



Ontario Energy Board Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2014-0370

ONTARIO POWER GENERATION INC.

Application to Dispose of Balances in Certain Deferral and
Variance Accounts

BEFORE: Allison Duff
Presiding Member

Cathy Spoel
Member

September 10, 2015

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1 INTRODUCTION AND SUMMARY

This is a decision of the Ontario Energy Board (OEB) in response to an application filed by Ontario Power Generation Inc. (OPG) to clear 2014 year-end balances in certain deferral and variance accounts (DVAs).¹

OPG is the largest electricity generator in Ontario. Provincial regulation² requires that the OEB set the payment amounts that OPG charges for the generation from its nuclear facilities (Pickering and Darlington) and most of its hydroelectric facilities (e.g. Sir Adam Beck I and II on the Niagara River). These payment amounts are included in the electricity costs which are shown as a line item on a customer's electricity bill sent from the customer's local electricity distributor.

The OEB issued a much larger decision on the 2014-2015 OPG payment amounts on November 20, 2014 (the EB-2013-0321 Decision) which addressed all of OPG's operational needs. OPG filed this DVA application on December 18, 2014 with a proposal to clear certain DVA balances that were not addressed in its EB-2013-0321 application. OPG proposed to recover \$1,289.7 million over an 18-month period starting July 1, 2015, through payment amount riders. OPG further proposed to recover \$458.6 million in a future period.³ The OEB accepted a partial settlement proposal leaving one unsettled matter, which is dealt with in this decision.

The remaining question before the OEB in this proceeding is “what is the appropriate reference point for recording entries into OPG's DVAs for the 10-month period from January 1, 2014 to October 31, 2014”. OPG, OEB staff and the Power Workers' Union (PWU) submitted that the entries be calculated with reference to the payment amounts orders in the EB-2010-0008/EB-2012-0002 proceedings.⁴ Other parties actively participating in this proceeding submitted that the entries be calculated with reference to

¹ Variance accounts track the difference between the forecast cost of a project or program, which has been included in rates, and the actual cost. If the actual cost is lower, then the extra money is refunded to customers. If the actual amount is higher, then the utility can request permission to recover the extra amount through future rates. A deferral account tracks the cost of a project or program which the utility could not forecast when the rates were set. When the costs are known, the utility can then request permission to recover the costs in future rates.

² Section 78.1(1) of the *Ontario Energy Board Act, 1998* establishes the OEB's authority to set payment amounts for OPG. Ontario Regulation 53/05 provides that the OEB may establish the form, methodology, assumptions and calculations used in making an order that sets payment amounts.

³ The amounts are based on the update filed by OPG to reflect 2014 audited year end balances on February 20, 2015. OPG's initial proposal was to clear \$1,315.6 million starting July 1, 2015 and proposed to clear \$434.7 million in a future period.

⁴ The EB-2010-0008 proceeding set payment amounts for the 2011-2012 period. The EB-2012-0002 proceeding was a DVA proceeding for the clearance of 2012 year end account balances.

the payment amounts order in the EB-2013-0321 proceeding. The answer to this question will determine whether \$263 million in DVA balances either is absorbed by OPG or is recovered from electricity customers in Ontario.

The OEB finds that the DVA entries during the first 10-months of 2014 will be calculated with reference to the EB-2010-0008/EB-2012-0002 payment amounts order, as the EB-2013-0321 payment amounts order was not effective until November 1, 2014. As a result, \$263 million will be recovered from electricity customers. This decision is based on the OEB's interpretation of O. Reg. 53/05 and the EB-2013-0321 payment amounts order, both of which the OEB finds are clear and unambiguous. The OEB has no discretion to deviate from the legal requirements of these instruments.

The School Energy Coalition (SEC) urged the OEB to look closely at the intent of the EB-2013-0321 Decision. SEC submitted that the decision implied that the \$263 million would be absorbed by OPG as a revenue loss, not recovered from customers. However, the OEB finds that it would be appropriate for the OEB to consider the underlying intent in the EB-2013-0321 Decision only if the payment amounts order was ambiguous. That is not the case in this proceeding. The payment amounts order is explicit, stating;

Effective November 1, 2014, OPG shall record entries into deferral and variance accounts listed below as follows: [account descriptions follow]⁵

Absent a motion to review, the OEB has no general authority to change the terms of one of its orders after the fact.

⁵ EB-2013-0321 Payment Amounts Order, December 18, 2014, Appendix G, p2

2 THE PROCESS

OPG filed this DVA application on December 18, 2014.⁶ If approved as originally submitted, OPG indicated that the application would result in an increase of \$3.08 on the monthly total bill for a typical residential customer consuming 800 kWh per month. This information was published in the Notice of Application in 89 newspapers throughout the province. OPG updated its proposal on February 20, 2015, to recover \$1,289.7 million through payment amount riders over an 18-month period starting July 1, 2015 and a further \$458.6 million in a future period.

In response to the notice, the OEB received 70 letters of comment and 11 parties requested and were granted intervenor status. In addition to PWU and SEC, the following six intervenors were active in this proceeding: Association of Major Power Consumers in Ontario, Canadian Manufacturers & Exporters, Consumers Council of Canada, Energy Probe Research Foundation, London Property Management Association, and Society of Energy Professionals.

Following an interrogatory process, settlement discussions were held starting on April 20, 2015. OPG and the active intervenors achieved a partial settlement that proposed to recover \$668.7 million in the 18-month period starting July 1, 2015 and recover a further \$815.7 million in a future period. The OEB approved the partial settlement proposal on June 23, 2015. As OPG, OEB staff and the active intervenors agreed that no further discovery was required on the unsettled matter, the OEB found that a written hearing was appropriate to hear the one, unsettled matter involving \$263 million and made provision for submissions.

⁶ OPG proposed to clear \$1,315.6 million starting July 1, 2015 and proposed to clear \$434.7 million in a future period.

3 THE UNSETTLED MATTER

OPG and the active intervenors agreed on the amounts recorded in DVAs for 2013 and for November to December 2014 in the partial settlement. The unsettled matter concerns the amounts recorded in DVAs for the period January 1, 2014 to October 31, 2014. The Society of Energy Professionals participated in the settlement, but took no position on the unsettled matter. The unsettled matter involves \$263 million which is summarized in the following table from Exhibit M of the partial settlement proposal.

Alternative Account Transactions for the Period January 1, 2014 to October 31, 2014 (\$M) -Disputed Accounts Only-				
Line No.	Account	OPG Proposed Entries Based on EB-2010-0008 Forecasts	Proposed by Some Parties Based on EB-2013-0321 Forecasts	Difference
		(a)	(b)	(c) = (b)-(a)
Previously Regulated Hydroelectric:				
1	Hydroelectric Water Conditions Variance	(1.7)	(23.9)	(22.2)
2	Ancillary Services Net Revenue Variance – Hydroelectric	(12.1)	(17.3)	(5.3)
3	Hydroelectric Incentive Mechanism Variance	(2.4)	(2.9)	(0.4)
4	Hydroelectric Surplus Baseload Generation Variance	22.7	27.4	4.7
5	Income and Other Taxes Variance – Hydroelectric	(0.0)	(0.0)	0.0
6	Capacity Refurbishment Variance – Hydroelectric	117.3	(0.1)	(117.4)
7	Hydroelectric Deferral and Variance Over/Under Recovery Variance	0.6	0.6	0.0
8	Total	124.3	(16.2)	(140.5)
Nuclear:				
9	Nuclear Liability Deferral	81.6	-	(81.6)
10	Nuclear Development Variance	1.2	1.2	-
11	Ancillary Services Net Revenue Variance – Nuclear	0.3	(0.3)	(0.6)
12	Capacity Refurbishment Variance - Nuclear – Capital Portion	6.3	2.9	(3.4)
13	Capacity Refurbishment Variance - Nuclear – Non-Capital Portion	(2.4)	2.2	4.6
14	Bruce Lease Net Revenues Variance – Derivative Sub-Account	(57.5)	(57.5)	-
15	Bruce Lease Net Revenues Variance – Non-Derivative Sub-Account - EB-2012-0002 Additions	-	-	-
16	Bruce Lease Net Revenues Variance – Non-Derivative Sub-Account - Post 2012 Additions	41.1	(38.6)	(79.7)
17	Income and Other Taxes Variance – Nuclear	(2.7)	(3.5)	(0.8)
18	Pickering Life Extension Depreciation Variance	(39.0)	-	39.0
19	Nuclear Deferral and Variance Over/Under Recovery Variance	12.1	12.1	-
20	Total	41.1	(81.4)	(122.5)
21	Grand Total	165.4	(97.6)	(263.0)

The data in column (a) are based on the EB-2010-0008/EB-2012-0002 decisions and the related payment amounts orders. OPG's proposed DVA entries are supported by the PWU and OEB staff. In its argument in chief, OPG stated that it had “correctly recorded the amounts in its deferral and variance accounts for the Disputed Period as it was entitled to do so under the OEB's orders in EB-2012-0002 and EB-2010-0008 and as explicitly recognized in the OEB's Order in EB-2013-0321.” OPG further stated that the application of the EB-2013-0321 order prior to November 1, 2014, “would be wrong in law”.⁷

The data in column (b), based on the EB-2013-0321 Decision and the related payment amounts order, are supported by SEC and the other active intervenors. SEC noted that the EB-2013-0321 payment amounts order references the entire 24-month revenue requirement⁸ for 2014/15 and the payment amounts in Appendix A of the EB-2013-0321 payment amounts order. SEC submitted 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).”⁹ SEC further submitted that once the \$263 million in dispute was included in the 2014 revenue requirement, OPG was no longer able to recover it through its DVAs. As the SEC submission was supported by most intervenors, the balance of this decision refers to the SEC submission only.

⁷ Argument in Chief, p2

⁸ The revenue requirement is the total cost for a utility to provide energy service. It includes the cost of salaries, equipment, capital projects, depreciation, taxes, interest and a return on the equity invested by shareholders. The revenue requirement is used to set rates for customers.

⁹ SEC Final Argument, p14

4 FINDINGS ON THE UNSETTLED MATTER

The OEB finds that amounts recorded in DVAs during the period January 1, 2014 to October 31, 2014 will be calculated with reference to the EB-2010-0008/EB-2012-0002 payment amounts orders. The OEB has considered the effective date requirements of the EB-2103-0321 Decision and the EB-2013-0321 payment amounts order in coming to its decision. The OEB has also considered the legislative requirements governing OPG's DVAs.

4.1 Effective Date

The EB-2013-0321 Decision issued on November 20, 2014 related to the payment amounts for the prescribed facilities from January 1, 2014 to December 31, 2015. One of the decision points was the November 1, 2014 effective date for new payment amounts for generation from hydroelectric, newly regulated hydroelectric and nuclear facilities.

November 1, 2014 was the critical date for the EB-2013-0321 payment amounts order; it is the date that the new payment amounts became effective. Although the decision approved a revenue requirement based on the entire 24-month period in 2014/15, the new payment amounts were not in effect for the first 10 months of 2014. Instead, the interim payment amounts that were in place from January 1, 2014 to October 31, 2014 became final, as originally established by the EB-2010-0008/EB-2012-0002 payment amounts orders.

While the November 1, 2014 effective date approved by the EB-2013-0321 Decision denied OPG revenue from the higher payment amounts for the first 10 months of 2014, the decision did not reference any off-setting impacts of DVAs in the discussion of effective date. The decision also did not refer to specific DVA requirements set out in O. Reg. 53/05. These amounts are recoverable unless there has been a finding that they were not prudently incurred. No such finding has been made. As a result, the revenue loss for OPG implied in the EB-2013-0321 Decision will be reduced.

The OEB's decision in this proceeding would be the same whether the disputed DVA amount in question was owed to OPG or to electricity customers. The applicable legal principles do not change.

4.2 O. Reg. 53/05

Regardless of the payment amounts order effective at any time, O. Reg. 53/05 enables OPG to recover certain costs through DVAs. The regulation is unique to OPG and enables the recovery of costs related to OPG's operations, such as Hydroelectric Water Conditions and Nuclear Liabilities.

In addition to DVAs directly established by O. Reg. 53/05, the OEB established DVAs to give effect to O. Reg. 53/05 for costs related to Capacity Refurbishment, and the Bruce Nuclear Generating Stations (i.e. Bruce Lease Net Revenues Variance Account).

To the extent that OPG did not collect enough revenue to recover its O.Reg. 53/05 stipulated costs during the first 10 months of 2014, OPG was correct in making the DVA accounting entries to recover the differential. The total recovery must equal 100% of the costs as the legal requirements of O. Reg. 53/05 must be met, although some of the costs must pass a test of prudence.

OPG has other DVAs established by the OEB, separate from the requirements of O. Reg. 53/05, such as the income and other taxes variance accounts. The relevant instrument regarding the treatment of those DVAs is the payment amounts order.

The OEB finds that the wording of the EB-2013-0321 payment amounts order is clear, stating that effective November 1, 2014 DVA entries were to be based on the new payment amounts. "OPG shall record entries into deferral and variance accounts as follows ..."¹⁰. The order is clear regarding entries from November 1, 2014 onward and implies the DVA entries prior to November 1, 2014 would be based on the existing payment amounts, not the new payment amounts. Unless specifically stated, the OEB's orders are not retrospective.

4.3 Have Costs Been Double Counted?

SEC submitted that, "The entire amount of the \$263 million in dispute in this case was included by the Board in the 2014/15 revenue requirement that the Board used to set the 2014/15 payment amounts. ...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."¹¹

¹⁰ EB-2013-0321 Payment Amounts Order, December 18, 2014, Appendix G, p2

¹¹ SEC Final Argument, p5-6

The OEB finds that OPG did not “double count” and did not recover the same costs twice. Despite the fact that the OEB approved a 2014 revenue requirement with 2014 costs in its EB-2013-0321 Decision, those approved 2014 costs were not recovered by OPG during the first 10 months of 2014.

4.4 Future Implications

SEC submitted that it believes the current proceeding is, “the first case in which a utility has sought to recover material amounts from D/V accounts that were already included in revenue requirement”.¹²

The OEB and all parties must recognize the potential impact of these DVAs for OPG. A new issue has arisen in this proceeding. O. Reg. 53/05 insulates OPG from regulatory risk for costs related to nuclear liabilities and the Bruce Generating Station. Other DVA balances are subject to regulatory risk as approval and disposition is dependent upon review.

OPG submitted the issue of DVA balance recovery and effective date is not new. In a prior OPG proceeding, the OEB approved a similar DVA treatment for two months in 2011.¹³ That is true. However, the dollar amount at issue in 2011 was considerably less than the \$263 million at issue in 2014. In addition, the evidence and submissions filed in this proceeding were extensive.

The implications of this issue need to be considered in future applications. Because the balances in OPG’s DVAs can be significant, the OEB will need to take their operation into account, particularly when setting effective dates, as will parties to the proceeding when reviewing and commenting on draft payment amount orders. The regulatory risk associated with the existence of DVAs has not changed, yet the ratemaking implications have evolved, particularly with the significant increases in DVA balances.

¹² SEC Final Argument, p9

¹³ The EB-2010-0008 proceeding set payment amounts for the 2011-2012 period effective March 1, 2011. The EB-2012-0002 proceeding was a DVA proceeding for the clearance of 2012 year end account balances.

5 IMPLEMENTATION AND COST AWARDS

Consistent with the settlement filed by the parties, the payment amount riders arising from this proceeding will be made effective July 1, 2015 with an implementation date of October 1, 2015. The OEB directs OPG to file a draft payment amounts order that reflects the partial settlement and this DVA Decision. The draft payment amounts order will include customer impacts, supporting schedules and a clear explanation of all calculations and assumptions used in deriving the payment amount riders and the interim period shortfall riders. It is the OEB's expectation that the draft payment amounts order will clearly describe the term for the riders, and that full descriptions for each deferral and variance account will be provided, including reference amounts. Provision is made for submissions on the draft payment amounts order.

The following intervenors were deemed eligible for cost awards in this proceeding: Association of Major Power Consumers in Ontario, Canadian Manufacturers & Exporters, Consumers Council of Canada, Energy Probe Research Foundation, London Property Management Association and School Energy Coalition. A cost awards decision will be issued after the steps set out below are completed.

6 ORDER

THE OEB ORDERS THAT:

1. OPG shall file with the OEB, and shall also forward to the intervenors, a draft payment amounts order by **September 18, 2015**.
2. OEB staff and the intervenors shall file any comments on the draft payment amounts order by **September 25, 2015**. The submissions shall be filed with the OEB and forwarded to OPG and other intervenors.
3. OPG shall file with the OEB, and shall also forward to the intervenors, responses to any comments on the draft payment amounts order by **October 2, 2015**.
4. Cost eligible intervenors shall file with the OEB and forward to OPG their respective cost claims within 7 days from the date of issuance of OPG's final payment amounts order.
5. OPG shall file with the OEB and forward to intervenors any objections to the claimed costs within 17 days from the date of issuance of OPG's final payment amounts order.
6. Intervenors shall file with the OEB and forward to OPG any responses to any objections for cost claims within 24 days of the date of issuance of OPG's final payment amounts order.

All filings to the OEB must quote the file number, **EB-2014-0370**, be made in searchable / unrestricted PDF format electronically through the OEB's web portal at www.pes.ontarioenergyboard.ca/eservice/. Two paper copies must also be filed. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available parties may email their documents to Boardsec@ontarioenergyboard.ca. 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.

DATED at Toronto September 10, 2015

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary