



**EB-2009-0038**

**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** an application by Ontario Power Generation Inc. pursuant to Rule 42 of the *Rules of Practice and Procedure* for an Order varying part of the Ontario Energy Board's Decision with Reasons made November 3, 2008.

**BEFORE:** Howard Wetston  
Presiding Member and Chair

Pamela Nowina  
Member and Vice Chair

**DECISION AND ORDER ON MOTION TO REVIEW AND VARY  
(Notice of Motion filed January 28, 2009)**

On January 28, 2009, Ontario Power Generation Inc. ("OPG") filed a Notice of Motion (the "Motion") for a review and variance of the Ontario Energy Board's (the "Board") Decision with Reasons dated November 3, 2008, file number EB-2007-0905 ("Payments Decision"). The Motion has been assigned file number EB-2009-0038.

On March 2, 2009, the Board issued a Notice of Motion and Procedural Order No. 1 which advised the Board would hold an oral hearing at which the threshold question of whether OPG's Motion raised a substantial question as to the correctness of the Decision, and the merits of the Motion, would be considered concurrently. The Board adopted the intervenors and parties of record from the EB-2007-0905 proceeding. No other parties came forward requesting intervenor or observer status.

The School Energy Coalition ("SEC"), Canadian Manufacturers and Exporters ("CME"), the Power Workers' Union ("PWU"), the Electricity Distributors Association ("EDA"), Board staff and OPG filed submissions in advance of the oral hearing. The Board heard submissions from SEC, CME, PWU and OPG at the oral hearing held on April 3, 2009.

After considering the oral and written submissions, the Board has decided to grant OPG's motion to vary the Payments Decision. The following Decision and Order sets out the reasons of the Board.

## **Background**

### *Motion Brought November 24, 2008*

Prior to the Motion which is the subject of this decision, OPG filed a Notice of Motion dated November 24, 2008 ("Previous Motion") which also sought a review and variance of the Payments Decision. No additional materials were filed.

The Previous Motion requested a review and variance of that portion of the Payments Decision "which purport to de-link 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".<sup>1</sup>

The Previous Motion listed four grounds:

1. the Board's analysis and disposition of the tax loss issue was never advanced before or during the hearing , depriving OPG of the opportunity to respond to the approach;

---

<sup>1</sup> OPG Compendium of Evidence, Tab 1, Previous Motion, p.3.

2. the Board erred in fact and law by failing to recognize regulatory tax loss carry forwards as the basis for the OPG's proposal to mitigate payment amounts in the test period;
3. the Board exceeded its jurisdiction by arbitrarily ordering OPG to make an unqualified gift to consumers, unlawfully depriving OPG of the opportunity to recover its approved costs and return on equity; and
4. the Board was unreasonable in its disposition of the tax loss issue as it appeared intended to result in double counting tax loss credits to consumers.

The Previous Motion described the relief sought as a variance of the portion of the Payments 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;
- (ii) a clear acknowledgement that OPG's mitigation proposal was not an unqualified gift but was unambiguously based on OPG's calculation of prior period regulatory tax losses notionally available to be carried forward into the test period;
- (iii) a clear acknowledgement that OPG would, under no circumstances, be found liable to provide credits to customers on account of any regulatory tax losses; and
- (iv) the establishment of a tax loss variance account to 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 Board's directions in the Payments Decision as to the re-calculation of those tax losses.

The Previous Motion made no reference to the Board's *Rules of Practice and Procedure* (the "Rules"), and specifically, no reference to the Rules under which OPG was proceeding; no reference to the powers that OPG sought the Board to exercise on its behalf (for example, no order was sought); no reference to the type of hearing sought; and no reference to the Board's power to determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

On December 19, 2008, the Board issued a Decision and Order which stated:

Rule 45 of the *Rules of Practice and Procedure* states 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 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.

*Motion Brought January 28, 2009*

*Procedural matters related to the Motion*

The Motion was filed January 28, 2009, along with a written submission.

Rule 42.03 requires a notice of motion to be filed and served within 20 calendar days of the date of the order or decision for which a review is requested. In a letter

accompanying the Motion, OPG acknowledged its late filing and requested the Board give consideration to it nonetheless; the Motion and the written submission sought no specific relief with regard to the late filing.

SEC and CME took issue with the filing of the Motion by OPG given the dismissal of the Previous Motion. In its written and oral argument, SEC expressed concerns that if the Board permitted the Motion to proceed, it would encourage parties to bring repeated review motions until they obtained a sympathetic Board panel, thus undermining the principle of the finality of decisions. SEC argued OPG could only be before the Board on the Motion “if, in principle, a party can keep moving to review or vary a decision of the Board as many times as it likes.” SEC urged the Board to exercise control over its own review process by refusing to permit the Motion to proceed.<sup>2</sup>

In its reply and oral submission, OPG responded that the Rules provided ample flexibility to the Board to hear and determine the Motion, without undermining the integrity of the Board’s processes. OPG argued that the Rules permitted the Board to receive the Motion if the Board was satisfied the circumstances of the case and the public interest in securing the most just, expeditious and efficient determination on the merits required it to do so.<sup>3</sup>

The Board agrees that finality in decision making is important, as is discouraging motions for review as a means of seeking a sympathetic Board panel; however, the Board views this matter as one which engages broader issues. The Board is the economic regulator charged with ongoing oversight of certain aspects of the regulated business of OPG and its prescribed facilities. The Payments Decision was the first opportunity for the Board to examine and consider the many issues associated with the setting of just and reasonable payment amounts for the prescribed facilities. The issues to be determined by the Board were complex, and the ambit of the decision was framed both by statute and by a regulation drafted in contemplation of the first payment amounts hearing. In this first payments case, it is self evident that the accurate assessment of the evidence would not only support the determination of the payment amounts for the test period but would also establish the framework for consistent results in future payment amounts proceedings.

---

<sup>2</sup> Submissions of SEC, paras. 3.1.1 – 3.2.2.

<sup>3</sup> Reply Submission, paras. 41 – 47. In support of its position, OPG cited Rules 1.03, 2.01, 2.02 and 5.01(a).

Given the significance of this first decision, and having considered the Motion and the written submission which accompanied it, the Board determined that an oral hearing on the threshold issue and the merits of the Motion was warranted in all of the circumstances; and that the breadth of its powers under the Rules, and its statutory mandate, permitted it to order such a hearing.

In making such a decision, the Board was exercising its authority, not relinquishing it. As it has done in the past and as it did in this instance, the Board will assess the circumstances of each matter in its determination of whether and how to proceed.

### **The Motion**

The Motion sought a review and variance of the Payments Decision; an order for an oral hearing of the motion on the merits, or alternatively an oral hearing on the threshold question of whether the Motion raised a substantial question as to the correctness of the Decision<sup>4</sup>; and if successful, an order varying the Payments Decision, and establishing a variance account.

The Motion made specific reference to the Rules on which it relied in seeking such relief, and the written submission outlined the evidence, law and argument on which OPG based its request for a review on the merits and an order varying the Payments Decision.

The grounds for the Motion as set out in the Notice of Motion were:

1. the Board exceeded its jurisdiction by ordering a revenue requirement reduction of \$342 million without evidentiary or legal foundation, unlawfully depriving OPG of the opportunity to recover its approved costs and return on equity;

---

<sup>4</sup> The Motion also stated that “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 Previous Motion was made”. As an oral hearing was ordered on both the merits of the motion and the threshold issues concurrently, this point was not argued; however, the Board points out that Rule 45 clearly states that it may dismiss a motion to review with or without a hearing. It is within the Board’s discretion to determine that the threshold has not been met, and to dismiss a motion to review without a hearing, based solely upon its review of the materials filed. No party seeking relief should expect the Board to grant its request; rather, the onus is on the moving party to persuade the Board to exercise its powers.

2. the Board 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
3. the Board's analysis and disposition of the regulatory tax loss and mitigation issue was never advanced at the hearing, depriving OPG of the opportunity to respond to the Board's approach to the regulatory tax loss and mitigation issue.

In the Notice of Motion the principal remedies sought were 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 the finding;
- (iii) an order establishing a tax loss 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.<sup>5</sup>

In addition to the written submission, OPG filed a reply submission. At the hearing, it was noted by CME and SEC that the reply submission was the clearest expression of what was being sought by OPG, its arguments and the relief it was seeking. In particular, CME expressed frustration that its written submissions were superseded by the reply submission, and that due to its filing shortly before the oral hearing, limited time was available to consider and respond to certain aspects of the reply submission.

This Motion Record has been difficult to follow. The materials filed by OPG have evolved as between the Previous Motion and this Motion, from the filing of the written submission and the reply submission, and the oral argument. For example, the jurisdictional argument, which was one of three grounds in the Previous Motion and the first ground cited in the Motion, and to which a significant amount of the written

---

<sup>5</sup> OPG Compendium of Evidence, Tab 1, Notice of Motion, p. 1, para.2. Although expressed otherwise in the Notice of Motion, at the oral hearing OPG's counsel advised that the remedies were sought in the alternative: Hearing Transcript, pp. 9-11.

submission and the Brief of Authorities was devoted, was referred to as an alternative argument in the reply submission, and was characterized as OPG's 'fifth' argument at the oral hearing.<sup>6</sup>

A similar evolution occurred in the relief sought. In the Previous Motion OPG requested the establishment of a tax loss variance account that 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 re-calculation of the tax losses required by the Board in the Payments Decision.<sup>7</sup>

In the Motion, OPG requested the establishment of a variance account to record the revenue requirement reduction of \$342 million incorporated in the test period payment amounts with the disposition of the account to be conducted in conjunction with the consideration of the analysis of prior period tax returns in OPG's next case.<sup>8</sup> In the reply submission, OPG explained the establishment of the variance account was to record the difference between the revenue requirement reduction of \$342 million embedded in the test period payment amounts and the amount of regulatory tax losses recalculated in accordance with the Board's directions.<sup>9</sup>

While the Board appreciates that arguments and positions evolve in response to arguments posed by others, it reminds all parties that those who seek relief from the Board must ensure the clarity and consistency of the materials they file. This is fundamental to effective adjudication and informed decision making. It also encourages meaningful participation by all parties in the regulatory process.

## **FINDINGS**

### **The Threshold Question**

#### *The Procedural and Substantive Issues related to the Threshold Question*

---

<sup>6</sup> Reply submission, para. 79; Oral Hearing Transcript, pp. 25-28.

<sup>7</sup> OPG Compendium of Evidence, Tab 1, Previous Notice of Motion, p. 12.

<sup>8</sup> OPG Compendium of Evidence, Tab 1, Notice of Motion, p. 2.

<sup>9</sup> Reply submission, para. 34.



Rule 45.01 states that in respect of a motion to review 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.

In determining the threshold question the Board considers the grounds for the motion, described in Rule 44.01 (a):

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.

The list of grounds set out in Rule 44.01(a) is not exhaustive but rather illustrative.<sup>10</sup>

In the *Natural Gas Electricity Interface Review Decision* (“NGEIR Review Decision”)<sup>11</sup> 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;
- 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

---

<sup>10</sup> *Natural Gas Electricity Interface Review Decision*, May 22, 2007, EB-2006-0322/0338/0340. p.15.

<sup>11</sup> *Ibid.*

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>12</sup>

### **The Board's Finding on the Threshold Question**

The Board is satisfied that the grounds put forward by OPG meet the tests as set out in the NGEIR Review Decision.

OPG has raised questions regarding the correctness of the finding that there was no connection between the mitigation offered by OPG and its regulatory tax losses, and the ordering of certain revenue requirement reductions after making that finding.

The Board is persuaded that those findings are inconsistent with the evidence; that those inconsistent findings are material and relevant to the outcome of the decision; and that if varied or changed, those findings would change the outcome of the decision.

The threshold having been met, the Board will proceed to consider the merits of the Motion.

### **The Merits of the Revenue Requirement Reduction**

The Board must decide if the panel in the Payments Decision erred in

- a) finding that OPG's proposal to eliminate an income tax provision in the test period was 'simply mitigation', and unrelated to regulatory tax losses;
- b) finding that there was no connection between the tax loss benefits and OPG's proposed carry forward or acceleration of a revenue reduction of \$228 million;

---

<sup>12</sup> *Supra.*, pp. 17-18.

while also

- c) ordering that OPG should not include any tax provision for 2008 and 2009 in respect of the prescribed assets; and
- d) ordering that the amount of mitigation for the test period will be equal to 22% of the revenue deficiency calculated based on the Board's findings in the decision.

The reductions ordered were:

1. The elimination of any tax provision for the test year period in respect of the prescribed assets. In its findings, the Board did not provide an exact figure for this amount; in its materials, OPG calculated this amount to be \$173 million.
2. Mitigation unrelated to regulatory tax losses in an amount equal to 22% of the revenue deficiency calculated based on the Board's findings in the Payment Decision; OPG calculated this amount to be \$169 million.

If the Board now decides that the findings and the reductions are in error, then the Board must determine if the treatment of tax losses necessitates the establishment of a variance account.

#### *OPG's Use of Tax Losses*

In its application to determine payments for OPG's prescribed assets, OPG attributed the benefit of prior period tax losses to ratepayers. This was done in two parts. The first amount was to offset the 2008/2009 taxes calculated on regulatory assets. The second amount represented the remainder of the estimated prior period tax loss benefit which would normally be used to offset taxes in a future period. In its application and evidence, OPG recommended that this amount be moved forward to the 2008/2009 payment period to mitigate rateshock.

In its submissions in this hearing OPG indicated that it had always been its position that both amounts should be to the benefit of the ratepayers, since the calculated taxes were based on assets which OPG believed should receive regulatory treatment and would therefore impose costs on ratepayers. According to OPG, the only question of true

mitigation was the availability of a portion of the benefit at an earlier period than would normally be the case.

#### *Related Payment Decision Determinations*

In the Payments Decision, the Board made several determinations which impact the calculation of taxes.

In its application OPG treated Bruce Nuclear revenues and costs as though they were related to a regulated business. The Board did not agree with this treatment. The Board required OPG to make these calculations on the basis of Generally Accepted Accounting Principles (“GAAP”) and not regulatory accounting. The Board indicated that the treatment of taxes on Bruce revenues and costs should be treated in a normal GAAP manner and a tax provision should be included in the calculation of Bruce costs, contrary to OPG’s proposal to carry forward tax loss benefits for the Bruce revenues and costs.

In its decision, the Board also made other findings questioning OPG’s regulatory tax loss calculations. It observed that it did not have the information necessary to determine the tax benefits which should be carried forward to offset payment amounts in 2008 and later periods, and ordered OPG to file better information and analysis on its forecast test period income tax provision in its next payment application. The Board stated that the analysis should be based on the principle that if electricity consumers should bear a cost (or should benefit from revenues) they should receive the related tax benefit (or will be charged the related income taxes).

Although these decisions on tax calculations are relevant to OPG’s Motion, the findings have not been challenged by OPG or any other party. What the OPG Motion does challenge are the Board’s findings which separate the rationale for the proposed revenue reduction from any tax loss benefit.

The Board found that OPG should reduce its revenue requirement by eliminating any tax provision for 2008 and 2009. The Board stated that because there was no evidence about the amount of the pre-2008 tax benefits that appropriately should be carried forward to offset 2008 and 2009 taxes, it viewed OPG’s proposal to eliminate the test period’s income tax provision as “simply mitigation.”<sup>13</sup>

---

<sup>13</sup> Payments Decision, p. 171

In addition, the Board ordered OPG to reduce its revenue requirement by 22% of its revenue deficiency. This latter amount was calculated to be approximately the same percentage of revenue deficiency that OPG had proposed as an additional reduction. OPG had based its calculation on the amount of tax benefit that it expected to be available to future periods and which it proposed bringing forward to the test period; however, the Board also separated this reduction from tax loss benefits stating: "As for OPG's proposed \$228 million mitigation amount, the Board does not accept that there is any connection between that amount and any regulatory tax losses."<sup>14</sup>

*Positions taken on the Motion*

OPG argued that the Board disposed of the regulatory tax loss and mitigation issue on a basis that was never raised or argued during the hearing, denying all parties the opportunity to make submissions on a material issue, and depriving the Board of the benefit of hearing parties on the issue. OPG submitted that by so doing, the Board was not fair and breached the rules of natural justice. PWU supported this argument in its written and oral submissions.

OPG also argued that the Board made findings that were unsupported by the evidence, thereby falling into error.

OPG argued:

In OPG's submission, once the OEB decided that it was not satisfied there were any regulatory tax losses, or that they had not been correctly calculated, or that there was not sufficient evidence to determine the amount of those regulatory tax losses, the proper response was not to require OPG to proceed to reduce its revenue requirement by approximately \$342 million in any event. Rather, the only proper and lawful course open to the OEB in the face of those findings involved one of two choices:

1. remove the mitigation proposal from any calculation of the revenue requirement for the test period and remit the matter for further consideration to a future panel; or
2. establish a variance account to record the revenue requirement reduction of \$342 million embedded in the test period payment and consider the disposition of that

---

<sup>14</sup> Ibid.

amount in the context of any regulatory tax loss calculations resulting from an analysis of prior period tax returns in OPG's next case.<sup>15</sup>

CME argued that any finding that was not based on evidence should be corrected. Assuming that the linkage between mitigation and the tax losses was restored, and a variance account was created as requested by OPG, the amount of the regulatory losses to be brought into the variance account should be corrected also; this correction could occur at the next payment amounts hearing when the tax loss analysis was placed into evidence, and tested by the intervenors and the Board.

SEC argued that as OPG's proposed revenue reduction was entirely voluntary, it should be required to live with the consequences of its own proposal. In support of its characterization of the proposed reduction as voluntary, SEC cited a portion of the transcript of the original hearing where Mr. Barrett of OPG describes returning the tax loss benefit to the ratepayers in the following way, "Yes, we do not believe this treatment is required, but we do believe that it is appropriate".<sup>16</sup> Therefore, SEC argued, the Board gave OPG what it asked for and the company should not be able to overturn the decision now because the tax calculations modified by the Board's decision result in a significantly lower regulatory tax benefit than OPG anticipated.

OPG and SEC both stated that the issue of the tax calculations was not raised in the hearing. SEC pointed out that while intervenors may have questioned the Board's decision in regard to those calculations, they could not move for review since the Board maintained the approximate revenue reduction as proposed originally by OPG.

### **Board Findings and Disposition of the Motion to Review**

OPG and PWU argued that the Board disposed of the regulatory tax loss and mitigation issue on a basis that was never raised or argued during the hearing, depriving parties of the opportunity to make submissions; by doing so, it was alleged that the Board denied OPG procedural fairness and breached the rules of natural justice.

While being provided the opportunity to make submissions is desirable, there is no general rule precluding the Board, a specialized economic energy regulator, from

---

<sup>15</sup> OPG Written Submission, para. 53.

<sup>16</sup> OPG Compendium of Evidence, Tab 4, Hearing Day 15, June 20, 2008, p. 75, ls. 20-21.

reaching decisions based on its own analysis of the record or on its own expertise or on the basis of some combination of the two. Ultimately the determination of whether fairness is breached in particular circumstances turns on the circumstances. In this case, the Board finds it unnecessary to make a specific finding on this issue.

The Board finds that the evidentiary record established and supported a link between the regulatory tax losses and the revenue requirement reduction. The oral and written evidence provided by OPG consistently linked the tax losses with the revenue requirement reduction. That evidence was not challenged by any party.

If a 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>17</sup> As noted above, the Board has determined that identifiable errors that are material and relevant to the outcome of the reviewed decision have been made.

The Board varies the Payments Decision in a manner that links the revenue requirement reduction and regulatory tax losses, and orders the establishment of a tax loss variance account to record any variance between the tax loss mitigation amount which underpins the 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 Board's directions in the Payments Decision as to the re-calculation of those tax losses.

The clearance of this account will be reviewed in OPG's next payment application hearing when a future panel of the Board reviews the tax analysis ordered in the Payments Decision.<sup>18</sup> The Board anticipates that any issues related to tax calculations will be dealt with at the next payment amounts hearing.

---

<sup>17</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>18</sup> Payments Decision, p. 171: "The Board also expects OPG to file an analysis of its prior period tax returns that identifies all items (income inclusions, deductions, losses) in those returns that should be taken into account in the tax provision for the prescribed facilities. That analysis should be based on the principle that if OPG is proposing that electricity consumers should bear a cost (or should benefit from revenues) they will receive the related tax benefit (or will be charged the related income taxes).

**Costs**

A decision regarding cost awards will be issued at a later date. Eligible intervenors claiming costs should do so as ordered below. OPG shall pay any Board costs of and incidental to this proceeding upon receipt of the Board's invoice.

**THE BOARD THEREFORE ORDERS THAT**

1. The Payments Decision shall be varied in a manner that links the revenue requirement reduction and the regulatory tax losses;
2. OPG shall establish a variance account to be called the Tax Loss Variance Account to be effective as of April 1, 2008;
3. Intervenors eligible for cost awards shall file with the Board and forward to OPG their respective cost claims within 14 days from the date of this Decision;
4. OPG may file with the Board and forward these intervenors any objections to the claimed costs within 28 days from the date of this Decision;
5. Intervenors, whose cost claims have been objected to, may file with the Board and forward to OPG any responses to any objections for cost claims within 35 days of the date of this Decision; and
6. Filings are to be in the form of two hardcopies and one electronic copy in searchable PDF format at [boardsec@oeb.gov.on.ca](mailto:boardsec@oeb.gov.on.ca) and copy Ontario Power Generation Inc.

**ISSUED** at Toronto, May 11, 2009

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli  
Board Secretary