

## **THE ONTARIO ENERGY BOARD**

**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** Rules 8 and 29.3 of the Rules of Practice and Procedure of the Ontario Energy Board.

## **NOTICE OF MOTION**

The Consumers Council of Canada (the "CCC") will make a motion to the Ontario Energy Board ("the Board") at its Chambers at 2300 Yonge Street, Toronto, on a date and at a time to be fixed by the Board.

### **PROPOSED METHOD OF HEARING**

The CCC proposes that the motion be dealt with orally.

### **THE MOTION IS FOR:**

1. An Order requiring Ontario Power Generation Inc. ("OPG") to provide the materials requested in CCC Interrogatory 1(b), for use at the oral hearing;
2. An Interim Order requiring OPG to provide the documents, on a confidential basis, to counsel for the CCC and to the Board, in advance of the hearing of this Motion;
3. Such further and other relief as the CCC may request and the Board may grant.

**THE GROUNDS FOR THE MOTION ARE:**

1. OPG has applied to the Board, pursuant to section 78.1 of the *Ontario Energy Board Act, 1998* for an order or orders approving the payment amounts for generating facilities prescribed under *Ontario Regulation 53/05*, as amended.
2. The CCC is an intervenor in that application.
3. OPG is a corporation, the sole shareholder of which is the Province of Ontario.
4. Pursuant to Procedural Order No. 1, the CCC delivered the following written interrogatory:

1. (A1/T7/S1) On March 29 and April 1, 2010 OPG held two stakeholder information sessions regarding its proposed Application. At that time the proposed payment amounts inclusive of riders was \$36.25/MWh for Hydroelectric and \$62.22/MWh for Nuclear. Please provide the following information: ...

- b) All presentations or reports made to the OPG Board of Directors during that period;

5. The Non-Confidential version of OPG's response to that interrogatory, which is identified as Exhibit L, Tab 4, Schedule 001, is as follows:

The requested presentations and reports provided to OPG's Board of Directors ("OPG Board") in relation to OPG's payment amounts application are privileged and OPG objects to their production. The requested materials were prepared for the purpose of litigating the payment amounts application. The materials contain a discussion of matters that are related to OPG's strategy for litigating the application including in relation to settlement, issue analysis, regulatory risks and anticipated positions of other parties. Production of these materials, even on a confidential basis, will impact the ability of management to candidly discuss the application with the OPG Board, undermine the OPG Board in carrying out its important governance and oversight roles, and effectively compromise OPG's ability to litigate the application.

Further, the requested materials are not relevant to the OEB's determination of just and reasonable payment amounts. The application has been prepared on a cost of service basis and must be considered by the OEB as such. OPG's internal assessment of

its application, prospects for settlement etc. as described above can have no impact on the OEB's responsibility to independently assess the application and objectively decide it based on the evidentiary record.

Even if the requested materials were relevant, and not privileged, their probative value is outweighed by the prejudicial effect on OPG and the regulatory process in general. In order to perform their respective roles of managing and governing OPG, management and directors must be able to speak freely and directors must be fully informed of both the risks and benefits of management proposals. In addition to the prejudice to OPG discussed above, the inevitable impact of production would be to reduce the level of detail in information and analysis presented to the OPG Board and reduce the level of oversight that the directors bring to bear on management's proposals. OPG submits that this result is not a desirable one for the company or Ontario ratepayers.

6. The materials requested in CCC Interrogatory #1 (b) are relevant to the Board's responsibility to independently assess the application and objectively decide it based on the evidentiary record.
7. The materials which the CCC asked for in Interrogatory #1 (b) are not privileged.
8. OPG is not, given the nature of the proceeding, entitled to claim privilege in respect of the materials asked for in CCC Interrogatory #1 (b).
9. The materials requested in CCC Interrogatory #1 (b), should be produced regardless of any alleged prejudicial effect on OPG.
10. Materials similar to those requested in CCC Interrogatory #1 (b) have been provided, whether on a confidential basis or otherwise, in other Board proceedings. Examples include the following:
  - (a) in EB-2009-0096, Hydro One Networks Inc. ("HON") was asked, in CCC Interrogatory #44, to "Please provide copies of all materials presented to HON's Board of Directors setting out the potential implications for HON regarding the Green Energy and Economy Act and related OEB Codes (RSC, DSC)." HON provided the requested material, in confidence.

- (b) in the same proceeding, HON was asked, in CME Interrogatory #1, to produce " all of the materials presented to and approved by Hydro One's Board of Directors with respect to the Application currently before the Board." The Interrogatory included the statement that equivalent material had been filed in EB-2008-0187. HON filed the requested material, in confidence.

11. Providing the materials requested in CCC Interrogatory #1, in advance of the hearing of this Motion, would put the Board and counsel for the CCC on an equal footing with OPG in presenting and understanding oral argument. To require the CCC to argue the Motion without having access to the materials would be unfair.

**The following Documentary Evidence will be used at the hearing of the motion.**

1. The Record in EB-2010-0008, including OPG's responses to written interrogatories.
2. Such further and other documents as counsel may advise and the Board may permit.

September 17, 2010

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**AND TO: All Parties**

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