



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

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## DECISION AND ORDER

EB-2014-0369

## ONTARIO POWER GENERATION INC.

Motion to review and vary the Decision with Reasons on the 2014-2015 payment amounts (EB-2013-0321)

**BEFORE: Ken Quesnelle**  
Presiding Member

**Cathy Spoel**  
Member

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January 28, 2016

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## 1 INTRODUCTION AND SUMMARY

This is a Decision of the Ontario Energy Board (OEB) in response to a notice of motion filed by Ontario Power Generation Inc. (OPG) to review and vary the OEB Decision with Reasons on 2014-2015 payment amounts.<sup>1</sup>

OPG is the largest electricity generator in Ontario. The OEB sets the rates 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). The rates charged by OPG are referred to as payment amounts. These payment amounts are included in the electricity costs which are shown as a line item on the electricity bill from a customer's distributor, and make up about half the total of an average household bill.

The OEB issued the 2014-2015 OPG payment amounts decision on November 20, 2014. OPG filed a notice of motion to review and vary the 2014-2015 payment amounts decision on December 10, 2014. In OPG's view, there are errors related to the OEB's disallowance of \$88.0 million for the Niagara Tunnel Project and the OEB's direction to reduce the 2014 income tax provision to account for the carry-forward of a regulatory tax loss in 2013.

The OEB's \$88.0 million disallowance was made up of two parts: \$28.0 million related to a settlement of a claim by the tunnel contractor, (the Pre-December 2008 Disallowance), and \$60.0 million related to incentives paid to the tunnel contractor (the Amended Design Build Agreement Disallowance).

Subject to the OEB review, the remedy OPG proposed in its motion is an increase to payment amounts, and an account to recover the difference from November 1, 2014 to the effective date of the higher payment amounts.

Rule 42.01 of the OEB's *Rules of Practice and Procedure* states that all motions brought under Rule 40.01 shall set out the grounds for the motion that raise a question as to the correctness of the order or decision.

The OEB's *Rules of Practice and Procedure* also states that the OEB may determine a threshold question of whether the matter should be reviewed before conducting any review of the merits of the motion. The OEB must ensure that the motion is not merely a

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<sup>1</sup> EB-2013-0321 Decision with Reasons, Payment Amounts for Prescribed Facilities for 2014 and 2015, November 20, 2014

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request for a reconsideration of the original application. A full explanation of the application of the threshold test is contained in chapter 4 of this Decision.

The OEB made provision for written and oral submissions on both the threshold and the merits of the motion in the current proceeding.

Most parties and OEB staff argued that the grounds for the motion put forward by OPG are insufficient and therefore the motion should be denied at the threshold stage.

In OPG's view, the threshold test is satisfied as there are material factual errors in the 2014-2015 payment amounts decision regarding the Niagara Tunnel Project and regarding taxes. OPG challenged the correctness of the 2014-2015 payment amounts decision on the basis that the findings are contrary to the evidence that was before the OEB.

For reasons that are contained in the following chapters the OEB has determined that OPG has not passed the threshold test on two of the three parts of its motion. The OEB has determined that errors were not made with respect to the disallowance associated with the Amended Design Build Agreement or with respect to the income tax provision to account for regulatory losses. The motion is denied on those two parts.

The OEB finds that the reasons provided in the original decision regarding certain elements of the disallowance of \$28.0 million pertaining to the Pre-December Disallowance are contrary to the evidence. The OEB review panel has determined that the original disallowance of \$28.0 million will be varied to a disallowance of \$6.4 million.

The motion by OPG is partially granted with a variance of the original decision disallowance for the Niagara Tunnel Project of \$88.0 million to a disallowance of \$66.4 million.

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## 2 THE PROCESS

OPG filed the notice of motion to review and vary the Decision with Reasons on 2014-2015 payment amounts on December 10, 2014.

The Notice of Hearing and Procedural Order No. 1 was issued on January 13, 2015. The OEB adopted all parties to the 2014-2015 payment amounts proceeding. The following intervenors participated in the motion proceeding:

- Association of Major Power Consumers in Ontario
- Canadian Manufacturers & Exporters
- Energy Probe Research Foundation
- Power Workers' Union
- School Energy Coalition (SEC)
- Society of Energy Professionals
- Vulnerable Energy Consumers Coalition

OEB staff filed its submission on February 20, 2015, and intervenors filed their submissions by March 2, 2015. The submissions addressed the threshold question of whether the matter should be reviewed as well as on the merits of the motion.

The oral hearing of the motion was held on March 24, 2015.

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### 3 STRUCTURE OF THE DECISION

The OEB has organized this Decision into chapters, reflecting the issues that the OEB has considered in making its findings.

Chapter 4 provides an explanation of the OEB's considerations with respect to motions to review, including the application of the threshold test.

Subsequent chapters deal with the three parts of the 2014-2015 payment amounts decision that OPG requested be reviewed and varied. Chapter 5 deals with the Niagara Tunnel Project, both the threshold test and the merits of the motion pertaining to the Pre-December Disallowance and the analysis and findings pertaining to the threshold test for the Amended Design Build Agreement. Chapter 6 contains the OEB's analysis and findings on the threshold test pertaining to the tax loss carry-forward. The Decision concludes with chapter 7 dealing with implementation of the OEB's findings and the procedures for the awarding of costs to eligible parties.

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## 4 MOTIONS TO REVIEW

### 4.1 The OEB's *Rules of Practice and Procedure*

Rule 42.01(a) of the OEB's *Rules of Practice and Procedure* provides the grounds upon which a motion may be raised with the OEB:

Every notice of a motion made under Rule 40.01, in addition to the requirements under Rule 8.02, 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;
  - (ii) change in circumstances;
  - (iii) new facts that have arisen;
  - (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

Rule 43.01 of the *Rules of Practice and Procedure* states:

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.

### 4.2 The Threshold Test

In the Motions to Review the Natural Gas Electricity Interface Review Decision, EB-2006-0322/0338/0340, May 22, 2007, the OEB found:

Therefore, the 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.

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

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

The OEB has adopted these findings in its consideration of the threshold question on many occasions over the past several years and does so again in consideration of arguments on the threshold question in this motion to review and vary. The analysis and findings on the threshold question are provided in the following chapters dealing with the three elements of this motion.

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## 5 NIAGARA TUNNEL PROJECT

The Niagara Tunnel Project is a 10.2 km long tunnel with a diameter of 12.7 meters which runs under the City of Niagara Falls. Its purpose is to increase the flow of water to hydroelectric generation facilities owned by OPG at Niagara Falls.

OPG sought to add \$1,452.6 million of Niagara Tunnel Project expense to rate base in the 2014-2015 payment amounts proceeding and to earn a return on that investment. The OEB's \$88.0 million disallowance was made up of two parts: \$28.0 million related to a settlement of a claim by the tunnel contractor, Strabag Inc. (the Pre-December 2008 Disallowance), and \$60.0 million related to incentives paid to Strabag to complete the Niagara Tunnel Project after December 2008 (the Amended Design Build Agreement Disallowance).

### 5.1 The Pre-December 2008 Disallowance

OPG and Strabag disagreed on the resolution of additional costs that were incurred in the early stages of the Niagara Tunnel Project. Strabag claimed that the additional costs were the result of subsurface conditions not previously identified and that the costs should be borne by OPG, the owner. OPG's position was that no differing subsurface condition existed, and that additional costs were related to modifications to tunnel boring and rock support and that the costs should be borne by the contractor.

The dispute, in which Strabag claimed costs of \$90 million, was referred to a Dispute Review Board. Strabag offered five reasons that it believed supported its claim for differing subsurface conditions. OPG had performed an audit of Strabag's costs and concluded that certain costs should not be included. It had determined that \$77.4 million was the amount of additional costs associated with the claim.

The Dispute Review Board's report was structured according to the five reasons presented by Strabag. The Dispute Review Board agreed that there were differing subsurface conditions, but not for each of the five matters presented. The report does not include any analysis of how much of the total cost could be attributed to any of the five individual issues presented by Strabag. As OPG and Strabag jointly developed the Geotechnical Baseline Report which formed the basis on which claims for differing subsurface conditions were to be assessed, the Dispute Review Board found that Strabag and OPG should share the shortcomings of the resulting documents and that

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both must accept the responsibility for some portion of the additional cost. OPG and Strabag ultimately negotiated a settlement and OPG paid Strabag \$40 million.

In the 2014-2015 payment amounts decision, the OEB found that the payment was not prudent and disallowed \$28.0 million in relation to the settlement of the Strabag claim.

### **Threshold Test**

OEB staff and most of the parties argued that the motion should be dismissed at the threshold stage as there was no new evidence in OPG's notice of motion. Parties submitted that OPG made the same arguments in its submissions to the OEB in the 2014-2015 payment amounts proceeding.

OPG agreed that the arguments made in its motion submission were the same as the arguments made in the 2014-2015 payment amounts proceeding. OPG argued that given that the grounds for the motion are based on OPG's contention that the OEB decision contained errors it would be peculiar if the submissions were different. OPG stated that the implication of having a different submission when the grounds for the motion are based on an alleged error is that the applicant had misidentified what the issue was in the original arguments.<sup>2</sup>

The OEB accepts that OPG's arguments on this motion repeat arguments made in the 2014-2015 payment amounts proceeding. OPG used these same arguments in expressing its contention that the analysis and reasoning in the payment amounts decision demonstrates that the original panel misinterpreted OPG's original argument and the evidence before it. The OEB does not consider that to be inappropriate.

OPG grounded its motion to review and vary this part of the decision on the assertion that an error had been made in interpreting evidence and this led to a decision that is inconsistent with the evidence.

The interpretation of the evidence pertaining to this part of the motion is a key factor in the payment amounts decision that if found to be incorrect would change the outcome of the decision. The OEB finds that the grounds for this part of the motion have substance and has therefore considered its merits.

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<sup>2</sup> Motion Hearing Transcript pages 153,154

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## Findings

The OEB finds that OPG has successfully demonstrated that the findings on the \$28 million disallowance that were supported by the conclusions of the Dispute Review Board's report are contrary to the evidence that was before the OEB.

OPG's notice of motion states that the OEB did not understand the nature of the Dispute Review Board process and that the OEB's findings are factually incorrect and inconsistent with the evidence. OPG stated that the only question before the Dispute Review Board was whether there were differing subsurface conditions. If there was a positive finding on any of the reasons put forth by Strabag, then a differing subsurface condition existed.

OEB staff argued that the issue before the OEB was not simply whether there were or were not differing subsurface conditions, but rather the issue was the amount to be included in rate base. OEB staff submitted that as the Dispute Review Board made discrete findings on each of the five matters raised by Strabag, there was therefore a range of possible disallowances and as the decision to disallow \$28 million was within that range, it was supported by the evidence.

At page 31-32 of the 2014-4015 payment amounts decision, it states:

The Board is not satisfied that paying Strabag \$40M for its claims up to December 2008 was prudent. This Board finds that the non-binding recommendations of the Dispute Review Board were reasonable, and that some level of shared responsibility between OPG and Strabag was appropriate. However, paying a \$40M settlement (44% of Strabag's \$90M claim) is excessive in the Board's view. There were five issues of dispute that were referred to the Dispute Review Board. The Dispute Review Board found that OPG was not responsible for three of the five issues and that OPG had only joint responsibility for the remaining two issues. No evidence was filed on the relative value or cost of the five issues. OPG's witnesses testified that the individual issues were not quantified.

As a result of the contract renegotiation with Strabag, OPG had the right to audit Strabag's claimed losses of \$90M. To the extent that the \$90M was not substantiated in the audit, the \$40M payment could be reduced proportionately. OPG's witnesses testified that OPG's internal auditors conducted the audit and found that a total of \$12.6M was not associated with legitimate expenses, resulting in a loss of only \$77.4M. The auditors

did not recognize inter-company transfers within Strabag's organization, thereby reducing the amount from \$90M to \$77.4M. OPG's evidence was that they could reduce the \$40M settlement proportionately based on the audit, but did not do so.

The Board is unable to find that a \$40M settlement of Strabag's claim was prudently incurred. In the absence of information regarding the costs attributable to each of the five issues, the Board must use its judgment of what is a reasonable amount. In determining the amount, the Board has decided to utilize the findings of the Dispute Review Board. As a result, the Board finds that OPG's ratepayers should not pay any amount for the three issues which OPG was not responsible, but should pay 50% of two issues for which OPG was jointly responsible. In addition, the Board is persuaded by the results of OPG's audit and considers the \$77.4M to be the appropriate starting point for the Board's calculation, not the \$90M claim by Strabag. There was no evidence or testimony provided supporting Strabag's claimed amount. As a result, the Board finds that ratepayers should only pay 20% of the \$77.4M audited amount, or \$15.5M. In addition, the Board denies the associated carrying costs of the disallowed \$24.5M,<sup>3</sup> which results in a reduction of another \$3.5M.<sup>4</sup> The Board finds this disallowance of \$28.0M reasonable given the evidence provided.

As noted above, the 2014-2015 payment amounts Decision states:

In the absence of information regarding the costs attributable to each of the five issues, the Board must use its judgment of what is a reasonable amount. In determining the amount, the Board has decided to utilize the findings of the Dispute Review Board.

This statement explains the original panel's approach to determining a reasonable amount of payment in the absence of certain information. However, the original panel based its finding that the \$40 million payment was excessive on the premise that there was a correlation between the attribution for responsibility contained in the Dispute Review Board's conclusions and a reasonable sharing of responsibility for the costs. The OEB finds that there is no such correlation.

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<sup>3</sup> \$40M – (20% x \$77.4M)

<sup>4</sup> \$24.5M x 5.25% x 33/12 months

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The finding that paying the \$40 million settlement was excessive is based solely on the Dispute Review Board's analysis of the five issues contained in its report. The analysis provides the Dispute Review Board's conclusions with respect to responsibility for the five issues. The payment amount decision does not identify any other determinative factors that influenced the original panel's determination that the settlement payment was excessive.

The findings that the results of OPG's audit and the carrying costs should also be considered relate only to the final calculation of the disallowance.

The OEB accepts OPG's assertion that the only question before the Dispute Review Board was whether there were differing subsurface conditions. The fact that there was no quantification of costs related to each of the five issues analyzed suggests that they were either not individually quantifiable or not relevant. This is demonstrated by the fact that the parties that were engaged in the dispute and the Dispute Review Board did not or could not quantify the costs associated with each of the five issues. OPG provided evidence describing the usual approach taken by the Dispute Review Board in dealing with these matters.<sup>5</sup> OPG's witness stated that it is usual to only deal with the merits of a dispute in a hearing and then only return to the Dispute Review Board seeking a resolution if parties are not able to negotiate an agreement on costs. It is clear from the Dispute Review Board's report that cost was not considered in its analysis. The OEB finds that the Dispute Review Board's conclusions on attribution of responsibility have no bearing on costs and therefore cannot be used in support of the finding that the \$40 million settlement was not prudently incurred.

Two other factors were included in the \$28 million disallowance. These are the impact of the OPG audit results which the OEB found should have been considered, and the calculation of the carrying costs. Neither of these depends on the interpretation of the Dispute Review Board's conclusions, so the findings on these issues are unchanged.

The disallowance will be varied only by removing the amount pertaining to the Dispute Review Board's conclusions from the original disallowance calculation. The OEB has applied the same contributing share of 44% to OPG that was derived through negotiation to the post audit quantum of \$77.4 million. As decided in the original decision, carrying costs on the new disallowance will not be recoverable.

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<sup>5</sup> EB-2014-0369 Supplemental Motion Record filed January 26, 2015, page 20 – Oral Hearing Transcript Volume 1 June 12, 2014, page 64

The varied disallowance is \$5.6 million<sup>6</sup> with an associated carrying cost of \$0.8 million<sup>7</sup>, resulting in a total varied disallowance of \$6.4 million.

The difference between the original disallowance and the varied disallowance is \$21.6 million. The revenue requirement impact of this difference is estimated to be \$2.16 million<sup>8</sup> on the total annual revenue requirement for the OPG regulated facilities of \$4,200 million.<sup>9</sup>

## 5.2 The Amended Design Build Agreement Disallowance

In 2009, following receipt of the Dispute Review Board's report, OPG and Strabag negotiated an Amended Design Build Agreement which increased contracted costs from \$622.6 million to \$985.0 million. While the structure of the initial agreement was fixed price, the structure of the amended agreement was based on target cost with incentives.

In the 2014-2015 payment amounts decision, the OEB found that the incentives were excessive and disallowed \$60.0 million. At page 33 of the decision, it states:

OPG's witnesses further confirmed that Strabag would suffer serious repercussions were it to walk away from the Project, including being sued by OPG for breach of contract, and suffering a serious blemish on its business reputation.

Strabag, therefore, had very strong incentives to reach an agreement with OPG to find a way to complete the Project. Walking away from the Project would have been an extremely expensive and unpalatable option for Strabag, and for its parent company.

Under these circumstances, the Board finds that the incentives offered to Strabag through the Amended Design Build Agreement were excessive. OPG understood that a contractor default was a potential risk, and indeed it took steps that should have mitigated that risk through a letter of credit

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<sup>6</sup> \$40 million – (\$77.4 million x (\$40 million/\$90 million))

<sup>7</sup> \$5.6 million x 5.25% x (33 months/12 months)

<sup>8</sup> EB-2013-0321 Oral Hearing Transcript, June 16, 2014, Vol 3 page 37: "So if you assume that you're bringing into rate base approximately \$1.5 billion of capital, the kind of annual carry on that, reflective of depreciation and return on capital, rule of thumb is about 10 percent or, say, \$150 million."

<sup>9</sup> EB-2013-0321 Payment Amounts Order, December 18, 2014, OEB approved revenue requirement for 2015

and a comprehensive parental indemnity. However, when it came time to renegotiate the Design Build Agreement, OPG did not properly use its leverage to secure a more favourable deal. The Board will disallow recovery of \$60M. The Board is mindful of the Dispute Review Board's recommendation that Strabag have appropriate incentives to complete the work. However, in the Board's view the Amended Design Build Agreement provided adequate "incentive" even without the specific incentive clauses. OPG agreed to pay Strabag hundreds of millions of extra dollars more than was provided for in the original Design Build Agreement. In the Board's judgment, the provision for incentives above this was not necessary and not prudent.

OPG argued that the OEB's reliance on the Strabag parental guarantee and indemnity was in error. As Strabag was not in default and there was no litigation in process, the indemnity provided OPG with no leverage in negotiating the Amended Design Build Agreement. OPG was advised by professionals with tunneling and litigation expertise and the negotiation was hard-fought.<sup>10</sup> It was necessary to include incentives in the Amended Design Build Agreement, and in the end, Strabag's profit over the 5 year project was very small.

As with the \$28 million disallowance, OEB staff and most of the intervenors argued that OPG made the same argument before the panel hearing the 2014-2015 payment amounts proceeding. There were thousands of pages of evidence and two days of cross examination on the Niagara Tunnel Project. Most intervenors argued that OPG was in a position of strength following the Dispute Review Board's report and that no one can determine Strabag's real profit except Strabag.

### **Threshold Test**

OPG contends that the OEB's reliance on the parental guarantee and indemnity was in error. The decision clearly cites the risk of Strabag suffering a serious blemish on its business reputation as an incentive for it to remain on the job.

The 2014-2015 payment amounts decision makes reference to OPG's witnesses' testimony in confirming the existence of reputational risk. OPG does not allege an error in the OEB's reliance on the existence of reputational risk. OPG argues that the OEB placed too much significance on the parental guarantee and indemnity features of the agreement.

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<sup>10</sup> Motion Hearing Transcript, pages 156-7

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The threshold test findings from the motions to review the Natural Gas Electricity Interface Review Decision covered in chapter 4 of this decision include the following:

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The OEB finds that the determination that the \$60 million in incentives was not prudently incurred was based on the panel's findings on evidence that is not in dispute; that being the existence of reputational risk. The existence of the parental guarantee and the indemnity features was not the determinative factor in the finding of the existence of reputational risk. The OEB does not accept that there is an identifiable error in the decision that could lead to the conclusion that the findings are contrary to the evidence that was before the original panel.

The OEB does not consider the grounds for this part of OPG's motion to warrant any further consideration.

## 6 TAX LOSS CARRY-FORWARD

OPG incurred a regulatory tax loss of \$211.6 million in 2013 that OPG attributes to a shortfall in nuclear production. In the 2014-2015 payment amounts proceeding, OPG submitted that the associated tax loss carry-forward should not be applied to regulatory taxable income in 2014 to reduce the tax provision included in the payment amounts. OPG argued that its shareholder incurred the costs associated with the loss in 2013 and should receive the benefit of the resulting tax loss carry-forward in 2014.

In the 2014-2015 payment amounts decision, the OEB found that the tax loss carry-forward should be applied against the 2014 tax provision. At page 101 of the decision, it states:

The Board directs OPG to reduce its 2014 income tax provision to recognize and carry forward its regulatory tax loss in 2013. This finding is consistent with Board policy as indicated in the Board's 2006 Electricity Distributor's Rate Handbook (the "Handbook") and in subsequent Filing Requirements.<sup>11</sup> The Board understands the policies contained in the Handbook and the Filing Requirements apply to electricity distributors, not directly to OPG as an electricity generator, yet finds that the underlying Board policy should be applicable to OPG in this application.

The rate regulation of the electricity distribution sector shows a history of tax loss carry-forwards being routinely used in the rate setting process for distributors. This approach is completely consistent with Board policy for tax losses to be applied to reduce income tax to be included in rates, and there is no reason for OPG to be treated any differently in this instance.

OPG referred to two decisions in which the Board did not apply the policy, namely OPG's EB-2007-0905 decision and Great Lakes Power's EB-2007-0744 decision. The Board finds that the circumstances in these two cases were unique and are not comparable to OPG's current circumstances.

At the motion hearing, OPG reviewed the EB-2007-0905 and EB-2007-0744 decisions in detail and explained how these decisions and the benefits follows costs principle is applicable to 2013 regulatory tax loss. OPG argued that the 2014-2015 payment

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<sup>11</sup> A requirement to identify any loss carry-forwards and when they will be fully utilized has been included in the Board's Filing Requirements for electricity distributors' cost of service applications since 2012. With the issuance of the 2012 Filing Requirements (for 2013 rates), the Board included any remaining relevant sections of both the 2000 and 2006 Electricity Rate Handbooks.

amounts decision did not correctly consider the two cases and made several errors, including limiting the reference to the Great Lakes Power case to the matter of regulated and non-regulated businesses. There were tax matters related to the regulated business and the OEB considered the benefits follows costs principle as well as the guidance of the Distribution Rate Handbook. OPG submitted that Great Lakes Power case is the leading case with respect to tax loss and that the OEB took a principled approach.

### **Threshold Test**

As with the Niagara Tunnel Project disallowance, OEB staff and most of the intervenors argued that OPG made the same argument before the panel hearing the 2014-2015 payment amounts proceeding. OEB staff argued that there is no error as the basis of the OEB decision in the 2014-2015 payment amounts proceeding was the application of guidance in the Distribution Rate Handbook, not the benefits follows costs principle. OEB staff noted that tax loss carry-forwards have been applied in eleven distribution rate applications from 2005 to 2011. SEC submitted that a cost of service application rebases all costs, including taxes.

OPG argued that the panel's determinations with respect to the comparability of the two cases cited are erroneous. OPG provided what it considered to be the applicable common elements that the OEB should have considered.

The decision states that the two cases were considered to be unique and found not to be comparable to OPG's current circumstances. The decision does not contain a description of the distinguishing characteristics of the two other cases that would make them unique.

The OEB does not consider the lack of analysis of the comparability of the two cases to the current OPG circumstance to be an error. The decision to apply the tax loss carry-forward to regulatory taxable income in 2014 to reduce the tax provision included in the payment amounts was not primarily based on a determination that the current circumstances differ from the circumstances in the two cases cited by OPG. The decision is clear as to why the OEB determined that the tax loss should be treated as directed. As noted above, the decision stated:

The rate regulation of the electricity distribution sector shows a history of tax loss carry-forwards being routinely used in the rate setting process for distributors. This approach is completely consistent with

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Board policy for tax losses to be applied to reduce income tax to be included in rates, and there is no reason for OPG to be treated any differently in this instance.

The threshold test findings from the motions to review the Natural Gas Electricity Interface Review Decision covered in chapter 4 of this decision include the following.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

The OEB finds that even if the finding that the current circumstances differ from those in the cases cited by OPG, and was made in error, it would not affect the outcome of the decision as it would not change the primary basis on which the decision was made. As submitted by OEB staff, the basis of the OEB decision in the 2014-2015 payment amounts proceeding was the application of guidance in the Distribution Rate Handbook, not the benefits follows costs principle.

The OEB does not consider the grounds for this part of OPG's motion to warrant any further consideration.

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## 7 IMPLEMENTATION AND COST AWARDS

### 7.1 Implementation

Subject to the OEB review of OPG's notice of motion, the remedy OPG proposed in its motion was an increase to payment amounts, and an account to recover the difference from November 1, 2014 to the effective date of the higher payment amounts.

The OEB has determined that errors were not made with respect to the disallowance associated with the Niagara Tunnel Project Amended Design Build Agreement or with respect to the income tax provision to account for regulatory losses. The OEB has determined that the Niagara Tunnel Project Pre-December 2008 Disallowance will be varied. The original rate base addition disallowance of \$28.0 million will be varied to a disallowance of \$6.4 million.

As noted earlier in this Decision, the estimated revenue requirement impact of the varied disallowance is \$2.1 million per year. The approved 2015 total annual revenue requirement for the OPG regulated facilities is \$4,200 million. Given the small percentage of payment amount impact the OEB finds that increasing payment amounts at this time to reflect the varied disallowance is not necessary.

The OEB orders the establishment of a variance account called the "Niagara Tunnel Project Pre-December 2008 Disallowance Variance Account". The variance account shall record the difference between the annual revenue requirement impact of the original rate base addition disallowance of \$28.0 million and the varied disallowance of \$6.4 million. The account shall record the difference from November 1, 2014. OPG shall record interest on the balance using the prescribed interest rates set by the OEB from time to time. OPG shall apply simple interest to the opening monthly balance of the account until the balance is fully recovered. The clearance of the Niagara Tunnel Project Pre-December 2008 Disallowance Variance Account will be reviewed in OPG's next payment amounts application.

Given the nature of the costs to be tracked in the new account and their quanta, the OEB will dispense with the requirement to establish a more detailed accounting order at this time. OPG shall include all relevant details as to the manner in which it made all entries into the new variance account at the time of disposition.

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## 7.2 Cost Awards

As noted in the Notice of Hearing and Procedural Order No. 1, any party that was determined to be eligible for an award of costs in the 2014-2015 payment amounts proceeding (EB-2013-0321) shall be eligible for costs in this proceeding.

In determining the amount of the cost award, the OEB will apply the principles set out in section 5 of the OEB's *Practice Direction on Cost Awards* and the maximum hourly rates set out in the OEB's Cost Awards Tariff.

## 8 ORDER

### THE ONTARIO ENERGY BOARD ORDERS THAT:

1. OPG shall establish the following new variance account as described in this Decision: Niagara Tunnel Project Pre-December 2008 Disallowance Variance Account.
2. Intervenors shall file with the OEB and serve on OPG, their cost claim within 7 days from the date of issuance of this Decision.
3. OPG shall file with the OEB and serve on intervenors any objections to the claimed costs within 14 days from the date of issuance of this Decision.
4. Intervenors shall file with the OEB and serve on OPG any responses to any objections for cost claims within 21 days of the date of issuance of this Decision.
5. OPG shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

All filings to the OEB must quote the file number, **EB-2014-0369**, be made through the OEB's web portal at <https://www.pes.ontarioenergyboard.ca/eservice/>, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.ontarioenergyboard.ca/OEB/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

**ADDRESS**

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**DATED** at Toronto January 28, 2016

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli  
Board Secretary