



EB-2010-0008

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.

**DECISIONS ON CONFIDENTIAL FILINGS AND MOTION ON EVIDENCE,
AND PROCEDURAL ORDER NO. 12**

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

Confidential Filings

On September 13, 2010, OPG requested confidential treatment for the response to undertaking JT1.7 part 1 of 3, a technical conference question filed by the Association of Major Power Consumers in Ontario. As an interim measure, OPG filed a redacted version of the response for the public record and provided the full response only to those persons who have signed the Declaration and Undertaking that is Appendix D of the Board's *Practice Direction on Confidential Filings*. In Procedural Order No. 8, the Board made provision for submissions on the request for confidential treatment for this undertaking response. None were received. Accordingly, the Board finds that it is appropriate to retain the confidential status of the response to undertaking JT1.7 part 1 of 3.

OPG Motion

The Board issued the final issues list in this proceeding on July 21, 2010. Issue 12, Methodologies for the setting of payment amounts, is as follows:

The Board Report, *A Regulatory Methodology for Setting Payment Amounts for the Prescribed Generation Assets of Ontario Power Generation Inc.*, EB-2006-0064, November 30, 2006, stated that, "The Board will implement an incentive regulation formula when it is satisfied that the base payment provides a robust starting point for that formula."

- 12.1 When would it be appropriate for the Board to establish incentive regulation, or other form of alternative rate regulation, for setting payment amounts?
- 12.2 What processes should be adopted to establish the framework for incentive regulation, or other form of alternative rate regulation, that would be applied in a future test period?

On September 15, 2010, OPG filed a notice of motion in respect of the report "Update to Report on Methodologies for Setting Ontario Power Generation Payment Amounts" (the "PA Report"). The report was prepared by Power Advisory LLC and was filed by Board staff as evidence in the current proceeding. OPG sought an order excluding the evidence, and all related interrogatories and responses, from this proceeding. OPG also sought an order prohibiting the attendance of the authors of Power Advisory LLC as witnesses in this proceeding. In its motion, OPG stated that the content of the PA Report is significantly beyond the scope of the issues 12.1 and 12.2.

The Board decided to hear the motion in writing and made provision in Procedural Order No. 9 for submissions.

The PWU supports OPG's motion and submitted that the PA Report, with the exception of sections of pages 6 and 12, does not address issues 12.1 and 12.2, but does deal with IRM formulations, options and implementation considerations. The PWU noted that it has participated in consultations on IRM for both the gas and electricity distribution sectors, and in some cases has filed expert evidence. As only Board staff had the opportunity to file expert evidence, PWU submitted that there is an unequal playing field for stakeholders.

APPPrO also filed a submission in support of OPG's motion. In APPPrO's view the issues considered in the PA Report are substantive and do not relate to issues 12.1 and 12.2, but deserve full consideration in a separate proceeding.

SEC agreed that the PA Report, an analytical survey of IRM in other jurisdictions and an assessment of how the mechanisms could apply to OPG, is within the scope of issues that the Board decided not to pursue. However, SEC opposes OPG's motion, stating that the Board can benefit from the presentation of background information and cross examination that explores the options or how the options available inform the question of timing. SEC submitted that the Board should limit cross examination on the evidence to matters that assist in considering issues 12.1 and 12.2 and give weight to the evidence only to the extent that it advances the Board's understanding of its options with respect to issues 12.1 and 12.2.

Board staff agreed that many parts of the PA Report do not directly relate to issues 12.1 and 12.2. Board staff indicated that it filed the report largely to provide background to the issue and to serve as a reference for parties. In the submission Board staff noted that certain parts of the PA Report (as identified in the response to OPG interrogatory #1) are relevant to issues 12.1 and 12.2. Board staff submitted that the PA Report (and associated interrogatory responses) should not be struck from the record. However, the Board panel should ensure that any cross examination or final submissions relating to the PA Report relate directly to issues 12.1 and 12.2. Further, Board staff stated that it did not propose to call the report's authors as witnesses unless another party indicated that it had cross examination questions directly relevant to the Board approved issues list.

In reply submission, OPG questioned whether the sections of the PA Report identified by Board staff in response to OPG interrogatory #1 are relevant to issues 12.1 and 12.2. In response to SEC's submission, OPG stated that parties might not agree with the options put forward in the PA Report and therefore the evidence may not provide the correct context. Further, OPG submitted that it is not efficient or fair to permit the authors of a report to testify on issues 12.1 and 12.2 when the report filed is on a different issue. OPG submitted that the Board should exercise its power to exclude the PA Report, but that the report could be filed in a subsequent proceeding to discuss the full range of IRM issues.

The Board finds that the Power Advisory evidence and interrogatory answers should be removed from the record of this proceeding. The report is almost exclusively concerned with issues that the Board has determined are beyond the scope of this proceeding. Board staff has acknowledged that there is little in the report which relates directly and substantively to issues 12.1 and 12.2. SEC suggests that the report provides context which may be useful to the Board in its consideration of issues 12.1 and 12.2 and suggests there should be cross-examination that “explores, for example, whether the menu being suggested is complete, or how the options available to the Board inform the question of timing.” The Board is of the view that these areas have been explicitly excluded from the issues list. The Board concludes that the report is essentially of no probative value in the Board’s consideration of issues 12.1 and 12.2. As a result, the Board finds that it would be appropriate to remove the report, and the associated interrogatories and answers, from the public record. Accordingly, the authors of the PA Report will not be called as witnesses in this proceeding. The Board expects that the report will help inform the Board’s work on the issue of an incentive mechanism for OPG in the future.

The Motion is granted.

THE BOARD ORDERS THAT:

1. The PA Report, and all associated interrogatories and answers, will be removed from the record in this proceeding.

ISSUED at Toronto, September 29, 2010

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary