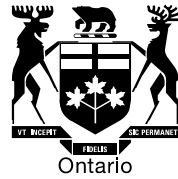


**Ontario Energy  
Board**

P.O. Box 2319  
27th Floor  
2300 Yonge Street  
Toronto ON M4P 1E4  
Telephone: 416- 481-1967  
Facsimile: 416- 440-7656  
Toll free: 1-888-632-6273

**Commission de l'énergie  
de l'Ontario**

C.P. 2319  
27e étage  
2300, rue Yonge  
Toronto ON M4P 1E4  
Téléphone: 416- 481-1967  
Télécopieur: 416- 440-7656  
Numéro sans frais: 1-888-632-6273



**BY E-MAIL**

August 10, 2010

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street, Suite 2700  
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Ontario Power Generation Inc.  
2011-2012 Payment Amounts for Prescribed Generation Facilities  
Board File Number EB-2010-0008**

Pursuant to Board correspondence, dated August 6, 2010, please find enclosed Board Staff's submission. Please forward the following to Ontario Power Generation Inc. and all other registered parties to this proceeding.

Yours truly,

*Original signed by*

Michael Millar  
Board Counsel





# **ONTARIO ENERGY BOARD**

## **STAFF SUBMISSION**

### **ONTARIO POWER GENERATION INC. 2011-2012 PAYMENT AMOUNTS**

**EB-2010-0008**

**August 10, 2010**



## Introduction

Ontario Power Generation Inc. (“OPG” or the “Applicant”) filed an application, dated May 26, 2010, with the Ontario Energy Board under section 78.1 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B (the “Act”) seeking approval for increases in payment amounts for the output of certain of its generating facilities, to be effective March 1, 2011.

On June 29, 2010, the Board issued Procedural Order No. 1 which stated that counsel and consultants for intervenors would have the opportunity to submit a Declaration and Undertaking (the “Undertaking”) to review unredacted versions of documents for which OPG had requested confidential treatment. One of the terms of the Undertaking is that confidential information will not be disseminated publicly. The procedural order also set out a schedule for the proceeding. Procedural Order No. 2, which was issued on July 5, 2010, amended the dates for parties to provide submissions on sections of the application for which OPG has requested confidential treatment. On July 21, 2010, the Board issued Decisions and Orders on Confidential Filings and Issues List, and Procedural Order No. 3.

On July 30, 2010, the School Energy Coalition (“SEC”) filed its interrogatories in the proceeding with the Board, and sent electronic copies of these interrogatories to OPG and the other intervenors. One of the interrogatories disclosed information that the Board had declared to be confidential. OPG alerted the Board to this issue shortly after the interrogatories were filed, and the materials were immediately removed from the public record. The Board also sent an email to the parties that had been copied with the interrogatories, instructing them to delete the file and destroy any copies that had been made.

On August 6, 2010, the Board issued correspondence to all parties stating that it is considering what sanction, if any, is appropriate for this breach of the Undertaking. The Board made provisions for submissions on the matter from Board staff, OPG and SEC.

This submission reflects observations which arise from Board staff’s review of the record on this matter, and are intended to assist the Board in its consideration of an appropriate response to the breach of the Undertaking.



## Potential Responses to Breach of Undertaking and Declaration

In a letter to the Board dated August 3, counsel for SEC (Mr. Shepherd) explained the circumstances behind the breach of the Undertaking. He apologized for the breach, and explained that it had been inadvertent.

In Board staff's submission, there can be little doubt that the breach of the Undertaking was inadvertent, and that Mr. Shepherd's apology is sincere.

A breach of the Undertaking however, is a serious matter. Access to confidential materials is an important aspect to many proceedings before the Board. All parties must have confidence that the Board is able to ensure that materials declared to be confidential in fact remain confidential.

If the Board is inclined to impose a sanction, there are a number of possibilities. Board staff has identified two possibilities below for the Board to consider under the current circumstances.

Other possibilities for more serious or intentional offences would include contempt proceedings through the *Statutory Powers and Procedure Act* (the possibility of which is specifically mentioned in the Undertaking itself), reporting counsel to the Law Society of Upper Canada for a breach of the rule 6.01(10) of the Rules of Professional Conduct, or commencing a compliance proceeding under Part VII.1 of the Act. These three options, while within the Board's powers, are not warranted under the current circumstances, largely because of the inadvertent nature of the disclosure. Board staff therefore recommends that the following two options be considered in this case.

### 1. Revoke the Undertaking

As the Board noted in its letter dated August 6, OPG has suggested that the Board should be guided by the remedy it imposed in a recent Hydro One Networks Inc. ("Hydro One") case (EB-2009-0096), where a similar disclosure of confidential materials occurred. In that case, counsel for an intervenor inadvertently revealed certain confidential information on a conference call with his client and certain other industry stakeholders (including Hydro One). In that case, the Board determined that the appropriate remedy was to rescind that individual's right to have access or make



reference to confidential materials in that proceeding. In other words, the Undertaking pertaining to confidential materials that had been signed by that individual was revoked.

Mr. Shepherd responded to OPG's suggestion in the letter dated August 3. He pointed out that a revocation of his Undertaking would be a very serious penalty for him and his client. Mr. Shepherd works as a sole practitioner, and does not have co-counsel that could assist with the parts of the proceeding relating to confidential materials. In addition, most other counsel familiar with Board proceedings are already working for other clients.

In Board staff's submission, the Board has complete authority over its processes, including the determination of who is permitted to see confidential information. A revocation of the Undertaking is an option that the Board should consider.

## 2. Impose a costs remedy

Section 2.01 of the Board's *Practice Direction on Cost Awards* states that the Board may make orders regarding by whom and to whom costs should be paid.

Section 5.01 lists some of the factors that the Board may consider in determining the amount of a party's cost award. Among these considerations are: whether the party participated responsibly in the process (5.01(a)), whether the party complied with directions of the Board including directions related to the pre-filing of written evidence (5.01(g)), and whether the party engaged in any other conduct which the Board found was inappropriate or irresponsible (5.01(j)). The breach of the Undertaking arguably falls into one or more of these categories.

Board staff submits that the Board would be within its rights to either require Mr. Shepherd to personally pay a portion of OPG's costs (presumably its costs relating to the breach of the Undertaking), and/or to reduce the quantum of Mr. Shepherd's cost recovery in this proceeding on account of the breach. Any reduction to Mr. Shepherd's cost recovery could be done at a set amount, or on a percentage basis. The exact amount could be determined now or at the cost awards phase of the proceeding.

- All of which is respectfully submitted -