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**BY E-MAIL**

March 18, 2009

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
P.O. Box 2319  
2300 Yonge St.  
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Board Staff Submission – OPG Motion to Vary  
Board File No. EB-2009-0038**

Please see attached Board Staff submissions for the above mentioned proceeding.  
Please forward the attached to Ontario Power Generation and all intervenors in this proceeding.

Yours truly,

*Original Signed By*

Richard Battista  
Project Advisor

Encl.

c: All parties

**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.

**BOARD STAFF SUBMISSIONS ON MOTION TO VARY APRIL 3, 2009**

On March 2, 2009, the Ontario Energy Board (the “Board”) issued a Procedural Order granting Ontario Power Generation Inc. (“OPG”) an oral hearing as requested by OPG in its Motion to Vary the Decision with Reasons in the OPG Payment Amounts application (the “motion”). The Board directed that the threshold question of whether OPG’s motion raises a substantial question as to the correctness of the Decision with Reasons, and the merits of the Motion, be considered concurrently.

Board Staff will not be taking a position on the correctness of the OPG Payment Amounts Decision with Reasons (“Decision”) or the merits of the Motion. This submission is to provide an overview of the applicable Rules of Procedure, a summary of relevant prior decisions of the Board and a brief overview of the case law as it relates to the right of a regulated entity to earn a fair return.

Relevant Rules of Practice and Procedure:

42.01 Subject to Rule 42.02, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

....

42.03 The notice of motion for a motion under Rule 42.01 shall include the information required under Rule 44, and shall be filed and served within 20 calendar days of the date of the order or decision<sup>1</sup>.

....

44.01 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:
  - (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.

45.01 In respect of a motion brought under Rule 42.01, 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 Threshold Question:

The threshold question has been discussed in the Board's Decision with Reasons in the *Natural Gas Electricity Interface Review Decision* ("NGEIR Review Decision").<sup>2</sup>

In the NGEIR Review Decision the Board determined that the threshold question requires the motion to review to meet the following tests:

- the grounds must raise a question as to the correctness of the order or decision;

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<sup>1</sup> The Notice of Motion was filed January 28, 2009; the Decision with Reasons dismissing the previous Notice of Motion was issued December 19, 2008. No reasons were given for the delay in filing and no party has raised the failure to comply with Rule 42.3 as a bar to proceeding. Under Rule 7.01, the Board may extend or abridge a time line set by the Rules.

<sup>2</sup> *Motions to Review the Natural Gas Electricity Interface Review Decision*, May 22, 2007, EB-2006-0322/0338/0340.

- the issues raised that challenge the correctness of the order or decision must be such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended;
- there must be an identifiable error in the decision as a review is not an opportunity for a party to reargue the case;
- in demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature; it is not enough to argue that conflicting evidence should have been interpreted differently; and
- the alleged error must be material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.<sup>3</sup>

A motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in such a case, there would be no useful purpose in proceeding with the motion to review.<sup>4</sup>

In the Board's Decision and Order in *Hydro One Networks Inc. Connection Procedures*<sup>5</sup>, the Board held that the moving party to a motion to review that alleges an error has been made in a decision must satisfy the Board that:

- the error is identifiable, material and relevant to the outcome of the decision and that if the error is corrected, the reviewing panel could change the outcome of the decision; and
- the findings of the panel are contrary to the evidence before the panel, the panel failed to address a material issue, the panel made inconsistent findings, or another error of a similar nature was made by the panel.<sup>6</sup>

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<sup>3</sup> Ibid., pp. 17-18.

<sup>4</sup> Ibid., p. 18.

<sup>5</sup> *Motion to Review Hydro One Networks Inc. Connection Procedure*, November 26, 2007, EB-2007-0797 (“*Connection Procedures Review Decision*”).

<sup>6</sup> *Connection Procedures Review Decision*, pp. 7-8.

### The Powers of the Board on a Motion to Review:

Rule 44.01 is not exhaustive but rather illustrative. Grounds which include errors of mixed fact and law, which do not fall squarely within the list of enumerated grounds in Rule 44.01, are within the jurisdiction of the Board on a motion to review.<sup>7</sup>

If the Reviewing Panel is satisfied that an identifiable error that is material and relevant to the outcome of the reviewed decision has been made, the Board may vary, suspend or cancel the order or decision, or if they find it appropriate, remit the matter back to the original panel<sup>8</sup>.

### The Setting of Just and Reasonable Rates, and a Fair Rate of Return:

#### *Context to Discussion of Fair Rate of Return*

In its application, OPG recognized that the revenue requirement increase over the current payment amounts was significant and would have an impact on consumers. OPG proposed to mitigate the impact by crediting the benefit associated with certain tax losses accumulated over the interim period to consumers in the test period. To mitigate the increase in payment amounts OPG proposed to accelerate the application of the available tax losses to reduce the test period revenue requirement by \$228M. If accepted as proposed, the application of the tax losses would reduce the payment amounts increase from 19% to 14.8%.<sup>9</sup>

In two tables outlining its payment design for both hydroelectric and nuclear payment amounts, OPG credited consumers with the tax losses by deducting them from the revenue requirement.<sup>10</sup>

In its pre-filed materials, OPG did not raise concerns that by crediting consumers with the tax losses by deducting them from the revenue requirement, it was affecting its

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<sup>7</sup> NGEIR, p. 15.

<sup>8</sup> *A Review of Certain Parts of the Natural Gas Electricity Interface Review Decision of November 7, 2006 and Conducted Pursuant to the Board's Review Decision of May 22, 2007*, EB-2006-0322/-340, Decision with Reasons, July 30, 2007, p. 1.

<sup>9</sup> OPG Compendium of Evidence, p. 24, Mitigation of Payment Amount Increases, Ex. K1, T1, Sch.2, p.1.

<sup>10</sup> OPG Compendium of Evidence, pp. 27-28, Table 1, Ex. K1, T2, Sch. 1, Table 1.

opportunity to earn its approved rate of return on equity, which had been set by the Board at 8.65%.

In its Decision, the Board adopted OPG's proposal to effect mitigation through a reduction in revenue requirement. The Board did not link the mitigation to the regulatory tax losses, as proposed by OPG.

In its first Motion to Vary, filed November 24, 2008, OPG raised as a ground the loss of opportunity to recover its approved costs and return on equity<sup>11</sup>.

At issue is whether, when the Board adopted OPG's proposal to effect mitigation through a reduction in revenue requirement, it affected the opportunity of the utility to earn the fair return it had earlier determined to be 8.65% and in so doing, breached its obligation to set just and reasonable rates.

#### *Relevant Case Law*

The Applicant has filed cases which reflect two statutory schemes for the setting of rates. As noted by Cumming J.A. in *Hemlock Valley Electrical Services Ltd. v. British Columbia Utilities Commission*, a distinction has been drawn in the case law between regulatory systems which afford the administrative tribunal an unfettered discretion to fix rates and those which provide the tribunal with specific statutory directions as to how the rates are to be fixed.<sup>12</sup>

The British Columbia scheme amounts to a statutory direction as to how the commission is to determine a just and reasonable rate. Section 65(3) and (4) of the *Utilities Commission Act* states:

65(3) It is a question of fact, of which the commission is the sole judge, whether a rate is unjust or unreasonable, or whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate of service, or whether a service is offered or furnished under substantially similar circumstances and conditions.

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<sup>11</sup> OPG Brief of Authorities, Appendix 1, Decision and Order EB-2008-0380.

<sup>12</sup> OPG Brief of Authorities, Tab 9, *Hemlock Valley Electrical Services Ltd. v. British Columbia Utilities Commission et al.*, [1992] 12 B.C.A.C. 1 ("*Hemlock*") at para. 60.

- 65(4) In this section a rate is "unjust" or "unreasonable" if the rate is
- (a) more than a fair and reasonable charge for service of the nature and quality furnished by the utility,
  - (b) insufficient to yield a fair and reasonable compensation for the service rendered by the utility, or a fair and reasonable return on the appraised value of its property, or
  - (c) unjust and unreasonable for any other reason.<sup>13</sup>

*British Columbia Electric Railway Co. Ltd. v. The Public Utilities Commission of British Columbia et.al.*<sup>14</sup>, also cited by the Applicant, considers the precursor to that statutory scheme.

The second statutory scheme is one in which the regulator has unfettered discretion to set rates, and is not limited by any statutory directions<sup>15</sup>. The *National Energy Board Act* is an example of such a scheme.

While the tolls set by the National Energy Board must be just and reasonable, its power in that respect is not trammled or fettered by statutory rules or directions as to how that function is to be carried out or how the purpose is to be achieved; in particular, it is permitted to select any method in determining just and reasonable tolls.<sup>16</sup>

In *Transcanada Pipelines Limited v. National Energy Board et. al.*, the Federal Court of Appeal held that once the National Energy Board selected a cost of service methodology to determine tolls, the utility must be compensated through tolls for its prudently incurred costs, including its cost of capital, and in particular, its cost of equity capital. When the cost of service methodology is used to determine just and reasonable tolls, the Board must permit the utility to earn a fair return on equity.<sup>17</sup>

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<sup>13</sup> Ibid., at para. 36.

<sup>14</sup> OPG Brief of Authorities, Tab 6, *British Columbia Electric Railway Co. Ltd. v. The Public Utilities Commission of British Columbia et.al.* [1960] S.C.R. 837 at 852.

<sup>15</sup> OPG Brief of Authorities, Tab 7, *Transcanada Pipelines Limited v. National Energy Board et. al.*, 2004 F.C.A. 149 at para 30.

<sup>16</sup> *Transcanada*, supra., at para. 30.

<sup>17</sup> Ibid., at paras. 31, 34.

The Ontario Energy Board has a statutory scheme that is similar to that of the National Energy Board. Like the National Energy Board, this Board was permitted to select the methodology used in making an order setting payments. In the OPG Payment Amounts Decision, the Board determined that it would use a cost of service methodology to set the initial payment amounts for the prescribed generation facilities.<sup>18</sup>

The Supreme Court of Canada defined ‘fair return’ in *Northwestern Utilities Ltd. v. Edmonton (City)* :

The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested. By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company’s enterprise.<sup>19</sup>

In this case, after considering all of the evidence led by the parties, the Board determined a fair rate of return on equity would be 8.65%.

In *Transcanada*, Rothstein J.A. (as he then was) discussed the impact of rates upon consumers, and the steps that a Board might take to extend the recovery of the utility’s costs over an extended period of time. Rothstein J.A. found that where a cost of service method is used, the utility must recover its costs over a reasonable period of time regardless of the impact on consumers:

While I agree with the appellant that the impact on customers or consumers cannot be a factor in the determination of the cost of equity capital, any resulting increase in tolls may be a relevant factor for the Board to consider in determining the way in which a utility should recover its costs. It may be that an increase is so significant that it would lead to "rate shock" if implemented all at once and therefore should be phased in

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<sup>18</sup> Decision, p. 7. Ontario Regulation 53/05, Payments under Section 78.1 of the Act, provided that the Board may establish the form, methodology, assumptions and calculations used in making an order that sets the payments. The regulation also included detailed rules that govern the determination of some components of the payment amounts.

<sup>19</sup> OPG Brief of Authorities, Tab 5, *Northwestern Utilities Ltd. v. City of Edmonton* [1929] S.C.R. 186 at 192-193, per Lamont J.



over time. It is quite proper for the Board to take such considerations into account, provided that there is, over a reasonable period of time, no economic loss to the utility in the process. In other words, the phased in tolls would have to compensate the utility for deferring recovery of its cost of capital. In the end, where a cost of service method is used, the utility must recover its costs over a reasonable period of time, regardless of any impact those costs may have on customers or consumers (see *Hemlock Valley Electrical Services Ltd. v. British Columbia Utilities Commission et al.*, [1992] 12 B.C.A.C. 1 at 20-21 (C.A.)).<sup>20</sup>

Conclusion:

Board staff sees merit in OPG's request for a variance account, the disposition of which will be reviewed in a future proceeding.

ALL OF WHICH IS respectfully submitted by Board staff this 18<sup>th</sup> day of March, 2009.

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<sup>20</sup> OPG Brief of Authorities, Tab 7, *Transcanada Pipelines Limited v. National Energy Board et. al.*, 2004 F.C.A. 149, para. 43. *Transcanada* was cited in *Natural Resources Gas Ltd. v. Ontario Energy Board* [2006] O.J. No. 2961 (C.A.)