

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch.B, as amended;

**AND IN THE MATTER OF** an Application by Ontario Power Generation pursuant to the *Ontario Energy Board Act* for an Order or Orders approving payment amount riders for the years 2015 and 2016

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**FINAL ARGUMENT  
OF THE  
SCHOOL ENERGY COALITION**

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## **1 GENERAL COMMENTS**

### **1.1 Introduction**

**1.1.1** On December 18, 2014 the Applicant Ontario Power Generation filed an Application to establish riders on its payment amounts for its prescribed facilities for the period commencing July 1, 2015. The Application initially sought approval to clear \$201.8 million from Hydroelectric deferral and variance accounts, and 1,548.5 million from Nuclear deferral and variance accounts<sup>1</sup>, through payment amounts riders that would recover a total of \$1,315.6 million over the period July 1, 2015 to December 31, 2016. Those amounts were adjusted through updates during the process.

**1.1.2** In a Settlement Agreement dated June 16, 2015, all Parties agreed to settle all issues, subject to one disputed issue that affects multiple accounts. The result of the settlement is as follows<sup>2</sup>:

- (a)* Hydroelectric amounts to be cleared: \$190.6 million (per OPG) or \$49.1 million (per certain intervenors);
- (b)* Nuclear amounts to be cleared: \$1,557.8 million (per OPG) or \$1,435.4 million (per certain intervenors);
- (c)* Amortization over the 18 months July 1, 2015 to December 31, 2016: \$926.7 million (per OPG) or \$668.7 million (per certain intervenors);

**1.1.3** OPG and the intervenors also disagree on the appropriate method of presentation of the rate increase that would result from this Application<sup>3</sup>:

- (a)* The intervenors believe that the rate increase is properly calculated by comparing payment amounts after July 1, 2015, when the riders are added, to the payment amounts in effect immediately prior to July. Using that method, the rate increase is 11.4% on OPG's view of the disputed issue, and 7.4% if the intervenor view of that issue is correct.
- (b)* OPG believes that the rate increase is properly calculated by comparing December 2014 payment amounts to the average of 2015 and 2016 payment amounts (i.e. including the new riders for 18 out of 24 months). Using that method, the rate increase is 7.2% on OPG's view of the disputed issue, and 4.2% if the intervenor view of that issue is correct.

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<sup>1</sup> Ex. H1-2-1, Tables 1 and 2.

<sup>2</sup> All amounts from the Schedules to the Settlement Agreement.

<sup>3</sup> All amounts from the Schedules to the Settlement Agreement.

Neither of these calculations includes any increases in payment amounts in 2016 arising out of the upcoming cost of service and IRM application from OPG.

- 1.1.4** The dispute between the Parties with respect to the presentation of the rate increase does not affect the amount or duration of the riders, and has no other impact on the Application. Therefore, the Parties believe that no formal decision by the Board with respect to this dispute is required, although of course SEC and others would be assisted in the future if the Board were to determine which presentation is preferred.
- 1.1.5** The remaining issue, common to several of the accounts, is whether the actuals for the period January to October, 2014 should be compared to the amounts or other values built into the EB-2010-0008 revenue requirement (per OPG), or to the amounts or other values built into the EB-2013-0321 revenue requirement (per certain intervenors). The difference between the two approaches is \$263.0 million<sup>4</sup>. This Final Argument deals with that disputed issue.
- 1.1.6** The ratepayer groups who intervened in this proceeding have worked together throughout the hearing to avoid duplication. We have been assisted in preparing this Final Argument by that co-operation amongst parties.

## **1.2 Summary of Submissions**

- 1.2.1** SEC submits that, once the \$263 million in dispute was included in 2014 revenue requirement, OPG was no longer able to recover it through deferral and variance accounts. It was included in Board-approved revenue requirement starting January 1, 2014.
- 1.2.2 *Legal Analysis.*** OPG argues that the wording of the various payment amount orders implies that actuals will be compared to the previous forecast amounts, until the payment amounts are actually changed. This argument is not consistent with the wording of those actual orders, which clearly order that actuals be compared to Board-approved revenue requirement. The Board-approved revenue requirement for 2014 includes the \$263 million in dispute. No amount of twisting of the words in those cases changes that fact.
- 1.2.3 *Policy Analysis.*** The EB-2013-0321 Decision on effective date resulted in the total deficiency of \$1,138.3 million (as determined by the Board<sup>5</sup>) being implemented for fourteen of the 24 months of the revenue requirement period. That is, the deficiency actually recovered was \$664.0 million (14/24ths of the deficiency), and an amount of \$474.3 million was not recovered. That was, in effect, the cost borne by OPG for failing to pursue its new payment amounts in a timely manner. The Board in the Decision ameliorated that by allowing OPG to recover the \$312.0

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<sup>4</sup> Settlement Agreement, Schedule 1, Chart 1.

million difference in pensions and OPEBs for that ten month period, leaving a net cost to OPG of \$162.3 million (about 2% of 2014/15 revenue requirement).

- 1.2.4** OPG proposes in this proceeding to recover that same \$312 million for pensions and OPEBs, which the EB-2013-0321 Board panel approved specifically. However, in addition OPG proposes in this proceeding to recover for that ten month period the \$263 million now in dispute. The effect of the OPG argument is therefore that OPG gets a net benefit of more than \$100 million (\$162.3 million cost less \$263.0 million incremental recovery) by filing late, and then having its EB-2013-0321 payment amounts effective November 1, 2014 rather than January 1, 2014. This cannot be, and was not, what the Board in that case intended. It did not intend to give OPG a windfall for late filing.
- 1.2.5** In addition, the effect of the OPG argument on O. Reg. 53/05 is that OPG can file as late as they want, and the Board is still legally required to allow recovery of all interim accruals in the 53/05 variance accounts. For example, OPG could complete the refurbishment of Darlington, avoiding any further Board review of their refurbishment proposals, and then ten years later, after the fact, demand that the Board order recovery of all amounts spent, relying on the presumption of prudence to buttress the costs already incurred. Again, this cannot be what is intended by O. Reg. 53/05.

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<sup>5</sup> EB-2013-0321 Payment Amounts Order, Appendix A, Table 4.

## 2 LEGAL ANALYSIS

### 2.1 Basic Principle of D/V Clearances

- 2.1.1** The issue is one of interpretation of the Board's decision in EB-2013-0321, specifically whether the Board in that case intended that the disputed amount of \$263 million be BOTH (a) included in 2014/2015 revenue requirement, and (b) (in addition) recoverable through deferral and variance accounts.
- 2.1.2** OPG's Final Argument is a highly legalistic approach to the disputed issue. For example, they ignore the practical impact of their position, which is that they recover \$100 million more in this proceeding than they would have recovered had the Board made the EB-2013-0321 payment amounts effective January 1, 2014. Instead, they try to parse the words of the Decision, ignoring the overall intent of the Board.
- 2.1.3** We will deal with each of the components of their legalistic approach below.
- 2.1.4** SEC, however, sees the question somewhat differently. In our view, it is more appropriate to start from a principled approach. The principle is that deferral and variance accounts facilitate recovery of certain types of cost, revenue, and other variances, until those amounts are included in the calculation of revenue requirement. Once they are included in revenue requirement, the deferral or variance account is no longer the appropriate way to recover them. They are, instead, recovered through the process of going from revenue requirement to rates (or, in this case, payment amounts).
- 2.1.5** This principle is not new. In our submission, it is fundamental to the nature of deferral and variance accounts. Rate orders regularly bear this out. For example, in the EB-2013-0321 Payment Amounts Order, each of the relevant accounts is stated to be a comparison between actual revenues or costs, and "forecast revenues and costs...factored into the...revenue requirement approved by the Board"<sup>6</sup>. Similar wording is seen in most rate orders and payment amount orders.
- 2.1.6** We will go through some of the details of this below, as part of the review of the OPG more technical approach. However, at the outset it is important to note that the Board does not refer to amounts factored into rates. It is the amounts factored into revenue requirement that matter. There is then a separate process to convert revenue requirement into rates.
- 2.1.7** The entire amount of the \$263 million in dispute in this case was included by the

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<sup>6</sup> Quote is from Bruce Lease Net Revenues Variance Account, EB-2013-0321 Payment Amounts Order, Schedule G, p. 11.

Board in the 2014/15 revenue requirement that the Board used to set the 2014/15 payment amounts. In SEC's view, once that amount was included in revenue requirement by the Board, it was no longer recoverable by OPG through deferral and variance accounts. The fact that the Board deferred implementation of the payment amounts arising out of that revenue requirement is not relevant. The timing of implementation was about rates, and the Board's control of its procedure. It did not change the revenue requirement for 2014 and 2015.

**2.1.8** SEC therefore believes that, to allow recovery of this \$263 million through deferral and variance accounts, in addition to including it in revenue requirement, would be double counting.

## **2.2 The OPG Position**

**2.2.1** The underlying reason why OPG seeks to recover this \$263 million through the deferral and variance accounts is that the Board in EB-2014-0321 did not allow them to recover their increased revenue requirement for the period January to October, 2014. At its root, this argument is "But we didn't get our money!" They therefore conclude that the Board should not follow the principled approach of saying that once amounts are in revenue requirement, they are no longer recoverable through deferral and variance accounts.

**2.2.2** To get to this result, OPG offers six basic arguments:

- (a)** The Board cannot legally order anything that would be operative prior to the effective date of its order.
- (b)** The past practice of the Board in OPG cases is that, in stub periods such as this one, the revenue requirement used for comparison has been the prior one.
- (c)** Use of the EB-2013-0321 revenue requirement for the January to October comparison doesn't calculate the correct variance, and therefore any recovery flowing from that would not be just and reasonable.
- (d)** For certain accounts, comparison of actuals to EB-2013-0321 would be contrary to O. Reg. 5/05, and therefore outside of the mandate of the Board.
- (e)** The specific wording of the EB-2013-0321 Payment Amounts Order should be interpreted as requiring comparison of actuals to the EB-2010-0008 revenue requirement, rather than the EB-2013-0321 revenue requirement.
- (f)** Comparison of actual costs to EB-2013-0321 revenue requirement would be contrary to prior orders of the Board.

**2.2.3** SEC notes that, for each of these arguments, they are relevant only to the extent that

they assist this Board panel in interpreting the EB-2013-0321 decision and order. It is common ground amongst the Parties, we believe, that OPG is not in this case seeking to review or appeal the EB-2013-0321 decision, and they have clearly not sought leave to do so. Therefore, whatever the Board intended in that case for the deferral and variance accounts in question is what should be applied in this case.

**2.2.4** That is, the decision and order in EB-2013-0321 establishes the parameters for the affected deferral and variance accounts. The question here is whether those parameters order that this \$263 million be included in both revenue requirement and the D/V accounts, or whether those parameters ordered by the Board follow the more traditional approach of treating inclusion in revenue requirement and inclusion in D/V accounts as alternatives only.

**2.2.5** The first four OPG arguments can be dealt with simply, in the next section. The last two OPG arguments are about parsing the wording of various Board decisions. We will deal with that separately, in Section 2.4 below.

### **2.3 SEC Response to OPG Arguments**

**2.3.1 *Effective Date.*** OPG argues that the Board in EB-2013-0321 was legally not allowed to include in its order anything that would take effect prior to November 1, 2014<sup>7</sup>. This is not, in fact, the law.

**2.3.2** On December 17, 2013, the Board declared the existing payment amounts for OPG interim as of January 1, 2014. The effect of declaring the payment amounts interim was that the Board was able to make all or any part of its EB-2013-0321 decision and order operate from any date on or after January 1, 2014.

**2.3.3** It is interesting that OPG cites only two cases and one text for their incorrect legal argument. None of them are in fact relevant to the current situation:

(a) *Edmonton v. JJC Holdings* is not about the effective date of a regulatory order. It is about an attempt by the City of Edmonton to get around the clear restrictions in the Alberta Municipal Taxation Act through pretending that lands in an adjacent county were annexed to the City on the date prior to when they were actually annexed. The court concluded “it is an attempt indirectly to do that which it cannot do directly, namely amend the *Municipal Taxation Act*”<sup>8</sup>. Nothing is mentioned in the case about the ability of a regulator to make anything happen prior to the effective date of an order. It is about something entirely different, and is not applicable here.

(b) *Cantareal v. Canada* is the interpretation of a lease that used the term

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<sup>7</sup> AIC, p. 3.

<sup>8</sup> Tab 2 of the OPG Book of Authorities, at para. 6.

“effective”. It is trite law that the interpretation of contracts follows very different rules from the interpretation of either statutes or regulatory decisions, and in any case this was not about “effective date”, but the word “effective”. Further, it was only about what that word meant in the context of that particular lease, i.e. did it mean on a specific date, or at any time on or after that date. The court makes clear, in fact, that it is only interpreting the word “in a contractual context”<sup>9</sup>, and taking into account the commercial realities of the situation before them. This case is also not in any way applicable to the current situation.

(c) Administrative Law in Canada. This text says:

*“No order may take effect prior to the date it is made without express authority. Orders must be prospective in effect.”*<sup>10</sup>

The Board is, of course, aware that this statement is not correct. While it is true that it is often correct, it is not correct in the case where rates have been declared interim, for example. It is also not the case with respect to deferral and variance accounts, as the text goes on to point out:

*“An order, directing the use of funds that were ordered put aside in case of a difference between forecast and actual revenues and costs, is not regarded as retroactive.”*<sup>11</sup>

SEC therefore submits that this text does not assist OPG in their incorrect argument that orders cannot have effect prior to their effective date.

**2.3.4** What is true is that it is generally better interpretation to assume that an order that declares an effective date speaks only from and after that date. That is a broader principle, driven by common sense. It is not a legal restriction, but rather a reflection of the natural meaning of the words “effective date”.

**2.3.5** The problem is that here the Board made very clear that, at least in some respects, its order would have effect prior to November 1, 2014. A good example is p. 92 of the Board’s Decision with Reasons, in which the Board ordered that OPG continue to record the difference between the EB-2011-0090 pension and OPEBs included in rates, and the actual accrual amount, for the period January 1, 2014 to October 31, 2014.<sup>12</sup>

**2.3.6** In SEC’s submission, the Board was free in EB-2013-0321 to make any part of its

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<sup>9</sup> OPG Book of Authorities, Tab 3, para. 14.

<sup>10</sup> OPG Book of Authorities, Tab 4, p. 133.

<sup>11</sup> OPG Book of Authorities, Tab 4, p. 134.

<sup>12</sup> EB-2013-0321 Payment Amounts Order, Appendix G, p. 12.

decision and order operate from and after any date it wanted, starting January 1, 2014, the date payment amounts were made interim. It is still necessary to assess what the Board panel intended to do, but there was certainly no legal restriction preventing the use of the new revenue requirement for D/V purposes. That is just not the law.

- 2.3.7 Past Practice.** OPG argues that in past cases the Board has retained the comparison of actuals to old revenue requirement, even though the same period has a new revenue requirement. OPG cites EB-2012-0002, which was the subject of a settlement between OPG and the intervenors, including SEC.
- 2.3.8** That case had to deal with a two month stub period, January and February 2011, because the previous rate order was effective March 1, 2011. What happened in fact was that the amount was immaterial (EB-2010-0008 did not have any significant rate increase), and the parties did not put their minds to it.
- 2.3.9** SEC believes EB-2014-0370 is in fact the first case in which a utility has sought to recover material amounts from D/V accounts that were already included in revenue requirement, and it is certainly the first case in which that issue has been addressed through argument before the Board.
- 2.3.10** In these circumstances, it is submitted that past practice is not helpful to OPG. Either their approach – including the \$263 million in both revenue requirement and D/V recoveries – is the appropriate approach, or it is not. If it is, that becomes the Board’s practice. If it is not, no past practice should be allowed to prevent the Board from implementing the appropriate approach.
- 2.3.11 Not the Correct Variance.** This argument by OPG simply begs the question. OPG wants to recover these amounts, and thus argues that any calculation by which they don’t recover them must be wrong, and therefore not just and reasonable.
- 2.3.12** But the argument is circular. OPG is not entitled to recover every dollar they spend. They are entitled to have payment amounts set on a basis that allows them a reasonable opportunity, going forward, to recover the amounts they reasonably have to spend to provide generation production. If they have past spending that they want to recover, their entitlement is to recover that in accordance with the terms of any deferral or variance account in place and covering the period of the spending. Those terms may or may not allow them to recover every dollar they spend. D/V accounts often have limitations and restrictions.
- 2.3.13** In this case, if the Board in EB-2013-0321 intended that the revenue requirement for comparison purposes in January-October be the revenue requirement approved in EB-2010-0008, then because of that intention OPG would recover that \$263 million. On the other hand, if the Board intended the EB-2013-0321 revenue requirement to be the base, then OPG cannot complain that they are not recovering

the \$263 million. Whatever the D/V rules were, they should apply. The fact that OPG spent the money does not trump what the Board intended.

- 2.3.14** We note that OPG made a somewhat similar argument in EB-2013-0321 with respect to the Board's ability to set an effective date different from January 1, 2014. The Board rejected that argument, saying in part:

*“OPG argues that the Board has an obligation to ensure that rates are just and reasonable at all times. As a general statement, this is true. However, the Board's power to consider and set what makes a just and reasonable rate is very broad and allows significant flexibility. The obligation to ensure that rates are always just and reasonable does not mean that the Board must examine and adjust a utility's rates on a constant basis. Most utility's rates are set on a forecast basis, for example, and invariably these forecasts turn out to be inaccurate to some extent. Absent extraordinary circumstances, the Board does not intervene to adjust rates simply because actual costs or revenues are different from what was forecast – even though the Board has the power to do so. In other words, there is a measure of “wobble room” in a just and reasonable rate. Just and reasonable rates can fall within a range, and there is no defined line past which rates immediately become “unreasonable”. Indeed, under incentive regulation rates are deliberately de-coupled from a utility's actual costs. The Board therefore does not agree with OPG's argument that the requirement to ensure just and reasonable rates at all times leads to an automatic requirement to match the effective date with the date interim rates were set.”<sup>13</sup> [emphasis added]*

- 2.3.15 O. Reg. 53/05.** With respect to certain of the D/V accounts<sup>14</sup>, OPG argues that the Board in EB-2013-0321 could not have intended that actuals be compared to the new revenue requirement, because they would have been acting contrary to law if they had done so. SEC disagrees with OPG's interpretation of the Regulation.

- 2.3.16** The Nuclear Liability Deferral Account is the easiest of the accounts. The Regulation says:

*“5.2(1) Ontario Power Generation Inc. shall establish a deferral account in connection with section 78.1 of the Act that records... the revenue requirement impact of changes in its total nuclear decommissioning liability between:*

*(a) the liability arising from the approved reference plan incorporated into*

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<sup>13</sup> EB-2013-0321 Decision with Reasons, p. 134.

<sup>14</sup> Nuclear Liability Deferral Account, Bruce Lease Net Revenues Account, and Capacity Refurbishment Variance Accounts.

*the Board's most recent order under section 78.1 of the Act, and*

*(b) the liability arising from the current approved reference plan.*

*6(2)7. The Board shall ensure that the balance recorded in the deferral account established under subsection 5.2(1) is recovered on a straight line basis over a period not to exceed three years, to the extent that the Board is satisfied that revenue requirement impacts are accurately recorded in the account..."<sup>15</sup> [emphasis added]*

**2.3.17** There is little doubt that, for this account, the wording contemplates that actual costs will be different than the amounts included in revenue requirement, and only in that case is the difference included in the account. Therefore, once an "impact" is included in revenue requirement, it is no longer part of the deferral account.

**2.3.18** The Bruce Lease Net Revenues Account is more complicated. The Regulation says:

*"6(2)9. The Board shall ensure that Ontario Power Generation Inc. recovers all the costs it incurs with respect to the Bruce Nuclear Generating Stations.*

*10. If Ontario Power Generation's revenues earned with respect to any lease of the Bruce Nuclear Generating Stations exceed the costs Ontario Power Generation incurs with respect to those Stations, the excess shall be applied to reduce the amount of the payments required under subsection 78.1(1) of the Act with respect to output from the nuclear generation facilities referred to in paragraphs 3, 4, and 5 of section 2."<sup>16</sup> [emphasis added]*

**2.3.19** A similar issue arises with respect to the Capacity Refurbishment Variance Accounts. The Regulation says:

*"The Board shall ensure that Ontario Power Generation Inc. recovers capital and non-capital costs, and firm financial commitments incurred to increase the output of, refurbish, or add operating capacity to a generation facility referred to in section 2... if the Board is satisfied that the costs were prudently incurred and that the financial commitments were prudently made."<sup>17</sup> [emphasis added]*

**2.3.20** In both of these cases, the plain wording of the section appears to suggest that the

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<sup>15</sup> O. Reg. 53/05. OPG Book of Authorities, Tab 9, p. 3,4.

<sup>16</sup> O. Reg. 53/05. OPG Book of Authorities, Tab 9, p. 4.

<sup>17</sup> O. Reg. 53/05. OPG Book of Authorities, Tab 9, p. 3.

Board must actually make sure that OPG gets the money from ratepayers for these items. Under OPG's interpretation, the Board must go beyond including these amounts in revenue requirement. The Board must make sure that the amounts actually collected from ratepayers specifically include these amounts.

- 2.3.21** This is, in our submission, not the correct interpretation of the Regulation. The reason we know this to be true is that the Board does not, in fact, set up a separate charge to ratepayers to recover these costs. Similarly, there is no true-up between the amount included in calculating revenue requirement, and the amounts actually collected from ratepayers<sup>18</sup>.
- 2.3.22** By way of example, the Board has ordered that the prudent costs associated with the Niagara Tunnel capacity addition be added to rate base and included in payment amounts going forward. However, in 2015 the production may or may not be equal to the forecast production in EB-2013-0321. If OPG fails to deliver enough production to recover the full revenue requirement associated with the Niagara Tunnel in 2015, that is OPG's problem, and the Board is not obligated to go back and give OPG more because their production was down.
- 2.3.23** What happens in practice, for O. Reg. 53/05 accounts, is that the Board assesses the prudence of the amounts, and then adds them to rate base and/or revenue requirement. Once that has been done, the Board has met the requirements of the Regulation, and any variations in the amounts actually collected from ratepayers to cover those costs are OPG's problem thereafter. The Board does not have a continuing responsibility to make OPG whole, despite the apparent wording of the Regulation. Adding the amounts to revenue requirement meets the obligations imposed under the Regulation.
- 2.3.24** SEC therefore submits that the Board has complied with O. Reg. 53/05 in EB-2013-0321, by including the spending associated with those items in revenue requirement commencing January 1, 2014.
- 2.3.25** OPG's argument that they can't collect the amounts because of the effective date of the payment amounts, November 1, 2014, is not about O. Reg. 53/05 at all. This simply goes back to the initial "effective date" argument, which has the weaknesses we have discussed above, or the circular "not the correct variance" argument. In either case, O. Reg. 53/05 adds nothing to the analysis.
- 2.3.26** SEC therefore submits that, for the above reasons, the four arguments proposed by OPG do not support their interpretation of the EB-2013-0321 decision and order.

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<sup>18</sup> There is a true-up of rate rider collections, but no true-up of amounts once added to revenue requirement or rate base.

## **2.4 Detailed Decision Analysis**

**2.4.1** That leaves two perspectives on this dispute: the direct interpretation of the words in the decisions, and the policy/regulatory implications of choosing the OPG position vs. the intervenor position. The latter is dealt with in Part 3 of this Final Argument.

**2.4.2** That leaves the analysis of the words of the decisions and orders. To do this, it is necessary to start with what the Board says in EB-2013-0321 about deferral and variance accounts. Then, assuming that the ten months is covered in whole or in part by previous decisions, it is necessary to look at what the Board says in those decisions about the calculation of entries into those accounts.

**2.4.3** **EB-2013-0321.** In the EB-2013-0321 Payment Amounts Order<sup>19</sup>, the Board lists all but one of the accounts referred to in Chart 1 of Schedule 1 of the Settlement Agreement, i.e. the D/V accounts in which there is a dispute over the entries for the ten month stub period. Of those accounts, the Board's order was:

*“OPG shall continue the following deferral and variance accounts in accordance with Appendix G, effective November 1, 2014, and shall extend the applicable accounts to the newly regulated hydroelectric facilities in accordance with Appendix G, effective November 1, 2014: [list].”*

**2.4.4** With respect to the listed accounts, the Board does not make any order with respect to the period prior to November 1, 2014. In Appendix G, the Board says: “Effective November 1, 2014, OPG shall record entries into deferral and variance accounts listed below, as follows:”. The Board then discusses each account in turn, but it is clear that for all of them the order speaks from November 1, 2014.

**2.4.5** The one exception to this list is the Pickering Life Extension Depreciation Variance Account. That account was intended to record a credit to ratepayers of \$3.9 million per month until new nuclear payment riders were set. About that account, the Board said, at page 12 of Appendix G:

*“The Pickering Life Extension Depreciation Variance Account was originally approved in EB-2012-0002 to record a credit amount of \$46.9M over the course of a year at approximately \$3.9M per month, for the period from January 1, 2013 until the effective date of new nuclear payment amounts (excluding riders), reflecting the revised service lives, for depreciation purposes, of the Pickering stations. As the payment amounts authorized in this Order reflect these revised service lives, effective November 1, 2014, OPG will record only amortization in the account. No interest shall be recorded on the balance in this*

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<sup>19</sup> At para. 11.

*account.”[emphasis added]*

- 2.4.6** Thus, the Board makes clear that that monthly credit continues until the new payment amounts are in place, because the account specifically refers to the effective date of payment amounts, not revenue requirement. SEC submits that the \$39.0 million credit to ratepayers listed in Chart 1 of Schedule 1 for this account should be applied in this Application, because the Board in EB-2013-0321 specifically so ordered.
- 2.4.7** With the exception of the Pickering Depreciation Account, and the Pension and OPEBs account previously discussed, the Board in EB-2013-0321 said nothing about how to deal with entries to D/V accounts over the period January to October, 2014. In every case, the Board’s directions were effective November 1, 2014. Although in each case the reference amount was stated to be the revenue requirement for 2014 and 2015 as determined in EB-2013-0321, at no time does the Board comment on the reference amount for the stub period.
- 2.4.8** The Board did do one other thing in EB-2013-0321; it approved a revenue requirement for all of 2014 and 2015. The Board-approved revenue requirement is stated on page 6 of the Payment Amounts Order, as follows:
- “The test period revenue requirement is \$1,652.8M for the previously regulated hydroelectric facilities, \$751.9M for the newly regulated hydroelectric facilities (18 month revenue requirement), and \$5,668.0M for the regulated nuclear facilities, as set out in Appendix A.”*
- 2.4.9** Appendix A then provides the details of those calculations, which cover the full twenty-four months for the existing facilities, and eighteen months for the newly-regulated hydroelectric.
- 2.4.10** SEC submits that, because of this Payment Amounts Order, OPG had a new Board-approved revenue requirement covering the period January 1, 2014 to November 1, 2014 (and beyond).
- 2.4.11** **EB-2012-0002.** Since the Board in EB-2013-0321 did not make any orders with respect to calculation of D/V entries prior to November 1, 2014 (except as noted above), it is necessary to go back to the previous decision and payment amounts order, which is in EB-2012-0002. This was a proceeding to clear a number of D/V accounts, and in the process to continue and sometimes modify some of the accounts. While there was a complete settlement of all issues in the proceeding, the actual Payment Amounts Order was proposed by OPG, the subject of submissions by a number of parties, and then finalized by a determination of the Board.
- 2.4.12** In the EB-2012-0002 Payment Amounts Order, the Board said, at para. 12 of the Order:

*“OPG shall continue making entries in the following deferral and variance accounts in accordance with Appendix B, effective January 1, 2013: [list]”*

- 2.4.13** The list includes all of the D/V accounts in Chart 1 of Schedule 1 to the Settlement Agreement in this proceeding.
- 2.4.14** In Schedule B, the Board deals with each of those D/V accounts, prefacing all of them by saying “Effective January 1, 2013, OPG shall record entries into the deferral and variance accounts listed below as follows:”
- 2.4.15** In each case, the wording is similar. An example of one of the revenue/expense accounts is the Ancillary Services Net Revenue Variance Account – Hydroelectric, where the Board says:

*“OPG shall continue to compare actual hydroelectric ancillary services net revenue to the forecast amount reflected in the revenue requirement approved by the Board (the “reference amount”). The monthly reference amounts shall be 1/24 of the total forecast amount of \$77.8M for 2011 and 2012 underpinning the two-year revenue requirement approved in EB-2010-0008. The monthly reference amount shall be \$3.24M.”<sup>20</sup>*

- 2.4.16** Similarly, for the Income and Other Taxes Variance Account, the Board says:

*“The income tax provision reflected in the revenue requirement approved by the Board shall be used to calculate any variances in income taxes recorded in the Income and Other Taxes Variance Account. The income tax provision reflected in the revenue requirement approved by the Board is calculated in the EB-2010-0008 Payment Amounts Order, Appendix A, Tables 6 and 7. The monthly reference amounts shall be 1/24 of the total forecast amount of \$152.0M for 2011 and 2012 underpinning the two-year revenue requirement approved in EB-2010-0008. The monthly reference amount shall be \$6.33M.”<sup>21</sup>*

- 2.4.17** Similarly, for the Capacity Refurbishment Variance Account, the Board says:

*“This account shall continue to record variances between the actual capital and non-capital costs, and firm financial commitments incurred to increase the output of, refurbish or add operating capacity to a prescribed generation facility referred to in O. Reg. 53/05 section 2 and those forecast costs and firm financial commitments reflected in the revenue requirement approved by the Board (the “reference amount”). The monthly reference*

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<sup>20</sup> EB-2012-0002 Payment Amounts Order, Appendix B, p. 4.

<sup>21</sup> Ibid, p. 5.

*amounts shall be 1/24 of the total forecast amount underpinning the two-year revenue requirement approved in EB-2010-0008 for 2011 and 2012. The monthly reference amount shall be \$4.42M.”<sup>22</sup>*

- 2.4.18** In each of these cases, and the other affected accounts, the Board says two things about the baseline to be used for calculating variances. First, the Board says entries should be calculated by reference to “the revenue requirement approved by the Board”. Then, the Board identifies the “monthly reference amount” applicable to that account.
- 2.4.19** On the face of it, this could be interpreted two ways. It could be read as providing a principle – compare to Board-approved revenue requirement – and then just details to be helpful. Alternatively, it could be read as suggesting that those monthly reference amounts should continue until a new payment amounts order changed them. That is, the dollars could be the focus, and the statement of principle that the reference is to the Board-approved revenue requirement could be ignored.
- 2.4.20** Two additional facts demonstrate that the latter – the approach taken by OPG - is not the appropriate interpretation.
- 2.4.21** First, this payment amounts order is the first time the Board included specific monthly reference amounts. This was done at the suggestion of Board Staff in its submissions on the draft order, and was opposed by OPG. The Board decided to include both the principle and the details in each case.
- 2.4.22** Second, EB-2012-0002 was not a cost of service application. Therefore, there was a good reason to include the actual amounts that would flow from the principle at that time.
- 2.4.23** In the previous case, while there was some reference to the amounts embedded in rates, there was more emphasis on the principle of comparison to Board-approved revenue requirement.
- 2.4.24** Thus, on the words of the EB-2012-0002 payment amounts order alone – which is the order that applies to the period January to October, 2014 - there is no clear basis to determine whether a change in revenue requirement should change the baseline or not. The fairer interpretation of that order is that when Board-approved revenue requirement changes, the baseline also changes.

## **2.5** **SEC Position**

- 2.5.1** SEC does not believe that the question of what happens if the Board-approved

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<sup>22</sup> Ibid. p. 10.

revenue requirement changes was contemplated by any of these orders, and there is certainly no express guidance in any of them. The question therefore is presented to the current Board panel as a new issue, without past guidance.

- 2.5.2** In our submission, the proper approach is not to gaze deeply into the words of the previous decisions and orders as if they were a crystal ball, trying to discern subtleties of meaning and intent. The Board should, in our view, start from the basic principle – amounts can be included in revenue requirement or D/V accounts, but not both – and determine based on logic and policy if there is any reason to depart from that principle in this case.
- 2.5.3** SEC believes that the principle that amounts cannot be included in both revenue requirement and D/V accounts should not be ignored lightly. The Board in EB-2013-0321 has decided to dispense with that principle for two accounts, pension/OPEBs and Pickering Depreciation Variance. In the absence of clear wording to the contrary, this Board should not extend that to the other accounts listed on Chart 1 of Schedule 1.
- 2.5.4** In this regard, we believe that Board should be guided by the practical and policy implications of deciding to accept the OPG position on this. As we note in the next section, two results arise:
- (a)* OPG will reap a net benefit of more than \$100 million by filing late, and losing their argument for a January 1, 2014 effective date. This is contrary to the clear intention of the Board panel in EB-2013-0321; and
  - (b)* The Board will send the message to OPG that it can ignore the Board's timelines largely with impunity, because so much of the OPG revenue requirement is protected by D/V accounts.
- 2.5.5** SEC therefore submits that, whether based on straight legal analysis interpreting the past decisions and orders, or whether based on the practical and policy implications, the Board should determine that the baseline for the accounts listed in Chart 1 of Schedule 1 (except the Pickering Life Extension Depreciation Variance Account), should be the Board-approved revenue requirement for 2014 as set out in EB-0213-0321.

### **3 POLICY ANALYSIS**

#### **3.1 General**

**3.1.1** SEC is concerned with two policy implications of the OPG position on the disputed issue:

- (a) The Board's decision to use a November 1, 2014 effective date for EB-2013-0321 payment amounts had the effect of reducing the deficiency from \$1,138.3 million over twenty-four months to \$664.0 million over fourteen months, for a net cost to OPG of \$474.3 million. The Board did specifically allow recovery of the \$312 million differential for pensions and OPEBs for January to October, 2014, but that still left a cost to OPG of \$162.3 million. On OPG's approach to the disputed issue, they would collect a further \$263.0 million because of the effective date of November 1, 2014 vs. January 1, 2014, thus providing them with a \$100.7 million benefit from filing late.
- (b) Because so much of the OPG revenue requirement is protected by D/V accounts, the Board would have little ability in the future to enforce its own procedures and require timely compliance by OPG with Board rate filings.

#### **3.2 Effect of OPG Position on EB-2013-0321 Result**

**3.2.1** The deficiency in the 2014/2015 revenue requirement in EB-2013-0321, after taking into account all of the changes determined by the Board in the Decision with Reasons, was \$1,138.3 million, comprised of \$181.7 million for previously regulated hydroelectric, \$213.9 million for newly regulated hydroelectric, and \$742.7 million for nuclear<sup>23</sup>. This was a reduction of about \$900 million from the deficiency ultimately proposed in the Application as amended through the process. Most of that reduction arose due to the change in pension and OPEB treatment from an accrual to a cash basis. The overall approved rate increase was 11.1%<sup>24</sup>

**3.2.2** In deciding to use a November 1, 2014 effective date, it was clear that the Board believed there would be a cost to OPG resulting from that decision. OPG argued strenuously for a January 1, 2014 effective date, to the extent of arguing it was outside of the Board's power to make the effective date later than that. The Board rejected OPG's arguments, saying in part:

*"The Board must control its regulatory process. The Board hears a large number of cases throughout the year and must plan its resources accordingly to ensure cases are completed and decisions are rendered. In*

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<sup>23</sup> EB-2013-0321 Payment Amounts Order, Appendix A, Table 4.

<sup>24</sup> Ibid. Table 9a.

*cases where utilities have not filed their applications in time to have rates in place prior to the effective date, the Board's practice has typically been to not allow the utility to retrospectively recover the amounts from the period where the interim order was in effect. All applicants are aware of the Board's metrics.*

*Ratepayers who made consumption decisions from January 1, 2014 to November 1, 2014, who thought they had already paid their electricity bills may be surprised to learn they will be responsible for additional costs, recovered through higher rates to be included on future bills until December 31, 2015. In addition, a January 1, 2014 effective date would result in some level of inter-generational inequity, to the extent customer profiles changed over that time.”<sup>25</sup>*

- 3.2.3** The whole point of the debate about whether to use a January or November effective date hinged on whether OPG would be denied recovery of incremental revenue requirement for the ten month intervening period. All parties, and the Board, believed that selection of the November 1<sup>st</sup> date would cost OPG money, and that was fair because it was OPG's responsibility to file their application in time to have January 1, 2014 rates if that's what they wanted. The “penalty” for failing to file on time was a reasonable one.
- 3.2.4** The penalty to be borne by OPG ended up being \$474.3 million, being ten months of the twenty-four months of deficiency (@\$47.29 million per month), less the \$312.0 million pension and OPEB variance for those ten months, which the Board specifically allowed OPG to recover on the old basis. The net cost to OPG was therefore \$162.3 million.
- 3.2.5** OPG is now proposing that they get extra recovery because of the delayed effective date. The costs that they say continued to be protected by D/V accounts were \$575.0 million, made up of \$312.0 million for pension and OPEBs, and \$263.0 million for the D/V accounts referred to in Charts 1 and 2 of Schedule 1 to the Settlement Agreement. As a result, OPG would recover, for the January to October 2014 period, \$100.3 million more using the November 1, 2014 effective date than had the Board decided on the January 1, 2014 effective date.
- 3.2.6** In SEC's submission, it is not reasonable to interpret the Board's decision in EB-2013-0321 as intending to provide OPG with a benefit for filing late.

### **3.3 Ability of the Board to Control its Process**

- 3.3.1** This raises a more general question with respect to OPG and the Board. If OPG can continue to collect on D/V accounts no matter how slow they are at complying

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<sup>25</sup> EB-2013-0321 Decision with Reasons, p. 135-6.

with the Board's timelines, they are effectively immune from directions from the Board as to process. The Board can say whatever it likes, but for OPG there are no material consequences to ignoring the Board's timing.

- 3.3.2** Under the current assumptions (i.e. ignoring the new approach OPG wishes to take), utilities are under some pressure to file their applications in a timely manner, and pursue them vigorously. If they fail to do so, the Board may well decide that any rate increases are effective only from a later date, as the Board did in EB-2013-0321.
- 3.3.3** OPG now proposes that, while normal revenue requirement may be captured by delayed effective date, nothing that is protected by D/V accounts is at risk. Since about 30%<sup>26</sup> of OPG revenue requirement is subject to D/V accounts, that means there is no material downside to OPG operating on its own preferred timeframe.
- 3.3.4** SEC submits that, if the Board accedes to the OPG interpretation of the EB-2013-0321 decision and order, the effect is to significantly reduce the Board's ability to require OPG to adhere to the Board's regulatory timelines.
- 3.3.5** We note in addition that the OPG formulation of the effect of D/V accounts leaves the Board open to gaming by OPG. At least with respect to the O. Reg. 53/05 accounts, it would be open to OPG to simply delay filing any evidence on a capacity refurbishment project, for example, until after the project is complete.
- 3.3.6** Take Darlington refurbishment as an example. OPG, in order to avoid a public review of its now \$12 billion+ spending plan for that project, may elect to file no evidence on that project. In 2025, when the project is fully booked, OPG would then be free to come to the Board seeking recovery of their actual spend (say, \$15-20 billion), and rely on the presumption of prudence to buttress their spending. The Board would not have had a chance to look at it in advance, and as a result the probability of recovery would be higher. Despite this, under OPG's view of the appropriate approach the Board would be obligated to "ensure recovery" of all of the spend, and all related cost of capital, even though much of it would have been added to rate base, in the normal course, many years earlier.
- 3.3.7** SEC believes that the OPG position on the operation of D/V accounts is taking the Board down a path that seriously limits the ability of the Board to control its own process.

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<sup>26</sup> EB-2013-0321, J3.9. SEC believes this estimate is probably low.

## **4 OTHER MATTERS**

### **4.1 Costs**

**4.1.1** The School Energy Coalition hereby requests that the Board order payment of our reasonably incurred costs in connection with our participation in this proceeding. It is submitted that the School Energy Coalition has participated responsibly in all aspects of the process, in a manner designed to assist the Board as efficiently as possible

All of which is respectfully submitted.

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Jay Shepherd

Counsel for the School Energy Coalition