



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

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## DECISION AND ORDER

EB-2018-0085

## ONTARIO POWER GENERATION INC.

Motion to review and vary the Decision and Order on the 2017-2021 payment amounts (EB-2016-0152)

**BEFORE: Ken Quesnelle**  
Vice Chair and Presiding Member

**Allison Duff**  
Member

**Lynne Anderson**  
Member

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August 30, 2018

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# 1 INTRODUCTION AND SUMMARY

This is a Decision of the Ontario Energy Board (OEB) on a motion by Ontario Power Generation Inc. (OPG) to review and vary the OEB Decision and Order on 2017-2021 payment amounts (2017-2021 decision).

OPG is the largest electricity generator in Ontario. Provincial regulation requires that the OEB set the payment amounts<sup>1</sup> that OPG charges for the generation from its nuclear facilities (Pickering and Darlington) and most of its hydroelectric facilities (including Sir Adam Beck I and II on the Niagara River, and RH Saunders on the St. Lawrence 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 the 2017-2021 decision on December 28, 2017. OPG filed a Notice of Motion to review and vary the 2017-2021 decision on January 17, 2018. The only aspect of the 2017-2021 decision that OPG challenges is the approval of an effective date of June 1, 2017 for new payment amounts rather than the January 1, 2017 effective date requested in OPG's application.

In this motion, OPG asks the OEB to vary the effective date to January 1, 2017, and to approve the establishment of one or more variance accounts to record the revenue shortfalls that OPG would have recovered if the effective date had been set at January 1, 2017.

Rule 42.01 of the OEB's *Rules of Practice and Procedure* Rule states that all motions brought under Rule 40.01 shall set out the grounds for the motion. The *Rules of Practice and Procedure* also state 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 made provision for submissions on both the threshold question and the merits of the motion.

For the reasons that follow, the OEB has determined that the OPG motion to review passes the threshold test, but fails on the merits. The OEB finds that there is no error of fact or law in the 2017-2021 decision and that the 2017-2021 decision is reasonable regarding the June 1, 2017 effective date determination. The motion brought by OPG is denied.

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<sup>1</sup> OPG does not have direct rates for serving customers. It has payment amounts that are developed in a similar manner as rates, by determining a revenue requirement.

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## 2 THE PROCESS

OPG filed the 2017-2021 payment amounts application on May 27, 2016. The application sought approval for nuclear payment amounts to be effective January 1, 2017 and for each following year through to December 31, 2021. The application sought approval for hydroelectric payment amounts to be effective January 1, 2017 to December 31, 2017 and approval of the hydroelectric payment amount setting formula for the period January 1, 2017 to December 31, 2021. The OEB assigned the application file number EB-2016-0152.

On December 8, 2016, at OPG's request, the OEB declared the existing payment amounts to be interim as of January 1, 2017. Following discovery, an oral hearing and submissions from parties, the OEB issued its Decision and Order on December 28, 2017. An effective date of June 1, 2017 was approved.

OPG filed the Notice of Motion to review and vary the effective date determination in the 2017-2021 Decision and Order on January 17, 2018. The OEB assigned the motion file number EB-2018-0085. The Notice of Hearing and Procedural Order No. 1 relating to the motion was issued on February 27, 2018. The OEB adopted all parties to the 2017-2021 payment amounts proceeding as parties to the motion. Provision was made for submissions on the threshold question of whether the matter should be reviewed, as well as on the merits of the motion. OEB staff and the following parties filed submissions:

- Association of Major Power Consumers in Ontario (AMPCO)
- Canadian Manufacturers & Exporters (CME)
- Consumers Council of Canada (CCC)
- Energy Probe Research Foundation (Energy Probe)
- Power Workers' Union (PWU)
- School Energy Coalition (SEC)
- Sustainability-Journal

While Procedural Order No. 1 set out an oral hearing for the OEB to ask questions regarding the motion and submissions, and to hear OPG's reply submission, Procedural Order No. 2 was issued on April 5, 2018, advising the parties that the OEB did not have questions regarding the submissions filed by OEB staff and the intervenors. The hearing of OPG's oral reply submission was held on April 10, 2018.

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### 3 THE THRESHOLD TEST

Rule 42.01(a) of the OEB's *Rules of Practice and Procedure* requires anyone bringing a motion to review and vary an OEB order or decision to identify the grounds for the motion:

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 that the OEB may determine the threshold question of whether the matter should be reviewed before conducting any review on the merits.

OPG submitted that the OEB's determination of a June 1, 2017 effective date rests on erroneous findings of fact and law. Those errors include the failure to address whether the payment amounts for January 1, 2017 to May 31, 2017 were just and reasonable, imposing, after the fact, a procedural requirement for an early application filing date, and taking into account the principle of rate certainty despite payment amounts being declared interim. OPG asserted that the OEB misapprehended material facts and that the threshold test has been satisfied.

The PWU adopted the submission of OPG on the threshold question. The Sustainability-Journal submitted that based on Rule 42.01(a), three of the four grounds apply to this motion. OEB staff submitted that the motion is not spurious and OPG's argument on the application of a new procedural standard should be heard on its merits; therefore, the threshold test has been met. CME agreed with and adopted OEB staff's submissions regarding the threshold test.

AMPCO, CCC and SEC submitted that OPG has not met the threshold test. These intervenors stated that OPG is re-arguing matters that were considered in the 2017-

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2021 payment amounts proceeding and the previous 2014-2015 payment amounts proceeding.<sup>2</sup> These intervenors referred to the OEB's Natural Gas Electricity Interface Review Decision (NGEIR decision)<sup>3</sup> to support their arguments. SEC submitted that deference should be given to the effective date finding as the original hearing panel had the benefit of considering the evidence first hand.

OPG replied that many of the same issues will necessarily arise in the review of errors from a previous decision. OPG argued that the intervenors misunderstand the NGEIR decision which stated that there must be an identifiable error rather than just re-argument. OPG also noted that in a previous OPG motion to review proceeding,<sup>4</sup> the OEB said that arguments may be repeated when there is an assertion that an error has been made in interpreting evidence.

## Findings

The OEB finds that the threshold test has been met. OPG advanced a number of arguments regarding the 2017-2021 decision, including errors in law, sufficient for the OEB to consider the motion on its merits. In addition, OPG's argument that the 2017-2021 decision applied a new procedural standard, and its argument concerning the legal implications of certain Supreme Court decisions, were not raised in the 2017-2021 proceeding and the OEB finds that they should be addressed.

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<sup>2</sup> EB-2013-0321.

<sup>3</sup> Natural Gas Electricity Interface Review Decision EB-2006-0322/0338/0340, May 22, 2007.

<sup>4</sup> Decision and Order, Motion to Review and Vary, January 28, 2016, EB-2014-0369.

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## 4 MERITS OF THE MOTION

The OEB has previously applied the reasonableness standard in considering a motion to review, and has said that the original hearing panel is entitled to deference.<sup>5</sup> In this Decision, the OEB continues to apply the reasonableness standard and gives deference to the original hearing panel.

The 2017-2021 decision reasons for approving a June 1, 2017 effective date contain two main elements:

- 1) The procedural expectations concerning the hearing of the application and the related issue of OPG's ability to have filed earlier; and
- 2) The balancing of OPG's revenue requirement with rate certainty for ratepayers.

Although the 2017-2021 decision included other comments and observations related to the effective date issue, these elements of the reasons were the main determining factors in the approval of the June 1, 2017 date.

The 2017-2021 decision reasons, OPG's submission regarding the motion, and the positions of the parties, are summarized in the sections below, followed by the OEB's findings on this motion.

### 4.1 Procedural Expectations and Earlier Filing Date

#### Expectations of Length of Time to Process the Application

The original hearing panel found that, given the substantial application filed on May 27, 2016, it was unrealistic of OPG to expect that a decision would be issued in time for payment amounts effective January 1, 2017.

OPG submitted that the 2017-2021 decision introduced a procedural requirement for OPG to file the payment amounts application far earlier than published guidelines. OPG submitted that this is inconsistent with the requirements of procedural fairness.

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<sup>5</sup> EB-2016-0255, Decision and Order, Milton Hydro Distribution Inc. Motion to Review, February 22, 2018, pp. 10, 12 and 14.

The OEB's website provides performance standards for the OEB to process various types of applications. The metric for a rate application with an oral hearing is 235 elapsed calendar days from application to decision. Given the application filing date of May 27, 2016, OPG submitted that it could reasonably have expected a decision in January 2017.

OEB staff and most intervenors submitted that the original hearing panel's finding on the June 1, 2017 effective date was reasonable considering many factors. AMPCO observed that the approved June 1, 2017 effective date precedes the filing of OPG's reply argument in the 2017-2021 proceeding, which was filed on June 19, 2017. Energy Probe submitted that OPG is "naïve" to rely on the 235 day decision metric, and suggested that an effective date of March 1, 2017 should have been adopted. CME, SEC and OEB staff submitted that the OEB's performance metrics were merely a guideline. As noted by most parties, none of OPG's payment amounts proceedings have been completed within the performance metrics.

In reply argument, OPG stated that its applications are inherently complex. For example, every issue in its first proceeding, EB-2007-0905, was "a question of first impression" including nuclear liabilities, which OPG characterized as the most difficult issue in any OPG case. In addition, OPG submitted that it did not introduce the complexity of the application. OPG argued that its proposal for payment amount smoothing was required by Ontario Regulation 53/05 (O. Reg. 53/05), while the Custom IR framework for the nuclear payment amounts and the incentive rate-setting mechanism (IRM) framework for the hydroelectric payment amounts were filed pursuant to OEB direction. OPG submitted that it is not appropriate for OPG to bear the risk of the complicated application.

## Findings

The 2017-2021 decision states that OPG's expectations were unrealistic and "OPG should have known it would take more than seven months for the OEB to consider the application, render a decision and finalize a payment amounts order."<sup>6</sup>

The OEB finds this a reasonable statement. Based on OPG's three prior cost-based applications, the average period from the filing of a complete application to decision was

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<sup>6</sup> EB-2016-0152 Decision and Order, December 28, 2017, p. 158.

325 days. While this proceeding took 580 days from application filing to decision issuance, the approved effective date was 370 days after the application's filing date.

OPG claimed its expectations for a January 1, 2017 effective date were guided by the OEB's 235-day metric for oral rate hearings. OPG also submitted that it was unreasonable for the OEB to apply a standard which OPG was not previously advised of and could not reasonably have anticipated.

The 235-day metric is a guideline only. It is not a procedural filing requirement or a rule. It was established for rate cases with oral hearings generally, and was not specifically created for OPG cases, which are much more evidence intensive and complex than most of the OEB's other oral hearings. The OEB's website states that the OEB is committed to follow these timelines "but it should be noted that they are based upon the full scope of procedural events associated with each application type taking place in a predictable manner. This includes the evidentiary requirements of the applicant and the intervenors."

The 235-day metric from the filing of an application to the decision is indicative of the average elapsed period for all utilities, from the smallest distributor with only a few thousand customers seeking a one-year approval, to OPG, the largest and only generator filing a five-year plan. This is then followed by a process to set the rates or payment amounts based on the decision.

The original hearing panel described OPG's application as substantial and complicated, noting that it included a Custom IR application for nuclear payment amounts, an IRM application for hydroelectric payment amounts, a review of the Darlington Refurbishment Program, and a consideration of Pickering Extended Operations. All prior OPG payment amount applications were for two years. The 2017-2021 decision stated that "in terms of the dollar amounts at issue, and the amount of supporting evidence, this was the largest rate case the OEB has ever heard". The nature of OPG's application was a first for the OEB, an application type not contemplated when the current metrics were developed.

The OEB disagrees with the premise of OPG's argument regarding the risk of a complicated application. The OEB expects any applicant to make a reasonable assessment of the time that it will take to process its application based on the nature of that application and the experience of previous applications, and to file with sufficient time before the requested effective date. To the extent that this assessment is not

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reasonable, customers should not bear any negative consequence. OPG is the largest generator in the province and its applications are inherently complex. This is not a new risk to OPG, imposed by the 2017-2021 decision. As AMPCO submitted, no reasonable person, let alone an extremely experienced regulated utility, would assume an average processing time for an application of such scale and scope.

The OEB finds that the 2017-2021 decision was reasonable in stating that OPG should have known it would take longer than seven months for the OEB to consider the application, render a decision and finalize a payment amounts order with an effective date of January 1, 2017.

### OPG's Ability to File Earlier

The original hearing panel found that OPG could have taken steps to ensure that certain key documents were completed to facilitate an earlier filing, as some items were largely in OPG's control. OPG submitted that it could not have filed a complete application earlier than it did.

Several parties argued that OPG's 2015 audited financial statements, in particular, were available prior to the May 27, 2016 application filing. The parties also submitted that OPG could have filed the application earlier, with the 2015 audited results filed at a later date.

OPG replied that audited financial statements are a fundamental component to the application. OPG referred to the OEB's filing guideline and the OEB's requirement for audited balances as a prerequisite for the clearance of deferral and variance accounts. OPG also referred to an OEB letter issued in the previous EB-2013-0321 proceeding that deemed OPG's application incomplete. The letter stated that the OEB did not intend to proceed with further procedural steps beyond notice until such time as certain documents, including audited financial statements for the historical years, were filed.<sup>7</sup>

### **Findings**

The OEB finds that it was reasonable for the 2017-2021 decision to conclude that OPG, knowing it was filing a major application, could have taken steps to ensure that the processing of its application could have commenced at a significantly earlier date.

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<sup>7</sup> Exh KM1.1 Tab 10.

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In submissions regarding the motion, OPG, intervenors and OEB staff focused on the filing of OPG's 2015 audited financial statements.

OPG submitted that it would not have been possible to file an application with the 2015 financial statements before March 2016 when they were released. Yet, OPG did not explain why it had the 2015 financial statements months before it filed its application. It was possible for OPG to file earlier.

In addition, OPG submitted that it was required to file a complete application including its 2015 audited financial statements, referring to its OEB filing requirements and the OEB's letter regarding OPG's incomplete EB-2013-0321 application. The OEB disagrees with OPG's assertion that it is required to file audited financial statements for its application to be deemed complete because the OEB's filing requirements for OPG state:

Audited OPG financial statements should be provided as soon as they are available. If the statements are not available at the time of filing, OPG should provide these as an update.<sup>8</sup>

Given OPG's filing requirements, the 2015 financial statements were not required at the time of filing and their unavailability did not prohibit OPG from filing an application and then providing the financial statements when they became available.

The OEB notes that the EB-2013-0321 application was filed on September 27, 2013 and that the OEB's letter dated October 25, 2013 identified that the 2012 prescribed facility financial statements had not been filed with the application. The circumstances differ from the 2017-2021 proceeding as the EB-2013-0321 application was filed without 2012 prescribed facility financial statements even though nine months had elapsed since 2012 year end. The 2012 financial statements should have been available and filed with the application.

The OEB's letter in the EB-2013-0321 proceeding also indicates that the OEB had initiated procedural steps by issuing a Notice of Application based on OPG's incomplete application. If OPG had filed an earlier application in the 2017-2021 proceeding, the OEB could have proceeded with the notice period as it did for OPG's previous

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<sup>8</sup> EB-2011-0286, Filing Guidelines for Ontario Power Generation Inc., revised Nov. 11, 2011, 2.2.3, p. 9.

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application. The notice period in the 2017-2021 proceeding was 51 days.<sup>9</sup> OPG then could have filed an update as allowed by the filing requirements.

Proceeding with notice, despite an incomplete application, is not unique to OPG or the EB-2013-0321 proceeding. In fact, the OEB has proceeded with notice for other applications for other utilities.<sup>10</sup>

In addition to the financial statements, OPG submitted that it did not control the timing of amendments to the Bruce Lease Agreements or the timing of changes to O. Reg. 53/05 which determined the requirements for rate smoothing. The OEB acknowledges Energy Probe's submission that OPG's shareholder is the province and that the items cited by OPG were in control of the province. If the shareholder of a private utility caused a delay in its utility's largest ever rate application, Energy Probe argued that the shareholder would be held to account for the consequences of the delay. It is the OEB's general practice to treat publicly and privately owned utilities alike.

The OEB finds that it was reasonable for the original hearing panel to state that OPG had the opportunity to file its application earlier. The OEB finds no reviewable error in this aspect of the decision.

## 4.2 Balancing Revenue Requirement and Rate Certainty

In arriving at the June 1, 2017 effective date, the original hearing panel stated that it attempted to balance the revenue requirement needs of OPG and rate certainty expected by ratepayers. The 2017-2021 decision observed that the smoothing of payment amounts, as required by O. Reg. 53/05, will help lessen some of the impact of the payment amounts increase, but would not alleviate the fact that ratepayers will be billed after-the-fact for increased payment amounts for seven months of 2017 and part of 2018.

OPG submitted that the OEB failed to consider whether the payment amounts were just and reasonable for the period January 1, 2017 to May 31, 2017 (the stub period). OPG submitted that, largely due to reduced production, the rates for the stub period were not just and reasonable. Darlington Unit 2 has been out of service for refurbishment since

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<sup>9</sup> From application filing to final publication date.

<sup>10</sup> EB-2017-0049 Hydro One Distribution application filed without audited financial statements on March 31, 2017, notice issued May 24, 2017, audited financial statements filed June 7, 2017.

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October 2016 and the production forecast includes 140 additional outage days in 2017 for Pickering Extended Operations. OPG's cost estimate of reduced nuclear production at existing payment amounts for five months was \$240 million.<sup>11</sup>

OPG also submitted that the original hearing panel made a determination on the revenue requirement for the full 2017 year. OPG stated that its nuclear revenue requirement reflects the forecast capital and operating costs that the OEB found to be prudent to incur in respect of 2017. Having found those costs to be prudent, OPG submitted that the OEB is required to enable recovery. OPG made a similar argument regarding hydroelectric payment amounts which were adjusted by a formulaic adjustment for 2017. The PWU submitted that the OEB has no discretion to deny a utility recovery of approved revenue requirement.

OPG submitted that the OEB unreasonably relied on the importance of payment amount certainty. As the payment amounts were declared interim as of January 1, 2017, OPG submitted there was no reasonable expectation of payment amount certainty from ratepayers. Regarding the interim rate order, OPG submitted that "rates are inherently subject to change. They may stay the same; they may not. That's exactly what you are telling individuals, the public, when you publish publicly your interim rate order."<sup>12</sup>

Further, OPG submitted that the OEB unreasonably considered the impact of new payment amounts on customers. OPG stated that in light of the Supreme Court decision in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)* (ATCO decision), the OEB may not disallow prudently incurred costs on account of concerns for the impact on the rates for customers:

Where costs are determined to be prudent, the regulator must allow the utility the opportunity to recover them through rates. The impact of increased rates on consumers cannot be used as a basis to disallow recovery of such costs. This is not to say that the Commission is not required to consider consumer interests. These interests are accounted for in rate regulation by limiting a utility's recovery to what it reasonably or prudently costs to efficiently provide the utility service.<sup>13</sup>

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<sup>11</sup> Exh KM1.1 Tab 7 p. 6, Tr. Vol. 1 p. 16.

<sup>12</sup> Tr. Vol. 1, pp. 32-22.

<sup>13</sup> 2015 SCC 45, para. 61 (internal footnote omitted).

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OPG stated that the ATCO decision established that utilities must have the opportunity to recover their prudently incurred costs. OPG also addressed submissions regarding the EB-2013-0321 decision in which the OEB stated that its power to set just and reasonable rates is very broad and allows significant flexibility. OPG submitted that references to the prior decision are of no assistance as that decision was issued before the Supreme Court decision in *Ontario (Energy Board) v. Ontario Power Generation Inc.*<sup>14</sup> and the ATCO decision.

While OEB staff submitted in the 2017-2021 proceeding that January 1, 2017 was a reasonable effective date, OEB staff submitted in the motion proceeding that there is a range of reasonable effective dates, including June 1, 2017.

AMPCO, CCC and SEC submitted that in making OPG's payment amounts interim, the OEB did so without making provision for submissions before the order was issued. SEC and CCC further submitted that it would be a breach of procedural fairness, if by declaring payment amounts interim the OEB is required to set the effective date to match, as affected parties were not heard on the matter.

OEB staff noted that the Alberta Court of Appeal has stated "concerns about predictability and unfairness that underlie the prohibitions against retroactive and retrospective ratemaking become less significant"<sup>15</sup> where the affected parties are aware that the rates were subject to change. OEB staff submitted that although an interim order removes the legal prohibition against retroactive rate adjustments, the concerns are not completely alleviated and it is still preferable to avoid such adjustments given the problems of inter-generational inequity and rate finality.

OEB staff, AMPCO and SEC submitted that revenue from payment amounts will never perfectly match costs. SEC submitted that as the IRM regime for OPG's hydroelectric facilities decouples revenue from costs, OPG's position was inconsistent with its rate-setting framework.

OPG replied that rates must be just and reasonable at all times, referring to the Supreme Court's decision in the *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)* case (Bell decision).<sup>16</sup> In response to the

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<sup>14</sup> 2015 SCC 44.

<sup>15</sup> *Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2014 ABCA 28, para. 56 (citing *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 132) (emphasis added).

<sup>16</sup> [1989] 1 S.C.R. 1722.

submissions of parties, OPG clarified that although the OEB is not required to adjust rates on an hour by hour basis, utilities must have the opportunity to recover their reasonable costs. OPG agreed that just and reasonable rates can fall within a range that could, for example, reflect a 5% reduction in operating cost or an 8% reduction in operating cost. However, OPG submitted that this differs from the OEB's decision to disentitle OPG to its reasonable costs for January to May 2017.<sup>17</sup>

## Findings

The OEB finds no reviewable error in this aspect of the 2017-2021 decision. It was open to the original hearing panel to balance revenue requirement and rate certainty, and the original hearing panel conducted that balancing exercise reasonably.

OPG submitted that the OEB failed to consider whether the payment amounts were just and reasonable for the stub period. OPG submitted that, largely due to reduced production, the rates for the stub period were not just and reasonable.

The original hearing panel did not elaborate on its balancing exercise. That does not mean the original hearing panel failed to consider the reasonableness of maintaining OPG's existing payment amounts during the stub period or the evidence on reduced nuclear production, as submitted by OPG.

The 2017-2021 decision addressed OPG's revenue requirement, including its nuclear production forecast, and the effective date. The original hearing panel heard the entire case and issued its decision. The OEB finds no merit to OPG's claim that the original hearing panel failed to consider the persistence of existing payment amounts, originally set in the EB-2013-0321 decision, for five more months. The OEB finds that in balancing revenue requirement and rate certainty, the original hearing panel applied its judgement given its knowledge of the entire case.

## Bell decision

OPG submitted that the Bell decision requires that rates must be reasonable "at all times" or "for the whole period".

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<sup>17</sup> Tr. Vol. 1 pp. 9-10.

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The OEB addressed the Bell decision in its EB-2013-0321 decision when OPG questioned the OEB's ability to set an effective date to some date other than the interim rate date. The EB-2013-0321 decision stated:

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... 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 EB-2013-0321 decision also stated:

The Bell decision does not support OPG's conclusion that the Board is legally required to align the effective date to the interim date, and OPG has not pointed to any other cases which support its position.

The OEB considers the findings of the EB-2013-0321 decision with respect to the Bell decision to be applicable in this case. There is a range within which the OEB may consider rates to be just and reasonable as a result of various considerations including the avoidance of rate uncertainty.

OPG provided an estimate of a \$240 million shortfall related to reduced nuclear production at existing payment amounts for the five months. Taken in consideration of OPG's nuclear approved nuclear revenue requirement of \$15.85 billion from 2017-2021, the \$240 million shortfall represents approximately 1.5% of total approved nuclear revenue requirement. While this is material, the OEB does not consider the impact of the setting of the June 1<sup>st</sup> effective date to be an undue impairment of OPG's ability to perform the proposed activities that underpin the approved revenue requirement.

The OEB finds it reasonable that the original hearing panel considered rate certainty. The original hearing panel explained the issue of rate certainty as follows: "ratepayers will have consumed power for the last seven months of 2017 (and for a period into 2018) at the existing rates and will now, after the fact, have to pay a new rate for those periods."

As noted by OEB staff, declaring rates interim does not completely alleviate concerns around this retroactive adjustment. In balancing the issues of rate certainty and OPG's revenue requirement, the 2017-2021 decision did permit a retroactive adjustment for a portion of the period sought by OPG, rather than setting payment amounts on a fully prospective basis.

The interim rate order was issued without a submissions process, as is standard OEB practice. The order approved OPG's request to set its rates interim effective January 1, 2017 and stated:

This determination is made without prejudice to the OEB's ultimate decision on OPG's application, and should not be construed as predicative, in any way whatsoever, of the OEB's final determination with regards to the effective date for OPG's payment amounts arising from this application.

This same issue was addressed in the previous EB-2013-0321 decision. The finding that if the OEB were legally required to match the effective date to the interim rate, the issuance of the interim order without process would represent a breach of the "right to be heard" principle from that decision is applicable in this case.<sup>18</sup>

#### ATCO decision

OPG submitted that given the ATCO decision, it is no longer open to the OEB to set the final rate for a portion of the interim rate period without any consideration of whether those rates are still just and reasonable.

The OEB does not interpret the ATCO decision to mean that its ability to approve effective dates is constrained. While the Supreme Court found that it was inappropriate to disallow costs solely on account of their rate impact on consumers, the Court said nothing about interim rates or effective dates. If OPG's argument was accepted, the only avenue open for the OEB to address the late filing of an application would be to find that some of the forecast costs were not reasonable. Taking OPG's argument to the extreme, if a utility filed an application on December 31, 2016 that would normally take over a year to process, and it was seeking an effective date of January 1, 2017, the OEB's only option to address this late filing would be to determine that forecast costs for

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<sup>18</sup> EB-2013-0321, Decision, November 20, 2014, p. 133.

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2017 were not reasonable.<sup>19</sup> The OEB must have the opportunity of addressing both the reasonableness of the forecast costs and the applicant's conduct in filing its application.

The setting of reasonable rates can include factors that go beyond the determination of the total amount of prudently incurred costs. The original hearing panel also considered the issue of rate certainty. The OEB finds that rate certainty related to the establishment of effective dates is a distinct issue from customer rate impacts related to the recovery of prudent costs.

The declaration of interim rates provides one of the regulatory exceptions to the prohibition against rate retroactivity. It allows the OEB to consider the reasonableness of the proposed effective date taking into account such issues as rate certainty and inter-generational inequity. Setting rates interim, however, does not require the OEB to ultimately match the effective date with the date the interim order comes into effect – it simply gives it the ability to do so. As stated earlier the OEB expects any applicant to make a reasonable assessment of the time that it will take to process an application and to file with sufficient time before the requested effective date. To the extent that this assessment is not reasonable, customers should not bear the negative consequence associated with rate uncertainty.

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<sup>19</sup> In the ATCO decision, the Court found that: "In the context of utilities regulation, I do not find any difference between the ordinary meaning of a 'prudent' cost and a cost that could be said to be reasonable" (para. 35). Therefore the words prudent and reasonable have both been used.

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## 5 COST AWARDS

The OEB's Notice of Hearing and Procedural Order No. 1 indicated that any party eligible for an award of costs in the 2017-2021 payment amounts proceeding (EB-2016-0152) shall be eligible for costs in this proceeding.

The OEB finds that OPG shall be responsible for the payment of approved cost claims. The OEB makes provision for the filing of cost claims in this Decision. 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.

## 6 ORDER

### THE ONTARIO ENERGY BOARD ORDERS THAT:

1. OPG's motion to vary the OEB Decision and Order on 2017-2021 payment amounts is denied.
2. Intervenors eligible for cost awards shall file with the OEB and forward to OPG their respective cost claims by **September 13, 2018**.
3. OPG shall file with the OEB and forward to intervenors any objections to the claimed costs by **September 24, 2018**.
4. Intervenors shall file with the OEB and forward to OPG any responses to any objections for costs claimed by **October 1, 2018**.
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-2018-0085**, be made in searchable / unrestricted PDF format electronically through the OEB's web portal at <https://pes.ontarioenergyboard.ca/eservice/>. Two paper copies must also be filed at the OEB's address provided below. 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.oeb.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 USB flash drive in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

**ADDRESS**

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

E-mail: [boardsec@oeb.ca](mailto:boardsec@oeb.ca)  
Tel: 1-888-632-6273 (Toll free)  
Fax: 416-440-7656

**DATED** at Toronto August 30, 2018

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli  
Board Secretary