



**EB-2008-0380**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*,  
S.O.1998, c.15, (Schedule B);

**AND IN THE MATTER OF** an application by Ontario Power  
Generation Inc. pursuant to section 78.1 of the *Ontario  
Energy Board Act, 1998* for an Order or Orders determining  
payment amounts for the output of certain of its generating  
facilities;

**AND IN THE MATTER OF** an application by Ontario Power  
Generation Inc. pursuant to Rule 42 of the *Rules of Practice  
and Procedure* for an Order varying part of the Ontario  
Energy Board's Decision with Reasons made November 3,  
2008.

BEFORE: Paul Vlahos  
Presiding Member

Cynthia Chaplin  
Member

Ken Quesnelle  
Member

## **DECISION AND ORDER**

On November 24, 2008 Ontario Power Generation Inc. ("OPG") filed a Notice of Motion (the "Motion") for a review and variance of the Ontario Energy Board's (the "Board")

Decision with Reasons in file number EB-2007-0905, dated November 3, 2008 (“Decision”). The Motion has been assigned file number EB-2008-0380.

The Decision dealt with payment amounts for OPG’s prescribed facilities. One of the matters dealt with by the Board was OPG’s proposal regarding treatment of tax losses and mitigation. In its Motion, OPG described the requested relief as follows:

OPG seeks to vary the portion of the Decision dealing with the treatment of tax losses to provide for:

- (i) a clear acknowledgement of the link between OPG’s mitigation proposal and the tax losses...
- (ii) a clear acknowledgement that OPG’s mitigation proposal is not an unqualified gift but rather, was unambiguously based on OPG’s calculation of prior period regulatory tax losses notionally available to be carried forward into the test period, based on the “stand-alone” principle and the principle that “benefits follow costs.”...
- (iii) a clear acknowledgement that OPG will, under no circumstances, be found liable to provide credits to customers on account of any regulatory tax losses which have the effect of requiring OPG to credit customers twice for the same tax losses; and
- (iv) the establishment of a tax loss variance account to record any variance between the tax loss mitigation amount which underpins the draft rate order for the test period and the tax loss amount resulting from the re-analysis of the prior period tax returns based on the Board’s directions in the Decision as to the re-calculation of those tax losses...<sup>1</sup>

The Motion is brought under Rule 44 of the Board’s *Rules of Practice and Procedure* which states:

Every notice of a motion made under Rule 42.01, 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:

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<sup>1</sup> Ontario Power Generation Inc. Notice of Motion, November 24, 2008, p. 4.

- (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; and
- (b) if required, and subject to Rule 42, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

Rule 45 of the *Rules of Practice and Procedure* states 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.

The review panel has determined that there are no grounds for review. In the review panel's view, the objective of the relief sought is to protect OPG from findings that *might* be made as a result of a future panel's interpretation of the Decision in the next OPG Payment Amounts application. The Motion anticipates an interpretation which is detrimental to OPG, and seeks to safeguard against such an interpretation by obtaining acknowledgements from the review panel which effectively remove the possibility of such an interpretation being made. It is the review panel's opinion that what is being sought is not the proper subject of a review motion as it is based upon how the Decision might be interpreted rather than the Decision proper.

The right of a future panel to interpret and apply the Decision as it sees fit cannot be pre-empted. OPG will have the opportunity to present its interpretation of the Decision as it relates to tax losses and mitigation to the future panel; OPG will also be able to present its concerns with respect to other potential interpretations. The future panel will undoubtedly inform itself as to all the relevant circumstances in determining the appropriate balance between customers and OPG. If after the next Payment Amounts proceeding and Board decision OPG is of the view that the interpretation and application of the Decision has led to customers receiving credit twice for the same amounts, OPG may bring a motion to vary at that time.

**THE BOARD THEREFORE ORDERS THAT:**

The Motion is dismissed.

**ISSUED** at Toronto, December 19, 2008

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli  
Board Secretary