that of the \$90.0M Strabag claim, \$12.6M was not associated with legitimate expenses and so the Board treated the claim as only amounting to \$77.4M;
  - OPG did not reduce the \$40.0M settlement amount proportionately;
  - They found that the \$40.0M settlement was not prudently incurred;

- They found that since the Dispute Review Board did not attribute specific amounts to specific claims that the Board was required to use its judgment in determining prudence amounts;
  - Rate payers should not pay any amount for the three issues for which OPG was not responsible;
  - Rate payers should pay only 50% of the two issues for which, on the basis of the recommendations of the Dispute Review Board, OPG was jointly responsible;
  - There was no evidence supporting Strabag's claimed amount;
  - Rate payers should only pay 20% of the \$77.4M audited amount;
  - The associated carrying costs of the disallowed \$25.4M reduces the claim by an additional \$3.4M resulting in a \$28.0M disallowance.
36. Although OPG may not like the decision of the Board it was correct and does not exhibit factual errors.
37. OPG argued in their motion that the Board did not understand the findings of the Dispute Review Board. That position is also raised in the reply argument of OPG responding primarily to the position taken by AMPCO in its written submissions following the hearing proper in EB-2013-0321.
38. OPG should not be able to argue the case twice.
39. OPG in its motion at paragraph 16 argues that there was only one issue before the Dispute Review Board; namely, were there differing subsurface conditions. There is no evidence to support this position. The Dispute Review Board was given five specific disputes to resolve. It distributed responsibility as described above, as did the Board. The Board was correct and made no error of fact in doing so.

### **The Amended Design Build Agreement**

40. The second part of the disallowance in the Decision (\$60.0M) was made because the Board found that OPG was imprudent in entering into the Amended Design Build Agreement.

41. OPG took the position that, “it simply did not have the leverage the Board wrongly believed that it did”.
42. In its submissions, in EB-2013-0321, AMPCO strongly argued that OPG did not take advantage of the leverage that it had in negotiating the Amended Design Build Agreement. AMPCO submitted that \$60.0M be disallowed.
43. The Board was correct and did not err in finding that OPG was imprudent in negotiating the Amended Design Build Agreement.
44. OPG submits the following with respect to this issues:
  - It had no leverage in its negotiations with Strabag for the Amended Design Build Agreement, inferring that the imprudent agreement which resulted could not have been avoided;
  - Strabag would have abandoned the project had OPG not entered into the imprudent agreement;
  - The Board erred in its reliance on the parental guarantee and an indemnity provided by Strabag.
45. There was no evidence before the Board to support any of these submissions of OPG and, therefore, the Board could not have erred in fact in not making findings which OPG suggests it should have.
46. OPG relies on the recommendation of the Dispute Review Board that **incentives** be provided Strabag to complete the project.
47. In reliance on that recommendation or for whatever other reason, OPG agreed to pay Strabag millions of dollars beyond the original Design Build Agreement; described in the Decision as “millions of extra dollars more”. The Board found these incentives imprudent. AMPCO argued strongly in its submissions following the hearing proper that by paying these incentives OPG was, “taking the easy way out”.
48. AMPCO’s argument with respect to this can be found at paragraph 127 of its submission:

“127. In response to the DBR report, OPG in consultation with the Owner’s Representative (OR) determined that four options were available moving forward.

- Seek to replace Strabag with a new contractor to complete the tunnel.
  - OPG considered this should only be considered as a last resort due to the cost and schedule consequences of locating, hiring and mobilizing a replacement contractor. During the hearing Mr. Ilsley provided a project example that illustrated this option could result in a significant increase in project costs.
  - OPG did not provide a cost estimate for this alternative. It is unclear if the costs would have been greater than the final NTP cost, but given that a tunnel boring machine was over 140 m underground at the time of the DRB’s decision in August 2009, it seems logical that it would be complicated, time consuming and costly to switch contractors which would not in the best interests of ratepayers.
- Reject the DRB recommendations and pursue arbitration under the Rules of Arbitration of the International Chamber of Commerce as provided in the agreement (Section 11.5 as amended).
  - OPG concluded there was no advantage to pursuing arbitration unless attempts at negotiation failed given the additional time needed for arbitration and a greater risk of a less certain outcome than negotiation.
- Settle all outstanding disputes with Strabag and negotiate a new target cost contract for completion including incentives and disincentives based on cost and schedule to completion.
  - OPG concluded that a negotiated settlement and contract with Strabag was the best path forward to reach the best result in terms of cost and schedule.
  - In reaching this conclusion it appears as if OPG was held hostage by its concern that Strabag would abandon the project if it was held to the terms of the existing agreement it had with OPG. In so doing AMPCO suggests that OPG ignored certain issues such as the fact that Strabag was an International contractor in the field of tunnelling whose reputation would be significantly hurt by abandoning its agreement with OPG. In addition, there is no evidence that OPG sought to determine the seriousness of its concern that Strabag would abandon the current agreement but rather accepted it as a given and renegotiated its agreement with Strabag.

- The agreement which was renegotiated, the ADBA, favours Strabag over OPG in that it does not reflect the allocation of responsibility for previous cost and time overrides determined by the DRB. This was done, allegedly, as a further inducement to have Strabag remain engaged in the project. Once again, there does not appear to have been any serious inquiry undertaken as to whether that was in fact a concern. All-in-all, it appears to AMPCO that OPG took the, “easy way out” in negotiating its second agreement with Strabag at the expense of rate payers.
- In AMPCO’s view OPG did not adequately consider the option negotiating changes to the existing DBA based on cost sharing.”

49. AMPCO further argued between paragraphs 128 and 133:

“128. As AMPCO understands it OPG and Strabag negotiated a hybrid solution that included resolution of Strabag’s claim for differing subsurface conditions in the Queenston Formation and negotiated ADBA using the original DBA as the basis for the ADBA except that the contract was converted from a fixed price contract to a target price contract.

129. Under the ADBA, OPG and Strabag agreed on a target cost of \$985M, a contract schedule completion date by June 2013 and changes to the allocation of risk. The ADBA also incorporates changes in the tunnel route (vertical and horizontal) to excavation with the tunnel crown in the Queenston Formation which shortened the tunnel length by 200m.

130. OPG resolved Strabag’s claimed losses of \$90M to November 2008 by agreeing to pay Strabag \$40M provided Strabag provided OPG with a \$40M letter of credit to cover the possibility that a final agreement could not be reached. This left Strabag with a loss of approximately \$50M. Under the ADBA Strabag could earn a \$20M completion fee plus maximum schedule and incentive fees of \$40M which were achieved leaving Strabag with a profit of \$10M as shown in the Table below prepared by AMPCO. In AMPCO’s view, OPG’s negotiated ADBA with Strabag does not reflect and equitable sharing of the losses as referenced in the DRB ruling.

<b>ADBA</b>		<b>Negotiated Settlement/ Incentives Paid</b>	<b>Audited Losses</b>
Strabag’s Claimed Losses	A	(\$90M)	(\$77M)
<b>Claim Settlement</b>	<b>B</b>	<b>\$40M</b>	<b>\$40M</b>

Claim Balance	C=A-B	(\$50M)	(\$37M)
<b>Completion Fees:</b>	D	\$20M	\$20M
Interim completion Fee		\$10M	\$10M
Substantial Completion Fee		\$10M	\$10M
Schedule Incentive	E	\$40M	\$40M
<b>Total Paid</b>	B+D+F	<b>\$100M</b>	
<b>Total ADBA incentives</b>	F=D+E	<b>\$60M</b>	<b>\$60M</b>
<b>Strabag Profit</b>	<b>C-F</b>	<b>\$10M</b>	<b>\$23M</b>

131. OPG had the right to audit Strabag's losses and to the extent that the full \$90M was not substantiated in the audit, the \$40M payment could be reduced proportionately. The result of the OPG audit was that only \$77.44M of the \$90M was substantiated so the \$40M paid to Strabag should have been reduced by \$5.6M to \$34.4M on a ratio basis. Instead OPG chose to pay Strabag the full \$40M and did not reduce the amount as provided for under the terms of the settlement. AMPCO submits OPG's decision to forego the \$5.6M under the negotiated contract was imprudent. The above table shows Strabag was paid \$100M.

132. AMPCO agrees with Board Staff that it is clear that although OPG assumed responsibility for hundreds of millions in extra costs, it is not evident what additional costs were borne by Strabag. The chief cost to Strabag appears to be a lower profit margin than had previously been expected. AMPCO supports Board Staff's analysis that if Strabag were to have walked away from the project it would have resulted in significant costs to Strabag, more than the reduced profit it wound up with so it is reasonable to expect that OPG could have negotiated a greater "sharing" of the costs resulting from the overbreak. In AMPCO's view there was no adequate sharing of costs. AMPCO submits OPG's decision to pay Strabag \$40M was imprudent.

133. Strabag achieved the incentives provided for in the contract because of OPG's largesse. Under the ADBA the target price and completion date can be extended. As a result of events, the contract target price was increased under Amendments No.1 and No.2 and the schedule was extended by 94 days due to two events. As a result, Strabag received \$40M in incentives instead of \$25M that it would have received under the original target substantial completion date. As noted below AMPCO submits that the 17 day extension due to an ungrouted borehole event is not justified. The tunnel was in-service March 9, 2013, ahead of the June 2013 target date. AMPCO submits the terms OPG

negotiated with Strabag were imprudent. AMPCO submits ratepayers should not have to pay the extra \$15M.”

50. The Board was correct in finding that OPG’s decision to pay Strabag the incentives in the Amended Design Build Agreement was imprudent.
51. The Board made no errors of fact in deducting \$60M from the OPG claim with respect to those issues.
52. In any event, all of these issues were argued by the parties at the EB-2013-0321 hearing. OPG should not have the right to re-argue its case.

**Conclusion**

53. For all of these reasons, AMPCO submits that the motion of OPG with respect to the NTP should be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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AMPCO Per: