



By E-mail

April 1, 2009

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Dear Ms Walli,

**Ontario Power Generation Inc. ("OPG")**  
**Board File No.: EB-2007-0905, EB-2009-0038**  
**Our File No.: 339583-000001**

We are writing to express our concern with the disclosure in OPG's Reply Submissions of its calculations to the effect that the findings the Board made in the Payment Amounts Decision with respect to tax losses and mitigation reduce the tax loss amount allocable to ratepayers from \$342M to \$65M.

The recent disclosure of this information is of concern because, for the reasons which follow, it materially changes the nature of OPG's Motions for Review.

The essence of OPG's initial and subsequent Motions for Review was to the effect that:

- (a) The Board had no jurisdiction to make the findings it made with respect to tax losses and mitigation and that the findings are in error and unsustainable; and
- (b) These findings expose OPG to the risk of having to pay the same amounts twice with the result that a variance account is needed to protect OPG from the double jeopardy risk it faces as a result of alleged errors in the Decision.

Protecting OPG from the detrimental consequences of allegedly erroneous findings was, until Monday of this week, the rationale for the variance account relief OPG proposes.

When we received OPG's initial Motion for Review in late November 2008, we sought information from OPG which would help us better understand its implications. We contacted OPG on November 26, 2008, and, *inter alia*, asked that a calculation be provided showing the difference between the \$342M of tax losses OPG had allocated to ratepayers and the allocable amount which would result from applying the Board findings alleged by OPG to be *ultra vires* and incorrect. OPG's counsel responded indicating that the information would not be provided.

Subsequently on December 19, 2008, the Board, without calling for submissions from interested parties, issued its Decision and Order which OPG seeks to review in these proceedings. That Decision and Order proceeds from the premise that the review relief OPG sought in its initial Motion for Review was intended to protect it from the double jeopardy risk it says it faces as a result of the allegedly wrongful and incorrect findings in the Payment Amounts Decision.

Submissions by parties opposite in interest to OPG in this case are based on a similar premise. Our submission on behalf of CME dated March 18, 2009, is premised on its understanding that "OPG seeks relief against a potential interpretation of the Payment Amounts Decision which would be detrimental to OPG.". Comments by other parties on OPG's proposed variance account have been made in the context of a belief that OPG's variance account proposal is intended to protect OPG from

the double jeopardy risk it faces and not to enable OPG to take advantage of the findings it challenges.

It is now clear from OPG's Reply Submissions that the primary objective of the variance account OPG proposes is not to protect it from the double jeopardy risk it faces, but to enable it to take advantage of the allegedly *ultra vires* and wrongful findings to recover an additional \$277M from ratepayers.

We submit that OPG's Reply Submissions materially change the nature of the initial and subsequent Motions for Review, in that the essence of what OPG is now saying is that:

- (a) The Board's findings with respect to tax losses and mitigation are *ultra vires* and incorrect; and
- (b) The variance account is needed to enable it to take advantage of these incorrect findings by increasing rates by \$277M.

Normally, a party alleging findings made without jurisdiction asks the reviewing tribunal to set the findings aside. OPG does not seek such relief. Rather, it asks for variance account relief so that it can take advantage of the incorrect findings. Such a request for relief is not the proper subject matter of a Motion for Review. A reviewing tribunal cannot grant relief which enables a party seeking review to benefit from the allegedly incorrect findings.

If the Board's findings are *ultra vires* and erroneous, then the reviewing tribunal should grant relief which prevents such findings from becoming operative. The reviewing tribunal cannot grant relief which enables OPG to take advantage of the wrongful findings. On the other hand, if the Board's findings are not *ultra vires* and erroneous as OPG alleges, then there is no basis for any order from the reviewing tribunal other than one dismissing the Motion.

In the context of the materially changed nature of OPG's Motions for Review brought about by its recent disclosure that it stands to benefit by an amount of about \$277M from findings which it says the Board made without jurisdiction, the reviewing tribunal should act to prevent the *ultra vires* findings from becoming operative. The reviewing tribunal should reverse the *ultra vires* findings and substitute those with respect to tax losses and mitigation which are compatible with the uncontradicted evidence that was adduced at the hearing, without prejudice to the rights of any party in a future proceeding to question the methodology to be used to determine the amount of OPG's prior period tax losses allocable to ratepayers.

This letter provides OPG and other parties with advance notice of these points of argument which we will include in our oral submissions on Friday, April 3, 2009, as further support for our opposition to the variance account relief OPG requests. Would you please add this letter to the submission of CME dated March 18, 2009.

Please contact me if there are any questions about the contents of this letter.

Yours very truly,



Peter C.P. Thompson, Q.C.

PCT\slc

c. Ontario Power Generation Inc.  
Interested Parties EB-2007-0905  
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