EB-2007-0905

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.

NOTICE OF MOTION

1. Ontario Power Generation Inc. ("OPG") will make a motion to the Ontario Energy Board ("OEB") on a date and time to be fixed by the OEB.

2. The motion is for a review and variance of part of the OEB's Decision with Reasons dated November 3, 2008 ("Decision") as set out below.

The Issue

3. Chapter 9 of the Decision is entitled "Design and Determination of Payment Amounts."

4. In earlier chapters of the Decision the OEB ruled on the recovery of all of OPG's costs for April 1, 2008 to December 31, 2009 (the "test period"). The OEB essentially ordered that OPG's test period costs were recoverable for one of three reasons: 1) because recovery was required by O.Reg. 53/05; 2) because they were found to be a reasonable forecast of test period costs associated with the prescribed facilities; and, 3) in the case of cost of capital, because recovery was required by the fair return standard. In coming to these conclusions, the OEB accepted and adopted the "stand-alone" principle, whereby the revenues and costs of OPG's regulated business (i.e., the facilities prescribed by O. Reg. 53/05) were determined independently of OPG's other, unregulated businesses.

5. In Chapter 9, the OEB dealt with OPG's mitigation proposal, which was based on tax losses which arose from 2005 to 2007 (the "prior period"). OPG fully utilized those tax losses on an actual basis to offset overall corporate income by the end of December 31,

2007. However, notwithstanding that the tax losses were fully utilized in the prior period on a corporate basis, OPG proposed (applying the "stand-alone" principle and the principle that "benefits follow costs") to carry the tax losses forward as "regulatory tax losses" and to apply them to reduce OPG's revenue requirement in the test period. OPG did so because: 1) the tax losses arose from contributions OPG was required to make to fund nuclear waste and decommissioning obligations associated with operations at the Pickering, Darlington and Bruce nuclear generating stations and other costs related to the nuclear facilities incurred in the prior period; and, 2) the consumer impact of the expenditures that led to the prior period tax losses either were or are likely to be recovered from consumers in OPG's payment amounts.

6. The OEB, however, contrary to the evidence and its own findings of fact, held that there was no connection between OPG's mitigation proposal and OPG's prior period tax losses.

7. Further, even though the OEB was not convinced that there were any prior period regulatory tax losses to be carried forward after December 31, 2007, the OEB nevertheless purported to require OPG to maintain an amended form of its mitigation proposal (i.e., required OPG to make an unqualified "gift" to consumers which represents the revenue requirement impact of the amount required to reduce taxes otherwise payable in the test period to zero plus an additional 22% of the revenue deficiency as determined by the OEB in the Decision).

8. The OEB also directed OPG to file in its next application an analysis of its prior period tax returns which would identify all items that "should be taken into account in the tax provision for the prescribed facilities."

9. In other words, the OEB appears to have found that there was no link between OPG's mitigation proposal and the tax losses on the basis that it was not convinced that there *were* any regulatory tax losses to carry forward after December 31, 2007, ordered OPG to reduce its revenue requirement by an amended amount based on its mitigation proposal anyway, and held that, for 2010 and beyond, OPG will be required to provide an analysis of prior period tax returns which appears intended to result in the OEB ordering

additional credits to consumers based on the very prior period tax losses that formed the basis of OPG's mitigation proposal in the first place.

10. In this context, specifically, OPG is seeking a review and variance of pages 167 to 172 of chapter 9 of the Decision, which purport to delink OPG's mitigation proposal from the prior period tax losses, require OPG to make an unqualified gift to consumers and expose OPG to liability to credit consumers twice for the same prior period tax losses.

The Grounds

11. The grounds for this motion which raise a question as to the correctness of the Decision are as follows.

(a) The OEB's analysis and disposition of the tax loss issue was never advanced before or during the hearing by Board 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 tax loss issue, disclosed for the first time upon release of the Decision.

(b) The OEB erred in fact and in law by failing to recognize regulatory tax loss carry forwards as the basis for OPG's proposal to mitigate payment amounts in the test period.

(c) The OEB exceeded its jurisdiction by arbitrarily ordering OPG to make an unqualified gift to consumers. In this regard, the OEB's Decision on the tax loss issue is confiscatory and unlawfully deprives OPG of the opportunity to recover its OEB-approved costs and its OEB-approved return on equity. In the absence of the relief sought in this motion, it will be OPG's position that there is no mitigation available (tax loss or otherwise) to reduce test period payment amounts.

(d) The OEB's Decision on the tax loss issue is unreasonable in that it appears intended to result in double counting tax loss credits to consumers – once as a result of OPG's use of regulatory tax losses to calculate mitigation of the test period revenue requirement and again in connection with the re-assessment of OPG's prior period tax returns when setting payment amounts in 2010 and beyond.

The Relief Sought

12. 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. There was clear evidentiary support for this link and no contrary evidence;

(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." This too was supported by the evidence and there was no contrary evidence;

(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. This variance account would 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 OEB's directions in the Decision as to the re-calculation of those tax losses. Disposition of the balance in this account would be addressed as part of OPG's next payment amounts application.

Documentary Support

14. The documentary support upon which OPG intends to rely will consist of material from the record in this proceeding and the Decision together with such other material as may be required. It is OPG's intention to prepare a compendium of the relevant documentary material and to file that compendium, along with a written summary of argument, in due course in advance of the hearing of this motion.

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