

**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** Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

### NOTICE OF MOTION

Ontario Power Generation Inc. (“OPG”) will make a motion to the Ontario Energy Board (“OEB”) at its offices at 2300 Yonge Street, Toronto on a date and time to be fixed by the Board.

The Motion is for:

1. a review and variance of the OEB’s decision of November 3, 2008 in EB-2007-0905 (the “Decision”), as confirmed by the decision of the OEB review panel dated December 19, 2008 in EB-2008-0380 (the “Review Panel Decision”) (attached as Appendix 1) which dismissed OPG’s November 24, 2008 motion for review and variance of the Decision (the “Motion to Vary,” attached as Appendix 2) on preliminary grounds;
2. an Order:
  - (a) for an oral hearing of the Motion on the merits and, ultimately, for an order:
    - (i) varying the approximately \$342 million reduction in OPG’s revenue requirement in the absence of any legal basis for the reduction;
    - (ii) varying the finding that there was no connection between OPG’s proposed revenue requirement reduction and regulatory tax losses carried forward

from the 2005-2007 period in the absence of any evidence to support this finding; and

- (b) as an efficient method to give effect to (a) (i) and (ii) above, given the OEB's Payment Amounts Order dated December 2, 2008, establishing a variance account to record the revenue requirement reduction of \$342 million incorporated in the test period payment amounts and directing that the disposition of that account be conducted in conjunction with consideration of the analysis of prior period tax returns in OPG's next case;

or, in the alternative,

- (c) for an oral hearing on the threshold question of whether OPG's Motion to Vary raises a substantial question as to the correctness of the Decision; and

- 3. such further and other relief as counsel may advise and the Board permit.

**The Grounds for the Motion are:**

- 1. There exist substantial questions as to the correctness of the Decision, including:
  - (a) the OEB exceeded its jurisdiction by ordering a revenue requirement reduction of \$342 million without evidentiary or legal foundation. In this regard, the Decision unlawfully deprives OPG of the opportunity to recover its OEB-approved costs and its OEB-approved return on equity;
  - (b) the OEB erred in fact and in law in finding that there was "no connection" between regulatory tax losses and OPG's proposal to reduce its test period revenue requirement; and
  - (c) the OEB's analysis and disposition of the regulatory tax loss and mitigation issue was never advanced at the hearing by OEB Staff, intervenors, OPG or the OEB itself. As a result, OPG was deprived of the opportunity to respond to the OEB's approach to the regulatory tax loss and mitigation issue, disclosed for the first time upon release of the Decision.

The Review Panel Decision did not address any of these issues.

2. the Review Panel Decision was made without a hearing;
3. while the OEB's Rules of Practice and Procedure contemplate the possibility of a decision being made not to review a motion to vary on preliminary grounds without a hearing, it has not been the OEB's practice to do so (see: EB-2006-0322 et al., Decision with Reasons, May 22, 2007 and Hydro One Connection Procedures Decision, EB-2007-0797, Decision and Order, November 26, 2007). OPG had a reasonable expectation that it would be heard on the threshold issue and basic fairness requires that it should have been heard before any decision to dismiss the Motion to Vary was made;
4. the OEB's powers, under Rule 43, to review all or part of any order at any time and to vary, suspend or cancel that order;
5. the OEB's Rules of Practice and Procedure, in particular:
  - (a) Rule 1.03 which provides that the OEB may dispense with, amend, vary or supplement, with or without a hearing, all or part of any rule at any time, if it is established that the circumstances of the proceedings will require, or it is in the public interest to do so;
  - (b) Rule 2.01 which provides that the Rules shall be liberally construed in the public interest to secure the most just, expeditious, and efficient determination on the merits of every proceeding before the OEB;
  - (c) Rule 2.02 which provides that where procedures are not provided for in the Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it; and
  - (d) Rules 5, 7, 8 and 42 to 45 of the Rules; and
6. such further and other grounds as counsel may advise and the OEB permit.

## **Documentary Support**

The documentary support upon which OPG intends to rely will consist of material from the record in this proceeding, the Decision and OPG's Submission provided with this Motion.

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AND TO: All Intervenors