



EB-2009-0174

OEB Application

for

An Accounting Order for Ontario Power Generation Inc.

Reply Argument of  
Ontario Power Generation Inc.

September 4, 2009

This is the reply submission of Ontario Power Generation Inc. ("OPG"), filed in accordance with Notice of Application and Procedural Order No. 1 issued by the OEB on June 30, 2009. Written submissions in this matter were filed by Board Staff, CME, SEC and Energy Probe.

Since the four responding submissions were all very different, this reply responds to each one *seriatim*.

### **Board Staff**

Board Staff's only submission, supported by Energy Probe, was to recommend the establishment of a variance account to track a potential for "over-collection" of the approved recovery associated with hydroelectric deferral and variance accounts.

OPG's proposal on this matter was informed by the original reasons for the inclusion of the recovery of the hydroelectric variance account balances in rates rather than as a separate rate rider. That rationale was simply that in the context of a \$6 billion revenue requirement, the amounts in issue did not warrant separate rate rider treatment.

However, OPG has no objection to the separate tracking of any over/under recovery resulting from the continuation of the hydroelectric deferral and variance account recovery amount in rates, as recommended by Board Staff, if the OEB believes it is warranted in the circumstances.

### **Energy Probe**

Energy Probe's only substantive submission was to support the Board Staff in connection with the hydroelectric deferral and variance account recovery. Energy Probe also noted that in light of the OEB's ruling of August 18, 2009, the issue of OPG's decision to defer its application to set new payment amounts for 2010 "was not within the scope of the current proceeding."

OPG agrees with Energy Probe's assessment of the situation and, as will be submitted in more detail below, believes that CME and SEC are simply repeating arguments made in support of their positions taken on CME Interrogatory #1, positions that have already been rejected by the OEB in its August 18, 2009 ruling.

## **CME**

CME continues to argue, as it did in its unsuccessful attempt to justify CME Interrogatory #1, that the disposition of OPG's accounting order application may somehow "contribute to material over-earnings" in 2010 and that a "condition" of granting the accounting order requested in this application should be a requirement that any "over-earning" in 2010 be credited back to consumers.

In OPG's submission, the entire basis for the CME (and SEC) argument in this matter has already been rejected by the OEB. The OEB said in its August 18, 2009 ruling:

"The current proceeding is not an examination of OPG's 2010 revenue requirement; rather it is concerned with the ongoing implementation of various Board determinations in the last proceeding relating to deferral and variance accounts, and the ongoing recording of amounts in certain accounts. OPG is not seeking approval of any balances in this proceeding; nor is it seeking disposition of any balances, other than those that have already been approved by the Board.

The current payment amounts remain in place, pursuant to the Board's Order of December 2, 2008, until such time as they are changed, either as a result of OPG filing an application to change the payment amounts, or as a result of the Board initiating a proceeding on its own motion to determine whether the payment amounts remain just and reasonable."

This, in OPG's submission, is a complete answer to the submissions of CME and SEC. CME's argument that material over-earnings in 2010 should be credited to consumers as a condition of granting this application must, therefore, be rejected on this ground alone. In the absence of either OPG or the OEB initiating a proceeding to change the Payment Amounts Order, there is no basis for any change to the Payment Amounts Order through the establishment of an earnings sharing mechanism as CME is advocating.

Further, OPG repeats and relies on the submissions it made in Mr. Penny's letter of August 12, 2009. In summary, CME's concern regarding any potential for over-earning in 2010 simply has nothing whatever to do with this Application. The only purpose of this Application is to seek "clarity with respect to the technical application of the language of the Payment Amounts Order." For several of the debit accounts, the OEB has already approved the variance and deferral amounts and the amortization periods of those amounts into 2010 and beyond. In a very real sense, "this is money, therefore, that the OEB has already held OPG is entitled to."

Importantly, as the OEB has already held, OPG's accounting order application seeks no change in the status quo, no disposition of any variance or deferral account balances and no change to OPG's OEB-approved payment amounts. "All of these questions are for another day."

The sole justification for CME's exceptional request is its allegation, based on its selective review of OPG's consolidated second quarter financial reports, that "OPG *may* now be forecasting significant revenue sufficiency for 2009 and 2010" [emphasis added].

CME's argument derives no support or justification from OPG's second quarter financials. These statements report actual financial and operating results for the three and six months ended June 30, 2009 and do not support the assertion that there will be a 2009 or 2010 revenue sufficiency for OPG's regulated facilities.

CME's argument relies upon the statement in the second quarter financials that net income in the second quarter of 2009 was "favourably impacted by the recognition of a regulatory asset related to a tax loss variance account authorized by the Ontario Energy Board...." and "higher earnings from Nuclear Funds...."

First, these statements only involve comparisons of Q2 2009 results to Q2 2008 results and, for this reason, cannot be used to assess whether OPG is forecasting earnings for 2009 above OEB-approved forecasts.

Further, the tax loss variance account cited as contributing to the favourable impact was established by order of the OEB dated May 11, 2009, following a finding by a review panel of the OEB, that the Decision of November 3, 2008 had made a material error (see Decision and Order on Motion to Review and Vary, May 11, 2009, pp. 14 to 16).

With respect to earnings from the Nuclear Funds, their impact on accounting income as reported in the Q2 2009 results is fundamentally different from their impact on regulatory revenue requirement. The revenue requirement impact of earnings on the Nuclear Funds related to the nuclear generating stations leased to Bruce Power is subject to a variance account. In the case of Pickering and Darlington, under the methodology established by the OEB in the November 3, 2008 payment amounts Decision, nuclear fund earnings have no direct impact on revenue requirement.

Contrary to CME's submission, therefore, OPG's second quarter financial statements do not disclose any potential for 2009 revenue sufficiency and do not, therefore, "provide justification" for concerns about "material over-earning" as CME has alleged.

The policy implications of CME's proposal are, in any event as noted above, profound and highly undesirable. CME's proposal is inconsistent with forward test year cost of service regulation which forms the basis of OPG's Payment Amounts Order. As the OEB has already held in this case, the current payment amounts remain in place until such time as they are changed "either as a result of OPG filing an application to change the payment amounts, or as a result of the Board initiating a proceeding on its own motion to determine whether the payment amounts remain just and reasonable."

Finally, CME relies upon the OEB's decision of September 4, 2003 in RP-2003-0048 as precedent for its request. That proceeding however, which involved Enbridge Gas Distribution Inc., is fundamentally different from the circumstances of this case. In RP-2003-0048, Enbridge was trying to deal with a regulatory lag problem under which its rate cases were regularly not being decided until almost a year after the effective date of the new rates. The OEB in a prior decision had directed Enbridge to devise a proposal that would allow for prospective, rather than retroactive, rate making. Enbridge's RP-2003-0048 application for 2004 rate increases, in response to this direction, was on a very simplified basis, involving virtually no review, in order to "get back on track."

In that case, Enbridge was proposing to increase rates by 1.8% for 2004 on the basis of an untried formula and on a basis that involved no review whatsoever of its 2004 forecast revenue requirement. Further, the proposal was subject to a partial settlement with most intervenors. In the circumstances, which the OEB itself described as highly "unique", the OEB decided to

impose a further ratepayer protection measure which involved an earnings sharing mechanism. Even in that case, however, the OEB rejected the suggestion that 100% of revenues over the regulated rate of return should accrue to customers. Rather, the OEB found that an appropriate earnings sharing mechanism would involve a 50-50 sharing of “over-earnings.”

In OPG’s submission, the current Application for an accounting order bears no similarities to the Enbridge situation in RP-2003-0048. In fact, OPG is not seeking to change its rates at all. OPG is not relying upon a completely new, totally untested mechanism for changing its rates. OPG is not faced with the need to “get back on track” through some expedited process. The Enbridge decision therefore, is no precedent for CME’s proposal.

For all these reasons, OPG submits that CME’s proposal is unsupported by any factual, regulatory or policy justifications and should, as it was in the OEB’s August 18, 2009 ruling, continue to be rejected.

## **SEC**

SEC makes essentially two submissions: first, that OPG is seeking OEB approval in this Application for the “continuation of existing rates for 2010” without evidence; and, second, that as a result, the OEB should, in granting OPG’s accounting order application, order OPG’s payment amounts to become interim effective January 1, 2010. OPG submits that both these submissions are without merit and should be rejected.

As with the CME argument, in OPG’s submission, SEC’s argument is foreclosed by the OEB’s ruling of August 18, 2009. This Application is not concerned with OPG’s 2010 revenue requirement; the current payment amounts remain in place until they are changed as a result of OPG filing for new payment amounts or the OEB initiating a review of the payment amounts on its own motion. This Application is not a request for the continuation of the existing payment amounts. As the OEB has already held, no such request is required.

In any event, it is simply not the case that, as SEC submits, OPG would be “forced to apply for new rates effective January 1, 2010” without the OEB’s approval “to continue” the deferral and variance accounts as requested. As OPG submitted on August 12, 2009, the Application is not seeking approval for the continuation of any deferral or variance accounts. No such approval is

required. The Application is simply seeking clarity with respect to the technical application of the language of the Payment Amounts Order on two narrow issues.

Until OPG seeks new payment amounts or the OEB initiates a review of OPG's payment amounts on its own motion, there is no basis for an order making OPG's payment amounts interim. As SEC acknowledges, there is no evidence that OPG expects a revenue sufficiency in 2010. If the OEB made OPG's rates interim on the strength of the record in this case, it would effectively be saying that every time a rate regulated utility does not file for new rates at the end of the test period, the current rates must always be made interim. In OPG's submission, there is no justification for setting the bar so low and to do so would be to create significant regulatory burden and expose consumers to additional risk. This is because, on the basis of SEC's proposal, once the payment amounts are interim, the consequences of any subsequent review may be applied retroactive to January 1, 2010, whether resulting from a sufficiency or deficiency in that year. Accordingly, OPG submits that SEC's argument is ill-founded. There is simply no basis for declaring OPG's payment amounts interim January 1, 2010.

In conclusion, OPG submits that its Accounting Order Application should be approved without the conditions proposed by CME or SEC.