



By E-mail

March 18, 2009

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th floor
Toronto ON M4P 1E4

Dear Ms Walli,

Ontario Power Generation Inc. ("OPG")
Notice of Motion
Board File No.: EB-2009-0038
Our File No.: 339583-000001

Pursuant to the Notice of Motion and Procedural Order No. 1 dated March 2, 2009, in this proceeding, please find attached the Submissions of Canadian Manufacturers & Exporters ("CME") on the Motion brought by OPG.

A copy of our Submissions is being sent to intervenors as shown below, as well as paper copies to the Board.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Peter C.P. Thompson', with a long horizontal flourish extending to the right.

Peter C.P. Thompson, Q.C.

\slc
c. Intervenors EB-2007-0905
Paul Clipsham (CME)

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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.

**SUBMISSION OF
CANADIAN MANUFACTURERS & EXPORTERS ("CME")
re: OPG's Motion to Vary dated January 28, 2009**

1. OPG's January 28, 2009 Motion to Vary relates to the Board's December 19, 2008 EB-2008-0380 Decision and Order (the "Review Decision") dismissing OPG's November 24, 2008 Motion to Review and Vary certain portions of the Board's EB-2007-0905 Decision with Reasons dated November 3, 2008 (the "Payment Amounts Decision").
2. In the Review Decision, the Board found as follows:

"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."

3. Under reserve of its rights to argue that OPG's further Motion to Review should be dismissed, CME suggests that consideration be given to the issuance of a clarifying supplement to the Payment Amounts Decision which confirms that it was not intended to permit customers to receive credit twice for the same prior period tax loss amounts. It is envisaged that the authors of this suggested clarifying supplement would be the Payment Amounts Decision Panel. The issuance of such a clarifying statement is suggested in the hope that its release on or before April 3, 2009, the date set for the oral hearing of this matter, will prompt OPG to withdraw this further Motion for Review.

4. If this further Motion for Review proceeds to hearing on April 3, 2009, then it should be dismissed for the following reasons:

- (a) After hearing oral submissions from counsel for OPG on all of the grounds of attack on the Review Decision, the essence of OPG's complaint remains as described in the Review Decision. OPG seeks relief against a potential interpretation of the Payment Amounts Decision which would be detrimental to OPG;
- (b) The Payment Amounts Decision rejects the method OPG used to determine the amount of prior period tax losses allocable to ratepayers and issues directives which will enable the results of the allocation method the Board prefers to be checked in a future proceeding. There is nothing specific in the Payment Amounts Decision which might reasonably be interpreted to create the "double jeopardy" exposure which OPG envisages;
- (c) The addition of a \$342M tracking account to the Payment Amounts Decision which OPG requests by way of a Review Decision and Order is both inappropriate and unnecessary because:
 - (i) Any issues which arise in a future proceeding pertaining to the extent to which the prior period tax losses allocated to ratepayers is

determined to be materially greater or less than \$342M will be determined in those proceedings; and

- (ii) All parties' rights with respect to the regulatory treatment of any material difference are preserved and unaffected by the Payment Amounts Decision;
 - (d) The potential "double jeopardy" interpretation which OPG ascribes to the Payment Amounts Decision is highly unlikely because the potential outcome OPG envisages would be both unfair and unreasonable; and
 - (e) Speculative outcomes which, on their face, are both unfair and unreasonable are an inappropriate foundation for a Motion for Review.
5. For these reasons, we submit that there is no reviewable error in the Review Decision.
6. Further, as a matter of principle, the Board should be very reluctant to consider a Motion to Review a Decision and Order which dismisses a prior Review Motion. Courts seldom, if ever, entertain a Motion for Leave to Appeal from an Order dismissing a Motion for Leave to Appeal.

Costs

7. CME requests that it be awarded 100% of its reasonably incurred costs for services rendered by its counsel with respect to OPG's initial Motion for Review and this further Motion for Review.

ALL OF WHICH IS respectfully submitted this 18th day of March, 2009.



Peter C.P. Thompson, Q.C.
Borden Ladner Gervais LLP
Counsel for CME