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Date April 11, 2011 **Client-Matter #** 14504-2089
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Page(s) 7 (including this cover page)

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Comments

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April 11, 2011

BY FAX

Ontario Energy Board
27th Floor - 2300 Yonge Street
Toronto, Ontario M4P 1E4

Attention: Kirsten Walli
Board Secretary

Dear Ms. Walli:

Re: Ontario Power Generation Inc. v. Ontario Energy Board

Please find attached a Notice of Appeal on behalf of Ontario Power Generation Inc. in respect of its appeal of the Decision with Reasons of the Ontario Energy Board released March 10, 2011. This Notice of Appeal is hereby served upon you pursuant to the *Rules of Civil Procedure*.

Should you have any questions or concerns, please do not hesitate to contact us.

Yours truly,

A handwritten signature in black ink, appearing to read "Crawford Smith", written over a white background.

Crawford Smith

Tel 416.865.8209
csmith@torys.com

CGS/tm

Attachment

c: John Laskin
Charles Keizer
Andrew Barrett/Barbara Reuber (OPG)

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

BETWEEN:

ONTARIO POWER GENERATION INC.

Appellant

- and -

ONTARIO ENERGY BOARD

Respondent

NOTICE OF APPEAL

(Appeal made under the *Ontario Energy Board Act, 1998*, S.O. 1998,
c. 15, Sched. B, s. 33)

THE APPELLANT, Ontario Power Generation Inc. ("OPG"), APPEALS from the Decision with Reasons (the "Decision") of the Ontario Energy Board (the "OEB") released March 10, 2011 (EB-2010-0008), made at Toronto, Ontario.

THE APPELLANT ASKS for an order:

- (a) setting aside that part of the Decision (at pages 84 to 88) which, without legal justification, reduced OPG's 2011 and 2012 test period revenue requirement pertaining to compensation and directing the OEB to issue an order for OPG's payment amounts as of March 1, 2011 based on a revenue requirement without the unjustified revenue requirement reduction;

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- (b) in the alternative to (a) above, remitting the issue of compensation, dealt with at pages 84 to 88 of the Decision, back to a differently constituted panel of the OEB for a new hearing with such direction as this Honourable Court considers just; and
- (c) awarding OPG its costs of the appeal;

or such further and other relief as this Honourable court deems just.

THE GROUNDS FOR THE APPEAL are as follows:

- (a) This appeal arises from an application filed by OPG with the OEB pursuant to section 78.1 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Sched. B (the "Act"), seeking approval of payment amounts for OPG's prescribed generation facilities for the test period January 1, 2011 through December 31, 2012, to be effective March 1, 2011.
- (b) On a payment amounts application, payment amounts are determined on the basis of the test period revenue requirement for the applicant. The OEB is obliged to permit the recovery of and the applicant entitled to recover its prudently incurred costs.
- (c) As part of its application, OPG sought a revenue requirement which included compensation costs of \$1,381.74 million and \$1,402.16 million for 2011 and 2012, respectively.
- (d) Approximately 90 percent of OPG's staff belong to either the Power Workers' Union ("PWU") or The Society of Energy Professionals ("The Society"), with which OPG is required by law to engage in collective bargaining.
- (e) OPG's compensation costs are therefore primarily determined by its collective agreements by which it is bound.
- (f) Changes in the collective agreements can be achieved only through collective bargaining or as the result of arbitration – OPG cannot unilaterally reduce the compensation of its represented employees.

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- (g) OPG prudently entered into its current collective agreement with the PWU in 2009, for a term that does not expire until 2012.
- (h) Under the current PWU agreement, employees are entitled to, and OPG is required to pay, general wage increases of 3 percent in 2011 and 2012.
- (i) Consistent with past experience, the evidence before the OEB forecast a similar level of increase for OPG employees who are members of The Society over the test period.
- (j) On the record before it, the OEB committed an error of law and exceeded its jurisdiction when it significantly reduced OPG's compensation costs, and thus OPG's revenue requirement, for 2011 and 2012.
- (k) In arriving at its Decision, the OEB misdirected itself as to the correct legal meaning of just and reasonable rates and erred in the application of that standard in reducing OPG's compensation costs.
- (l) In reducing the compensation costs that OPG is entitled to recover, the Decision is confiscatory and unlawfully deprives OPG of the opportunity to recover its OEB approved, and legally required, fair return on equity.
- (m) The OEB further erred in law, acted without or beyond its jurisdiction and failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe. It did so by acting arbitrarily and failing to comply with its duty to give reasons in:
 - (i) reducing OPG's compensation costs in 2011, without explaining the basis for, and in the absence of any evidence to support, the amount of this decrease; and
 - (ii) reducing OPG's compensation costs by a further amount in 2012 again without explaining the basis for, and in the absence of any evidence to support, the amount of this decrease.

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- (n) Such further and other grounds as OPG may advance and this Honourable Court permit.

THE BASIS OF THE DIVISIONAL COURT'S JURISDICTION IS section 33 of the Act, which provides that an appeal lies to the Divisional Court from an order of the OEB on a question of law or jurisdiction.

The Appellant requests that this appeal be heard at Toronto.

April 11, 2011

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ONTARIO POWER GENERATION INC. and ONTARIO ENERGY BOARD
Appellant Respondent

Court File No:

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)**

Proceeding commenced at Toronto

NOTICE OF APPEAL

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