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By electronic filing

May 24, 2011

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th floor
Toronto, ON M4P 1E4

Dear Ms Walli,

Ontario Power Generation Inc. (“OPG”)
Motions to Review and Vary Board Decision EB-2010-0008
Board File No.: EB-2011-0090 and EB-2011-0091
Our File No.: 339583-000064

I Introduction and Overview

This letter contains the submissions of Canadian Manufacturers & Exporters (“CME”) with respect to OPG’s March 30, 2011 Motion requesting that the Board review and vary its March 10, 2011 EB-2010-0008 Decision with Reasons (the “Decision”). OPG’s Motion pertains to the Board’s determination of the forecast amount for Pension and Other Post-Employment Benefits (“OPEB”) to be included in the test period revenue requirement used to derive just and reasonable payment amounts for 2011 and 2012.

OPG asserts that the Board erred in fact when it determined that it was more appropriate to include OPG’s initial, rather than its updated, forecast of test period Pension and OPEB costs in the revenue requirement to be used to derive just and reasonable payment amounts for 2011 and 2012.

For reasons that follow, we submit that the Board did not err in fact when it expressed its preference for including the initial forecast, rather than the update, in the revenue requirement used to derive the just and reasonable payment amounts.

Moreover, “threshold” considerations under Rule 45.01 of the Board’s *Rules of Practice and Procedure*, including matters pertaining to the Board’s discretion to conduct a review and variance, should prompt the Board to conclude that the relief OPG seeks on its Motion should be denied.

II OPG's Proposals

At the hearing, OPG asked the Board to approve variance account treatment for its Pension and OPEB costs for the test period and, in the alternative, that the Board include a forecast of Pension and OPEB costs in an amount of some \$264.2M higher than the \$633M amount initially forecast in the revenue requirement to be used to determine just and reasonable payment amounts for 2011 and 2012.

(a) Variance Account

The Board clearly and unequivocally rejected OPG's variance account proposal as follows:

"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 made no error of fact in rejecting OPG's variance account proposal and there is no basis for questioning the correctness of that feature of the Decision.

(b) Pension and OPEB Forecasts

In the Decision, the Board expressed its preference for OPG's initial forecast of about \$633M for use in the derivation of just and reasonable payment amounts for 2011 and 2012 and found it to be more appropriate than the higher updated forecast by some \$264.2M and more than 40% greater.

The Board's particular expertise encompasses an awareness of the fact that forecasts of prospective Pension and OPEB costs can vary widely, having regard to their sensitivity to assumptions. The submissions of Board Staff elaborate upon matters that call into question the appropriateness of the more than 40% increase in Pension and OPEB costs reflected in OPG's "Update".

It was open to the Board to consider the volatility of point in time estimates of future Pension and OPEB costs, having regard to changes in assumptions. In the context of the volatility that surrounds such point in time estimates, it was open to the Board to prefer OPG's initial estimates. Updates of such volatile estimates linked to changed assumptions do not displace previously filed estimates reflecting different assumptions as OPG argues in paragraphs 25 to 29 of its written submissions. The Board is fully empowered to determine the forecasts of such costs that it considers to be "appropriate" for inclusion in a prospective test period revenue requirement that the Board uses to derive just and reasonable payment amounts.

It is for the Board to determine, on a case by case basis, the weight that it chooses to ascribe to different test period forecasts of Pension and OPEB costs that can vary widely, having regard to their sensitivity to assumptions.

In these circumstances, we submit that the Board made no error of fact in concluding that an amount of about \$633M for Pension and OPEB costs was appropriate for inclusion in the revenue requirement used to derive just and reasonable payment amounts for 2011 and 2012.

III Threshold Considerations

While we agree with Board Staff that OPG's Motion is not "spurious", for reasons that follow, we submit that the Board should deny OPG's Motion on the grounds that it fails to satisfy the "threshold" requirements of Rule 45.01 of the Board's *Rules of Practice and Procedure*.

The Board's power to consider OPG's request for review and variance of the Decision is discretionary. The Board's discretion is reflected in the use of the word "may" in Rule 43 of the Board's *Rules of Practice and Procedure* entitled "Board Powers" and in the provisions of Rule 45.01 conferring on the Board a discretion to:

"... determine, with or without a hearing, a threshold question of whether the matter should be reviewed ..."

We submit that there are two (2) reasons why the Board should find that OPG has failed to satisfy the threshold requirements for an exercise of discretion in its favour.

First, there has been no *prima facie* demonstration by OPG that the Board made any factual error when it expressed its preference for the initial, rather than the updated, forecast of Pension and OPEB costs forecasts.

Second, the challenge OPG makes to the approach the Board followed with respect to Pension and OPEB forecasts is substantively no different than the challenge it has launched, by way of Appeal to the Divisional Court, of the Board's approach to the compensation cost component of the Operating, Maintenance & Administration ("OM&A") expenses envelope that it used to derive just and reasonable payment amounts for 2011 and 2012.

In the Appeal to the Divisional Court, OPG contends that by refusing to accept its forecasts of compensation costs, the Board deprived it of the opportunity to recover its prudently incurred costs. It makes assertions to the same effect in paragraph 34 of the written submissions it has filed on this Motion with respect to the Pension and OPEB costs forecast. Moreover, the Board has determined, in this proceeding, that:

"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."

At issue in the Divisional Court proceeding are matters pertaining to the breadth of the Board's powers to determine the level of forecasts that are to be used in setting just and reasonable rates. This is substantively the same issue OPG raises in this Motion for review and variance.

Having chosen to challenge the breadth of the Board's powers to determine the level of forecasts that are to be used in setting just and reasonable rates by way of Appeal to the

Divisional Court, OPG should be precluded from raising the same issue on a Motion for review in the same proceeding that it has appealed.

Put another way, we submit that the Board should seldom, if ever, exercise its discretion to consider a request to review and vary a particular decision when the party seeking an exercise of that discretion is concurrently attacking the very same decision on the same grounds in a judicial proceeding before the Divisional Court.

IV Summary

The Motion review and variance lacks merit and should be denied. There is no reason to doubt the correctness of the Board's Decision rejecting OPG's variance account proposal and its determination that a forecast amount of \$633M was appropriate for inclusion in the revenue requirement to be used in deriving the just and reasonable payment amounts for 2011 and 2012.

Moreover, the approach the Board used to determine the appropriate forecast of Pension and OPEB costs is substantively the same approach that it followed in determining other OM&A expenses. OPG's dissatisfaction with the outcome of that approach is already a matter before the Divisional Court. The Board should decline to review a matter that is before the Court.

V Costs

CME respectfully requests an award of 100% of its reasonably incurred costs of participating in this proceeding.

Yours very truly,



Peter C.P. Thompson, Q.C.

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c. Barbara Reuber (OPG)
Intervenors EB-2010-0008
Paul Clipsham

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