

**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.

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**ENERGY PROBE RESEARCH FOUNDATION  
("ENERGY PROBE")**

**SUBMISSIONS**

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**March 2, 2015**

**ONTARIO POWER GENERATION INC.  
MOTION TO REVIEW AND VARY  
DECISION WITH REASONS (EB-2013-0321)**

**EB-2014-0369**

**SUBMISSIONS OF ENERGY PROBE RESEARCH FOUNDATION**

**A- INTRODUCTION**

The Ontario Energy Board (the “Board”) issued its decision in EB-2013-0321 on November 14, 2014 (the “Decision”). On December 10, 2014, Ontario Power Generation Inc. (OPG) filed a motion to review and vary the Decision to reduce certain requested costs of the Niagara Tunnel Project (“NTP”) and to reduce OPG’s 2014 income tax provision (the “OPG Motion”). In its Notice of Hearing and Procedural Order No. 1 dated January 13, 2015, the Board invited parties to file submissions on the OPG Motion and stated that it would consider the threshold question at the same time it hears submissions on the merits.

In preparing its submissions, Energy Probe Research Foundation (“Energy Probe”) reviewed the Decision in EB-2013-0321 and other materials related to that proceeding. In formulating its submissions below, Energy Probe did not consider the submissions of Board Staff, but finds that it largely agrees with those submissions. Hence, Energy Probe’s comments on the threshold question and on the merits of OPG’s motion will be brief and will focus on its own matters of concern.

**B - SUBMISSIONS**

**Part A: Niagara Tunnel Project: Energy Probe Submissions on the Threshold Issue**

In its submissions on the OPG Motion dated January 26, 2015 (the “OPG Submissions”), OPG alleges that the Decision contains four “material errors”:

- The pre-December 2008 disallowance error (OPG Submissions, para 33, p.10)
- The Amended Design Build Agreement disallowance error (ibid., para 38, p.11)

- Misapprehension of the nature of the “incentives” paid to Strabag (ibid., para 41, p.12)
- Misapprehension of the uncontradicted evidence that Strabag would abandon (ibid., para 45, p.13)

Regarding the first alleged error, OPG submits that since it negotiated a risk-sharing arrangement with Strabag giving OPG contractual responsibility for “more adverse subsurface conditions than are represented in the GBR” (ibid., para 36, p.11), OPG is entitled to recover all the costs therefrom from ratepayers, and the Board erred in holding otherwise.

The implication is that the Board errs by failing to ensure the recovery of any cost that OPG incurs as a result of risks for which it is responsible under a contract with a third party. Energy Probe submits that it would be dangerous for the Board to adopt such a policy. Allowing OPG by to recover all costs from ratepayers in such risky circumstances rewards excessive risk-taking by OPG.

In Energy Probe’s view, the Board did not err in denying OPG the recovery of the costs from ratepayers at issue in the alleged error. Accordingly, OPG is mistaken in asserting that the Board made a factual error in this regard. Indeed, the erring party is OPG which apparently acted in the belief that its risk-taking would be fully compensated.

The other three alleged Board errors are, in Energy Probe’s view, simply reflections of the underlying contractual issue that OPG exposed itself to by adopting Design-Build procurement. Had OPG been realistically able to choose another contractor, these alleged errors would not have arisen.

Energy Probe submits that none of the errors alleged by OPG are errors that require the Board to revisit its Decision. Therefore, OPG has failed to meet its burden on the threshold issue.

### **Part B: Niagara Tunnel Project: Energy Probe Submissions on the Merits**

In regard to the Niagara Tunnel Project, the OPG Motion provides an extensive review of the evidence in EB-2013-0321 and claims that the Board has made errors of fact that support the motion to review and vary the Board’s decision to disallow \$88 million addition to the rate base.

Energy Probe does not challenge the aggregate figure of \$88M that the Board decided to disallow.

At paragraphs 1-4 (pp.2-3) of the OPG Motion, OPG asserts that the additional cost of construction at issue here was:

due entirely to the extremely difficult rock conditions encountered by Strabag, which were significantly more challenging than expected. ... (para 4, underlined emphasis in original)

OPG re-states this claim in the OPG Submissions (para 7, p.3).

OPG's assertion that the costs at issue arose solely because of unanticipated conditions is a continuing theme throughout the OPG Motion and the OPG Submissions. OPG would have the Board accept that the unexpected nature of the costs supports its claim for inclusion of \$88M thereof in the rate base.

Energy Probe submits that OPG's assertion is factually incorrect. It is certainly true that some of the additional costs of the NTP that OPG incurred can be directly attributed to unanticipated conditions and would have arisen under Design-Bid-Build procurement. However, in Energy Probe's view, the contractual resolution process and the amounts required to settle with Strabag were both significant and, to some extent, a consequence of OPG's early decision to adopt "Design-Build" procurement rather than "Design-Bid-Build".

Indeed, in its questions to OPG's expert Mr. Ilsley during the hearing in EB-2013-0321 and in its Final Argument, Energy Probe argued that the Design-Build process was a source of extra cost because Strabag's proprietary knowledge and technology, which it built into its design, rendered merely theoretical OPG's option to select another contractor when the dispute between them arose. (Energy Probe Final Argument, August 26, 2014, para. 15-27, pp.6-11)

Energy Probe had argued that because OPG could not realistically select another contractor, the costs that could have been avoided had a Design-Bid-Build approach been adopted should be deducted from OPG's proposed addition to the rate base. It further argued that available evidence did show that \$60M was the best estimate of the minimum amount that OPG spent because it could not terminate Strabag. Allowing an additional \$10M to fund a Design-Bid-Build bidding process, Energy Probe submitted that \$50M should be deducted from the rate base that OPG had proposed. (Energy Probe Final Argument, para 30-32, p.12)

In the OPG Motion, OPG notes that it had followed the recommendation of the DRB and the CLOC (ibid, para 14-17, pp.5-6) that settling with Strabag and negotiating the Amended Design-Build Agreement was the preferred option. In following those recommendations, OPG may have been correct: in the circumstances, it may well have been cheaper to re-negotiate with Strabag simply because the costs (both monetary and scheduling delay) of breaking off with Strabag and selecting and bringing in a new contractor would have been prohibitive.

However, Energy Probe submits that the relevant comparison is with the costs associated with selecting another contractor had OPG adopted the Design-Bid-Build procurement process at the outset.

In its final submissions in EB-2013-0321, intervenor AMPCO called attention to the problems of Design-Build procurement that the Dispute Resolution Board itself had noted:

AMPCO submits that there are issues with a Design-Build contract regarding attention to details and resulting negotiations that can lead to disputes. The DRB states that “Typically during Design Build negotiations the parties concentrate on getting the work started, often without adequate attention to the details of the design, specifications and payment provisions. It is not uncommon therefore, that after aware of Design-Build contracts, problems arise from provisions in the negotiated contract that were either not clearly written, were overlooked, or reflect misunderstandings during the final drafting of the contract.” This is precisely what occurred on the NTP. OPG’s multi-step process to develop the GBR led to confusion and deficiencies in the negotiations and understanding of the GBR baseline that had a negative ripple effect on the means and methods of the contractor. (Final Submissions of AMPCO, August 26, 2014, para 54, p.13)

The final submissions of intervenor AMPCO also support Energy Probe’s conclusion that Design-Build procurement was a source of cost. In its discussion of contract renegotiation issues, AMPCO states:

In reaching this conclusion [to settle with Strabag and negotiate a new target cost] it appears as if OPG was held hostage to its concern that Strabag would abandon the project if it was held to the terms of the existing agreement it had with OPG. (Final Submissions of AMPCO, August 26, 2014, para 127, p.30)

Hence, Energy Probe rejects entirely OPG’s assertion that the source of the additional cost was solely the unanticipated conditions that arose. Rather, OPG’s management of the project, including its decision to adopt Design-Build procurement contributed substantially to those costs.

Energy Probe also rejects any assertion that its claims of the mistakes of OPG management, whether as above or in its final argument in EB-2013-0321, are or were based on after-the-fact observation that OPG's costs were higher than it had expected.

In its final argument in EB-2013-0321, Energy Probe acknowledged that OPG would likely have incurred higher costs even if it had adopted Design-Bid-Build procurement. (Energy Probe Final Argument, August 26, 2014, para 29 at p.11.) The real issue is whether the all of the costs that OPG incurred were properly attributed to factors beyond its control, and it is clear that a significant portion of the costs arose as a result of management's decision on procurement strategy.

For greater certainty, Energy Probe is not asking the Board to address Energy Probe's specific claim that \$50M should be deducted from OPG's requested rate base. Rather, Energy Probe's submission here is that OPG's attempt to attribute all of its cost overruns to unexpected conditions is without merit.

Accordingly, based on the above review, Energy Probe submits that OPG's claim that:

The uncontroverted evidence before the Board was that if the rock conditions had been known in advance with perfect foresight, the tunnel would have cost at least what OPG paid and may have cost more. (OPG Notice, para 5, p.3)

is irrelevant and should be ignored.

### **Part C: Tax-Loss Carry Forward**

Energy Probe makes no submissions on the threshold issue or the merits regarding the tax-loss carry forward, as the matter appears to largely turn on whether the Board was correct in its actions in light of previous decisions of the Board and Board policies.

Energy Probe notes only its understanding that the Board is not strictly bound by previous decisions. Moreover, it is Energy Probe's general understanding that policies of the Board, even if published, are not legally binding and can be changed without notice.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**March 2, 2015**

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