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May 6, 2011

RESS and Overnight Courier

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

Dear Ms. Walli:

**Re: EB-2010-0090 - Ontario Power Generation Inc. (OPG) Factum**

Further to Procedural Order #2 in EB-2011-0090, please find attached OPG's Factum. The Notice of Motion filed March 30, 2011 included a Compendium of References. These references have not been submitted again with the Factum. Supplemental references, not filed with the Notice of Motion, are provided in Tabs 1 – 3 of the Factum.

Pursuant to Procedural Order #1, I am providing two(2) hardcopies and one electronic copy in searchable PDF format filed through the OEB's web portal (RESS).

Yours truly

[Original signed by]

Barbara Reuber

Attach:

cc: Charles Keizer           Torys  
Crawford Smith           Torys  
Carlton Mathias           OPG  
EB-2011-0090 Intervenors (via email)

**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** a motion by Ontario Power Generation Inc. pursuant to Rule 42 of the Ontario Energy Board's *Rules of Practice and Procedure* for an Order or Orders to vary the Decision with Reasons EB-2010-0008 dated March 10, 2011.

## **SUBMISSIONS OF**

### **ONTARIO POWER GENERATION INC.**

**MAY 6, 2011**

#### **A. Overview**

1. These are the submissions of Ontario Power Generation Inc. ("**OPG**") in support of its motion to review and vary the Ontario Energy Board's (the "**OEB**") Decision with Reasons dated March 10, 2011 in EB-2010-0008 (the "**Decision**").
2. In the Decision, the OEB did not accept:
  - (a) OPG's updated pension and other post-employment benefits ("**OPEB**") costs, which OPG filed on September 30, 2010 as Ex. N-T1-S1 (the "**Update**") for purposes of establishing OPG's revenue requirement for the test period, and
  - (b) OPG's request for a variance account covering the difference between forecast and actual pension and OPEB costs and associated tax impacts.

3. Rather, the OEB found that OPG's pre-filed evidence on pension and OPEB costs filed May 26, 2010 (the "**Pre-filed Evidence**") was the best evidence of such costs on the record.
4. In concluding that the Pre-filed Evidence, rather than the Update, was the best evidence of pension and OPEB costs on the record, the OEB erred in fact. This error raises a material question as to the correctness of the Decision in respect of pension and OPEB costs and should be corrected by granting the relief sought in OPG's motion.
5. OPG is therefore seeking, by way of its motion, an Order:
  - (a) varying the OEB's finding that the Pre-filed Evidence was the best evidence of OPG's pension and OPEB costs for the test period on the record; and
  - (b) establishing a variance account to record the difference between (i) the pension and OPEB costs reflected in the Decision and the resulting payment amounts order, and (ii) OPG's actual pension and OPEB costs for the test period and associated tax impacts.
  - (c) As discussed at paragraph 30 below, OPG recognizes that an acceptable alternative to subparagraph 5(b) above is as follows:
  - (d) a finding that the Update was the best evidence of OPG's pension and OPEB costs for the test period and was therefore the appropriate amount to be used for purposes of determining the pension and OPEB costs in OPG's test period revenue requirement; and
  - (e) as a method to give effect to (d) above, establishing a deferral account to record the difference between the pension and OPEB costs in the Pre-filed Evidence and the Update, including the associated tax impacts, over the 22 months from March 1, 2011 to December 31, 2012, which results in an opening balance for the deferral account of \$207.3 million, with the

balance of such account to be disposed of in OPG's next payment amounts proceeding.

**B. Facts Relating to the Factual Error**

*Evidence Update*

6. In the Pre-filed Evidence, filed on May 26, 2010, OPG provided comprehensive evidence to support its request to recover forecast pension and OPEB costs for the test period in the amount of \$633 million. The methodology and assumptions used to determine the initial forecast of pension and OPEB costs are described in the Pre-filed Evidence.

Ex. F4-T3-S1, Chart 9, p. 25 and Sections 6.3.1 and 6.3.2 (OPG Notice of Motion, March 30, 2011, Tab 3 Sub-tab 1).

7. By way of the Update, OPG indicated that its forecast of pension and OPEB costs had increased over the initial test period forecast of \$633 million set out in the Pre-filed Evidence by \$251.5 million for nuclear and \$12.7 million for regulated hydroelectric, respectively, for a total of \$264.2 million. In the Update, OPG stated that the \$633 million pension and OPEB cost forecast included in the Pre-filed Evidence was based on, among other things, discount rates (presented in Chart 8 of Ex. F4-T3-S1) forecast during the 2010-2014 business planning process which was finalized during the fall of 2009. OPG noted that since the beginning of 2010, these discount rates had declined significantly. Pension costs are also based on fund performance and the Update provided updated information on pension fund performance. The decline in discount rates and improved fund performance were the primary factors in the net increase in the forecast pension and OPEB costs for the test period and these are beyond OPG's control. In addition, the forecast of pension contributions for 2011 and 2012 had changed and the Update reflected changes to forecast pension contributions.

Ex. N-T1-S1, p. 3 (OPG Notice of Motion, March 30, 2011, Tab 3 Sub-tab 6); Affidavit of N. Reeve, Paragraph 5. (Ibid. Tab 2); Ex. H1-T3-S1, p. 10. (Ibid. Tab 3 Sub-tab 2).

8. OPG's amended evidence included a projected actuarial accounting assessment of OPG-wide pension and OPEB costs for the test period, which assessment was provided by OPG's external actuaries, Mercer (Canada) Limited ("**Mercer**"), using data as of August 2010 (the "**Mercer Report**"). The costs in the Update were based on the Mercer Report.

Ex. H1-T3-S1, as amended October 8, 2010, Attachment 1 (OPG Notice of Motion, March 30, 2011, Tab 3 Sub-tab 3).

9. Section 6.3 of Ex. F4-T3-S1 discusses how pension and OPEB costs were determined for the Pre-filed Evidence and sets out the main assumptions in Chart 8. There was no change in the Update to the methodology used to calculate pension and OPEB costs. The analysis and methodology employed by OPG with respect to the Pre-filed Evidence was the same as that employed in the preparation of the Update. The Update is derived from the same internally consistent assumptions and approach applied with the same degree of rigor as that used for the Pre-filed Evidence. Each of the assumptions underpinning the Pre-filed Evidence was considered in the preparation of the Update. In fact, the Update is a more accurate forecast for the test period because it was based on more current information and was developed closer to the test period.

Affidavit of N. Reeve, paragraph 11 (OPG Notice of Motion, March 30, 2011, Tab 2).

10. The internal consistency of the analysis is demonstrated by the fact that the Update and the Mercer Report included updated information with respect to discount rates and pension fund returns. In addition to discount rates and pension fund returns, all variables considered as part of the methodology to calculate the Pre-filed pension and OPEB costs were reviewed as part of the Update to determine whether they had changed. These variables have relationships to each other, and neither OPG nor Mercer selectively updated only one of these variables while ignoring the others. Where a change was not warranted none was made, but each of the underlying assumptions was considered and a conclusion was made as to the appropriate value.

Affidavit of N. Reeve, paragraph 12 (OPG Notice of Motion, March 30, 2011, Tab 2).

***The Decision***

11. In the Decision, the OEB stated:

The request for a variance account is denied. Pension and OPEB costs should be included in the forecast of expenses in the same way as other OM&A expenses, and then managed by the company within its overall operations. The Board finds that the forecast included in the pre-filed evidence was more rigorous because it was based on a set of internally consistent assumptions, while the update is based on the AA bond yields which will change. Accordingly, the Board finds that the allowance for pension and OPEB expenses in the pre-filed evidence is appropriate, as it is the best evidence on this matter.

The Board is reluctant to make selective updates to the evidence. The bond yields have changed, and will continue to change, as noted by the actuary in the updated statement. Further, the Board notes that the financial market conditions are variable and have indeed improved since the impact statement was filed. The Board concludes that an adjustment to the allowance is not warranted.

Decision, p. 91 (OPG Notice of Motion, March 30, 2011, Tab 3 Sub-tab 11).

12. The Decision in respect of OPG's pension and OPEB costs and the related request for a variance account are based on the following findings of fact:

- (i) That the forecast pension and OPEB costs provided in the Pre-filed Evidence was better evidence than the forecast pension and OPEB costs provided in the Update because the Pre-filed Evidence was more rigorous due to it being based on a set of internally consistent assumptions;
- (ii) That the forecast pension and OPEB costs provided in the Update reflects the change of only one variable, i.e., AA bond yields, and is not a complete analysis; and

- (iii) That OPG's Update was a selective update to the evidence rather than an update that addressed material changes to all costs.

Decision, p. 91 (OPG Notice of Motion, March 30, 2011, Tab 3 Sub-tab 11).

- 13. OPG notes that the reference in the Decision to "selective updates" is somewhat ambiguous and could relate to updates to certain variables in the determination of pension and OPEB costs or to updates to certain elements of the revenue requirement. Subparagraphs 12 (ii) and 12 (iii) deal with both of these aspects.
- 14. The OEB made errors in fact in concluding, contrary to the evidence, that: (a) the Update was less rigorous and not internally consistent such that it was not the best evidence of the forecast pension and OPEB costs for the test period, (b) the Update was not based on a complete analysis, and (c) the Update was a selective update.

***Update Provides the Best Evidence***

- 15. The OEB erred in finding that the updated pension and OPEB cost evidence set out in the Update was less rigorous than the Pre-filed Evidence and not internally consistent. On the basis of this incorrect finding, the OEB incorrectly concludes that the Update was not the best evidence of the forecast pension and OPEB costs for the test period.
- 16. By accepting the analysis and assumptions underpinning the Pre-filed Evidence in the Decision, the OEB has implicitly endorsed the analysis and assumptions underpinning the Update. This is because the methodology used to develop the forecast of pension and OPEB costs was the same in both cases. The OEB's conclusion, that the Pre-filed Evidence is somehow better or different than the Update because it is based on more rigorous analysis, is contrary to the evidence. Moreover, it is inconsistent for the OEB to accept the methodology and assumptions as being sufficiently rigorous in the circumstances of the Pre-filed Evidence but not in the circumstances of the Update.

Affidavit of N. Reeve, paragraph 11 (OPG Notice of Motion, March 30, 2011, Tab 2).

17. The OEB is incorrect when it states at p. 91 of the Decision that only changes in AA bond yields were considered in the Update. As a review of the evidence shows and Mr. Reeve's affidavit confirms, OPG did not selectively update only one variable. Rather, OPG considered each assumption used in the actuarial assessment and made changes, where warranted, in an internally consistent fashion. Thus, contrary to the OEB's findings in the Decision, the Pre-filed Evidence and the Update were prepared using identical methodologies and reviewed an identical set of variables with the same degree of rigor.

Affidavit of N. Reeve, paragraph 12 and Exhibit B (OPG Notice of Motion, March 30, 2011, Tab 2).

***Update Was Based on Complete Analysis and Was Not Selective***

18. Rule 11.02 of the OEB's Rules provides that where a party becomes aware of new information that constitutes a material change to evidence already before the OEB before a decision or order is issued, that party must file appropriate amendments to the evidentiary record based on the new information. This is an obligation that OPG, in filing the Update, fully satisfied. Based upon the evidence on the record, OPG established \$10 million as the appropriate materiality threshold and canvassed the regulated business units for information concerning any changes at or in excess of this materiality threshold. Using this process, OPG identified only three areas where updates were warranted. These areas were CNSC fees, management compensation and pension and OPEB costs.

OEB Rules of Practice and Procedure, p. 8 (EB-2011-0090 OPG Factum, May 6, 2011, Supplemental References Tab 1); Hearing Transcript, Vol. 15, p. 105-106. (OPG Notice of Motion, March 30, 2011, Tab 3 Sub-tab 8).

19. It is an error for the OEB to reject the Update as being a "selective update" when the Update was filed in accordance with the Rules and as a result of a thorough review by the applicant that considered both increases and decreases in costs.



Exemplifying the unfairness and inconsistency of the Decision is the fact that at p. 49 of the Decision the OEB readily accepted the updates to the CNSC fees and management compensation which are also described in Exhibit N-T1-S1 even though those updates resulted from the same process.

Decision p. 49 (OPG Notice of Motion, March 30, 2011, Tab 3 Sub-tab 10); Ex. N-T1-S1 pp. 1-2 (Ibid. Tab 3 Sub-tab 6).

**C. Threshold Test**

20. The threshold question was articulated in the OEB's Decision on a Motion to Review in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). The OEB found that the purpose of the "threshold test" in Rule 45.01 must be derived from the language of Rule 44.01, which requires that a motion for review "raise a question as to the correctness of the order or decision." The OEB stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the decision, and whether there is enough substance to the issues raised such that a review based on those issues could result in the OEB varying, cancelling or suspending the decision.

Decision with Reasons, EB-2006-0322/-0338/-0340, May 22, 2007, pp. 17-18. (EB-2011-0090 OPG Factum, May 6, 2011, Supplemental References Tab 2).

21. The OEB also indicated in the NGEIR Decision that in order to meet the threshold test there must be an "identifiable error" in the decision for which review is sought. In demonstrating an error, the moving party must show that the findings are contrary to the evidence, the panel failed to address a material issue or something of a similar nature. The alleged error must be material and relevant to the outcome of the decision. It is not enough to argue that conflicting evidence should have been interpreted differently. A motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and there is no purpose in proceeding with the motion to review.

Decision with Reasons, EB-2006-0322/-0338/-0340, May 22, 2007, p. 18. (EB-2011-0090 OPG Factum, May 6, 2011, Supplemental References Tab 2).

22. The OEB's error in fact raises a material question as to the correctness of the OEB's decision in respect of pension and OPEB costs and should be corrected by granting the relief sought by OPG's motion. The OEB's findings are contrary to the evidence that was before the panel and, once corrected, the outcome of the Decision in respect of pension and OPEB costs for the test period will be materially different than as set out in the Decision. Accordingly, OPG's motion satisfies the threshold test in Rule 45.01.

**D. OEB's Findings of Fact are Incorrect**

23. In the circumstances of OPG's application, the Decision of the OEB in respect of pension and OPEB costs relied upon out of date information that was effectively not part of the evidence on the record and should therefore not have provided the basis for decision on this aspect of the application.
24. In filing the Update, and in the Update itself, OPG clearly indicated that the "Impact Statement" being filed as Ex. N-T1-S1 was an update to the Pre-filed Evidence.

Hearing Transcript, Vol. 1, pp. 12-13 (EB-2011-0090, OPG Factum, May 6, 2011, Supplemental References Tab 3); Ex. N-T1-S1, p. 1 (OPG Notice of Motion, March 30, 2011, Tab 3 Sub-tab 6).

25. The Update was filed in accordance with Rule 11.02 of the OEB's Rules, which provides as follows:

11.02 Where a party becomes aware of new information that constitutes a material change to evidence already before the Board before the decision or order is issued, the party shall serve and file appropriate amendments to the evidentiary record, or serve and file the new information.

26. As indicated by Rule 11.02, where a party becomes aware of new information that constitutes a material change to evidence already before the OEB and such party files the new information so that the new information becomes part of the evidentiary record, this will be an amendment to the evidentiary record.
27. The effect of an amendment to the evidentiary record is that the evidentiary record is thereafter modified. The amendment indicates those aspects of the evidentiary record that are changed and all other aspects of the evidence will remain as part of the evidentiary record. The result is that the amended evidentiary record which was prepared on the same basis as the evidence that the OEB has found to be the best and most comprehensive, requires the OEB to decide in OPG's favour in respect of this motion. The OEB had no basis to reject the Update in favour of the Pre-filed Evidence.
28. In filing the Update, OPG caused the evidentiary record in the proceeding to be amended. The Update caused the evidence to be amended by updating the discount rates and rates of return on pension fund assets as set out in Chart 8 of Ex. F4-T3-S1, as well as the calculations of pension and OPEB costs set out in Chart 9 of Ex. F4-T3-S1. Moreover, the overall discussion concerning the methodology and assumptions used in forecasting pension and OPEB costs were not amended and therefore continue to form part of the evidentiary record.
- Ex. N-T1-S1, pp. 2-3 (OPG Notice of Motion, March 30, 2011, Tab 3 Sub-tab 6).
29. By relying on aspects of the Pre-filed Evidence that were amended in the evidentiary record through the Update, the OEB's Decision in respect of pension and OPEB costs is not correct. Accordingly, this aspect of the OEB's Decision should be corrected.

**E. Remedies Sought**

30. Central to the motion is the determination by the OEB that an error in fact has occurred with respect to pension and OPEB costs for the test period. A

determination in this regard will permit the OEB to establish one of the remedies set out in OPG's notice of motion. In this motion OPG has sought: (a) a variance account that records the difference between the pension and OPEB costs reflected in the Decision and the actual pension and OPEB costs and associated tax impacts; or (b) in the alternative, a deferral account to record the difference between pension and OPEB costs in the Pre-filed Evidence and the update, including tax impacts, for the 22 month period from March 1, 2011 to December 31, 2012. OPG believes either remedy would resolve the error and ultimately provide just and reasonable payment amounts.

31. In the proceeding and in conjunction with the Update, OPG filed amended deferral and variance account evidence on October 8, 2010 supporting the request for a variance account, to record the difference between the pension and OPEB costs reflected in OPG's approved payment amounts and the actual pension and OPEB costs and associated tax impacts during the test period for the prescribed facilities.

Ex. H1-T3-S1, as amended October 8, 2010, pp. 9-11 (OPG Notice of Motion, March 30, 2011, Tab 3 Sub-tab 2).

32. It was OPG's view that a variance account was an appropriate vehicle because of the material amount of these costs, the variability of the factors underlying them and the fact that the variability was not under OPG management's control. In addition, OPG noted that the Update was introduced when the hearing process was already well advanced and that incorporating the updated costs into payment amounts may have impacted the progress of the hearing.

Hearing Transcript, Vol. 15, p. 100 (OPG Notice of Motion, March 30, 2011, Tab 3 Sub-tab 8).

33. In its response to parties objecting to the establishment of a variance account for pension and OPEB costs, OPG stated that if the OEB were to reject the requested variance account then OPG's revenue requirement for the test period should

incorporate the most current estimates of its test period pension and OPEB costs, which were presented in the Update.

OPG Reply Argument, p. 134 (OPG Notice of Motion, March 30, 2011, Tab 3 Sub-tab 9).

34. The Update demonstrates that pension and OPEB costs vary primarily based on changes to the discount rate and the performance of the pension fund. Neither of these factors is subject to the control of OPG's management. Denying OPG either a variance account or, in the alternative, a reasonable forecast of its pension and OPEB costs (based upon the analysis included in the Update) will necessarily mean that OPG will not be able to recover its reasonable and prudently incurred costs.
35. With respect to a variance account, OPG notes that based on its most recent estimates, as of the end of February 2011, pension and OPEB costs for the regulated facilities for the test period are forecast to be \$840.7 million, an increase of \$207.7 million from the Pre-filed Evidence. The associated tax impacts are forecast to be an increase in tax expense of \$28.5 million. These forecasts incorporate the discount rate, inflation and expected return assumptions for 2011 that were established on December 31, 2010, the actual 2010 pension fund return and OPG's current forecast of pension contribution levels. This cost estimate remains subject to the finalization of pension contribution levels for 2011. These contribution levels are currently expected to be finalized in May, after the pension funding valuation has been completed. Otherwise, absent any significant changes to OPG's operations or legislation, OPG does not expect any further significant changes to 2011 pension and OPEB costs. Pension and OPEB costs for 2012 are subject to the finalization of assumptions on December 31, 2011, the actual 2011 pension fund return, and final pension contribution levels for 2012.

Affidavit of N. Reeve, paragraph 18 (OPG Notice of Motion, March 30, 2011, Tab 2).

36. With respect to a deferral account, based upon the Update, OPG believes that the appropriate level of additional pension and OPEB costs to be included in the test period revenue requirement is \$264.2 million. The opening balance in the deferral account requested as the alternative relief sought by OPG, which considers the change in pension and OPEB costs and the associated tax impacts for the 22 month period from March 1, 2011 to December 31, 2012, should be \$207.3 million. This calculation reflects the OEB's Decision that new payment amounts are effective March 1, 2011, while the revenue requirement is for a 24 month test period.

Affidavit of N. Reeve, paragraph 17 (OPG Notice of Motion, March 30, 2011, Tab 2).

37. As submitted above, either a variance account or a deferral account is acceptable to OPG.

***ALL OF WHICH IS RESPECTFULLY SUBMITTED***

*[Original signed by]*

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***Crawford Smith, Torys LLP***

*[Original signed by]*

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***Charles Keizer, Torys LLP***

***Counsel to Ontario Power Generation Inc.***

**SUPPLEMENTAL REFERENCES**  
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2	EB-2006-0322/0388/0340 NGEIR Motion Decision dated May 22, 2007, pages 16-18	4
3	EB-2010-0008 Hearing Transcript, Volume 1, pages 12-13	7

# **TAB 1**



**ONTARIO ENERGY BOARD****Rules of Practice and Procedure  
(Revised November 16, 2006 and July 14, 2008)****11. Amendments to the Evidentiary Record and New Information**

11.01 The Board may, on conditions the Board considers appropriate:

- (a) permit an amendment to the evidentiary record; or
- (b) order an amendment to the evidentiary record that may be necessary for the purpose of a complete record.

11.02 Where a party becomes aware of new information that constitutes a material change to evidence already before the Board before the decision or order is issued, the party shall serve and file appropriate amendments to the evidentiary record, or serve and file the new information.

11.03 Where all or any part of a document that forms part of the evidentiary record is revised, each revised part shall clearly indicate:

- (a) the date of revision; and
- (b) the part revised.

11.04 A party shall comply with any direction from the Board to provide such further information, particulars or documents as the Board considers necessary to enable the Board to obtain a full and satisfactory understanding of an issue in the proceeding.

**12. Affidavits**

12.01 An affidavit shall be confined to the statement of facts within the personal knowledge of the person making the affidavit unless the facts are clearly stated to be based on the information and belief of the person making the affidavit.

12.02 Where a statement is made on information and belief, the source of the information and the grounds on which the belief is based shall be set out in the affidavit.

12.03 An exhibit that is referred to in an affidavit shall be marked as such by the person taking the affidavit, and the exhibit shall be attached to and filed with the affidavit.

**ONTARIO ENERGY BOARD****Rules of Practice and Procedure  
(Revised November 16, 2006 and July 14, 2008)**

- 42.04 Subject to **Rule 42.05**, a motion brought under **Rule 42.01** may also include a request to stay the order or decision pending the determination of the motion.
- 42.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.
- 42.06 In respect of a request to stay made in accordance with **Rule 42.04**, the Board may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

**43. Board Powers**

- 43.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.
- 43.02 The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions.

**44. Motion to Review**

- 44.01 Every notice of a motion made under **Rule 42.01**, in addition to the requirements under **Rule 8.02**, shall:
- (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
    - (i) error in fact;
    - (ii) change in circumstances;
    - (iii) new facts that have arisen;
    - (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and
  - (b) if required, and subject to **Rule 42**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

**ONTARIO ENERGY BOARD****Rules of Practice and Procedure  
(Revised November 16, 2006 and July 14, 2008)****45. Determinations**

- 45.01 In respect of a motion brought under **Rule 42.01**, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

## **TAB 2**

## Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Parties were asked by the panel to provide submissions on the appropriate test for the Board to apply in making a determination under Rule 45.01.

Board Staff argued that the issue raised by a moving party had to raise a question as to the correctness of the decision and had to be sufficiently serious in nature that it is capable of affecting the outcome. Board Staff argued that to qualify, the error must be clearly extricable from the record, and cannot turn on an interpretation of conflicting evidence. They also argued that it's not sufficient for the applicants to say they disagree with the Board's decision and that, in their view, the Board got it wrong and that the applicants have an argument that should be reheard.

Enbridge submitted that the threshold test is not met when a party simply seeks to reargue the case that the already been determined by the Board. Enbridge argued that something new is required before the Board will exercise its discretion and allow a review motion to proceed.

Union agreed with Board Staff counsel's analysis of the scope and grounds for review.

IGUA argued that to succeed on the threshold issue, the moving parties must identify arguable errors in the decision which, if ultimately found to be errors at the hearing on the merits will affect the result of the decision. IGUA argued that the phrase "arguable errors" meant that the onus is on the moving parties to demonstrate that there is some reasonable prospect of success on the errors that are alleged.

**DECISION WITH REASONS**

CCC and VECC argued that the moving parties are required to demonstrate, first, that the issues are serious and go to the correctness of the NGEIR decision, and , second, that they have an arguable case on one or more of these issues. They argued that the moving parties are not required to demonstrate, at the threshold stage, that they will be successful in persuading the Board of the correctness of their position on all the issues.

MHP argued that the threshold question relates to whether there are identifiable errors of fact or law on the face of the decision, which give rise to a substantial doubt as to the correctness of the decision, and that the issue is not whether a different panel might arrive at a different decision, but whether the hearing panel itself committed serious errors that cast doubt on the correctness of the decision. MHP submitted that a review panel should be loathe to interfere with the hearing panel's findings of fact and the conclusions drawn there from except in the clearest possible circumstances.

Kitchener argued that jurisdictional or other threshold questions should be addressed on the assumption that the record in NGEIR establishes the facts asserted.

School Energy Coalition argued that an application for reconsideration should only be denied a hearing on the merits in circumstances where the appeal is an abuse of the Board's process, is vexatious or otherwise lacking objectively reasonable grounds.

**Findings**

It appears to the Board that all the grounds for review raised by the various applicants allege errors of fact or law in the decision, and that there are no issues relating to new evidence or changes in circumstances. The parties' submissions addressed the matter of alleged error.

In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that:

Every notice of motion... shall set out the grounds for the motion that raise a question as to the correctness of the order or decision...

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

## **TAB 3**



1 will also avoid the rate shock for ratepayers that would be  
2 experienced under the traditional regulatory approach of  
3 addition to rate base.

4 OPG is of a view that the OEB should be commended for  
5 its openness to regulatory treatment for large  
6 infrastructure investments.

7 As well as, the OPG board of directors approved an  
8 initiative to extend the operating life of Pickering B for  
9 four years from their current nominal end-of-life of 2011  
10 to 2016 to 2018 to 2020. This initiative was also endorsed  
11 by the province on February 4, 2010, and the OPA on  
12 April 1, 2010, and the OPA indicated in its letter that it  
13 believes the substantial benefits could potentially arise  
14 from the continued operation of Pickering B and supports  
15 OPG's decision to proceed with expenditure of funds in the  
16 2010-2012 period.

17 Those are the three components. If I could just  
18 advise you that OPG did file last week on September 30th an  
19 impact statement with the Board to show the impact of three  
20 changes since OPG's filed its application in May 2010.

21 The first change was an increase in regulatory fees  
22 for the test period for the CNSC, having an impact of  
23 \$13 million increase on revenue requirement. The second  
24 change arises from the Public Sector Compensation Restraint  
25 Act. As a result of that legislation, OPG is removing  
26 management wage escalation for the period to April 1, 2012  
27 from its test-period revenue requirement for regulated  
28 facilities, which is a reduction of \$12 million.

1 The increase in revenue requirement arising from  
2 regulatory fees then is largely offset by the decrease in  
3 management compensation levels.

4 The third element of the impact statement relates to  
5 pension and OPEB costs -- and for the record, that's O-P-E-  
6 B -- which are subject to significant variability to the  
7 extent that forecast assumptions, such as discount rates or  
8 assumed pension-fund performance, differ from actual  
9 values.

10 Since the beginning of 2010, discount rates have  
11 declined significantly. Pension costs forecasts are based  
12 on assumed rates return on the pension-fund assets of  
13 9 percent in 2009 and 7 percent in 2010. The actual return  
14 in 2009 was 15 percent, but the actual return in 2010 at  
15 the end of August is approximately 2.5 percent.

16 As a result of these changes, OPG has updated the  
17 total pension and OPEB costs for 2011 and 2012, and have  
18 projected the -- which have been projected by external  
19 actuaries as of the end of August 2010.

20 Given the potential significant variability between  
21 the updated forecasts and the actual pension and OPEB  
22 costs, OPG is proposing to revise its proposed payment  
23 amounts or payment riders to address the projected increase  
24 in these costs.

25 Now, the impact statement was filed last week. I'm  
26 not sure whether or not that had been provided to the  
27 Panel, and as a result -- it has. Okay. Thank you.

28 Instead, OPG proposes to -- instead of passing these