Application by Ontario Power Generation Inc.
Under Section 78.1 of the *Ontario Energy Board Act, 1998*
EB-2007-0905

Submissions of Board Staff on Issues Associated with Request for an Interim Order

The following are the submissions of Board staff made in response to the Board's January 24, 2008 Procedural Order No. 1 in relation to the application by Ontario Power Generation Inc. ("OPG") for the determination of payment amounts under section 78.1 of the *Ontario Energy Board Act, 1998* (the "Act").

More specifically, these submissions focus on the three issues identified in Procedural Order No. 1 as being associated with OPG's request for an interim order making the current payment amounts (the "Regulated Payment Amounts") interim and increasing the payment amounts as of April 1, 2008. This being the first proceeding in which the Board will determine payment amounts under section 78.1 of the Act, these are issues that have not to date been adjudicated by the Board.

Board staff's submissions on Issue 1 are in support of the authority of the Board in relation to the granting of an interim order. Board staff takes no position on Issue 2 or Issue 3, and its submissions on these Issues are intended to assist the Board by providing contextual information and analysis.

Issue 1: Can the Board grant an interim order making the Regulated Payment Amounts interim?

A. Introduction

The Regulated Payment Amounts that are currently being paid to OPG by the Independent Electricity System Operator (the "IESO") in relation to the output of the generation facilities that are the subject of this proceeding (the "Prescribed Facilities") are set out in Ontario Regulation 53/05, *Payments Under Section 78.1 of the Act* ("Regulation 53/05").

While the Board has, in the past, made rates that it had previously set interim, the Board has not yet considered the issue of its authority to make payment amounts interim when they are prescribed by statute. Board staff submits that the Board has authority to make the Regulated Payment Amounts interim, and that this conclusion is supported by:

- the application of generally accepted principles of statutory interpretation;
- section 21(7) of the Act, which empowers the Board to make interim orders; and

- section 78.1 of the Act, which refers to "the effective date" of the Board's order.

Each of these elements is discussed further below.

B. General Principles

Board staff submits that the issue is one of statutory interpretation, to be determined based on accepted principles of statutory interpretation and on the language of the applicable legislative provisions.

The Board, as an administrative tribunal created by statute, has the powers that are expressly or impliedly granted to it by statute. This principle is summarized in *Administrative Law in Canada* (2nd edition) as follows:

> An administrative tribunal has no inherent powers to make orders or to take proceedings that may affect interested members of the public. Being created by statute, it has only those powers conferred on it by statute […] These powers exist by necessary implication from the wording of the Act, its structure, and its purpose. Thus, a tribunal's powers should not be sterilized by overly technical interpretation, but rather should be interpreted so as to enable the tribunal to fulfill the purposes of the statute.
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> A tribunal may determine the scope of its own powers and it must do so when its authority to act is questioned. It may interpret its enabling statute to ascertain whether it has the power necessary to perform a specific act […]
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> A tribunal has not only the authority but a duty to determine the scope of its powers. It cannot refuse to act because it is not sure if it has the power it is called on to exercise. It must decide whether it has that power.[1]

In *Sullivan and Driedger on the Construction of Statutes*, the modern principles of statutory interpretation are described as follows:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an

[1] Sara Blake, *Administrative Law in Canada* (2nd ed.), Butterworths Canada Ltd. (Toronto) 1997, p. 99.

> interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.[2]

Although Professor Sullivan specifically refers to "courts" in her discussion of statutory interpretation, Board staff submits that the principle applies equally to administrative tribunals and thus the Board.

Of further note is the *Legislation Act, 2006*, which applies to all Ontario statutes. Section 64(1) of the *Legislation Act, 2006* reads:

> An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.[3]

Board staff also notes that the courts have consistently found that the Board has very broad discretion in exercising its mandate to set just and reasonable rates.[4] In Board staff's submission, the same broad discretion applies to the Board's mandate to determine just and reasonable payment amounts under section 78.1 of the Act, subject only to statutory provisions that constrain the exercise of that discretion.

C. Applicable Statutory Provisions

Section 21(7) of the Act empowers the Board to make interim orders pending the final disposition of a matter before it. Board staff notes that this power is expressed in unconditional terms. Board staff submits that only a clear provision to the contrary in another provision of the Act can remove the Board's authority to make interim orders in any given case.

In Board staff's submission, there is nothing in section 78.1 of the Act or in Regulation 53/05 that can or should be read as removing the power of the Board to make interim orders in the exercise of its payment-setting mandate. To the contrary, the provisions of section 78.1 of the Act are supportive of the Board's authority in that regard. Specifically, section 78.1(2) of the Act speaks of the payment amounts being determined based in part on "the effective date" of the Board's first order:

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[2] Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* (3rd ed.), Butterworths (Toronto), 1994, p. 131.

[3] *Legislation Act, 2006*, S.O. 2006, chapter 21, Schedule F, section 64(1). The same concept was formerly captured in section 10 of the *Interpretation Act*, R.S.O 1990, chapter I.11.

[4] See, for example, *Natural Resource Gas v. Ontario Energy Board*, [2005] O.J. No. 1520 (Ont. Div. Ct.); *Union Gas Ltd. v. Ontario (Energy Board),* (1983), 43 O.R. (2nd) 489 (Ont. Sup. Ct.); and *Garland v. Consumers' Gas Company*, [2000] O.J. No. 1354 (Sup. Ct. Jus.) (overturned on different grounds).

(2) Each payment referred to in subsection (1) shall be the amount determined,

(a) in accordance with the regulations to the extent the payment relates to a period that is on or after the day this section comes into force and before the later of,

(i) the day prescribed for the purposes of this subsection, and

(ii) the effective date of the Board's first order in respect of the generator; and

(b) in accordance with the order of the Board then in effect to the extent the payment relates to a period that is on or after the later of,

(i) the day prescribed for the purposes of this subsection, and

(ii) the effective date of the Board's first order under this section in respect of the generator.

Section 78.1 of the Act therefore recognizes that the Board's first order may be effective at a different – and earlier – date than the date on which the order is made. In so doing, section 78.1 of the Act contemplates a seamless transition from the Regulated Payment Amounts to payment amounts set by the Board in a manner that admits of the possibility that the regulatory process may not lend itself to issuance of a final order on a pre-determined date.

Issue 2: Would an interim order of the Board declaring the Regulated Payment Amounts to be interim and/or increasing the payment amounts as requested by OPG be considered the Board's first order for purposes of section 78.1 of the Act and section 4 of Regulation 53/05? If so, what are the implications for the application of the provisions of Regulation 53/05 that make reference to the Board's first order? If not, on what basis can the IESO make payments to OPG in accordance with the interim order, having regard to the provisions of section 78.1(2) of the Act and of section 4 of Regulation 53/05?

A. Introduction

Issue 2 raises questions concerning the implementation of the interim order requested by OPG. Section 78.1 of the Act and Regulation 53/05 together set out a statutory framework regarding not only the determination of payment amounts for OPG, but also the payment of those amounts to OPG. Questions of both a practical and legal nature arise in relation to how an interim order might best be accommodated within that statutory framework. This section considers the legal questions, while practical implementation is considered in the section on Issue 3 below.

B. Rules Regarding the Making of Payments to OPG

The statutory framework associated with payment amounts for OPG contemplates that the payments will be made by the IESO (section 78.1(1) of the Act). Section 78.1(2) of the Act, cited above, in turn prescribes how the payments made by the IESO are to be calculated. Specifically, each payment by the IESO is to be determined as follows:

i. in accordance with Regulation 53/05, to the extent that the payment relates to a period that is "on or after [January 1, 2005][5] and before the later of [April 1, 2008][6] and the effective date of the Board's first order" in respect of OPG; and

ii. in accordance with the order of the Board then in effect, to the extent the payment relates to a period that is "on or after the later of [April 1, 2008][6] and the effective date of the Board's first order" under section 78.1 in respect of OPG.

Section 4 of Regulation 53/05 is to the same effect, and more specifically refers to payments being made for output generated by the Prescribed Facilities during the periods referred to above:

> 4. (1) For the purpose of clause 78.1(2)(a) of the Act, the amount of a payment that the IESO is required to make with respect to a unit at a generation facility prescribed under section 2 is,
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> (a) for the hydroelectric generation facilities prescribed in paragraphs 1 and 2 of section 2, $33.00 per megawatt hour with respect to output that is generated during the period from April 1, 2005 to the later of,
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> (i) March 31, 2008, and
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> (ii) the day before the effective date of the Board's first order in respect of Ontario Power Generation Inc.; and
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> (b) for the nuclear generation facilities prescribed in paragraphs 3, 4 and 5 of section 2, $49.50 per megawatt hour with respect to output that is generated during the period from April 1, 2005 to the later of,
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> (i) March 31, 2008, and
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> (ii) the day before the effective date of the Board's first order in respect of Ontario Power Generation Inc.

In Board staff's submission, the effect of the above provisions is that, for output generated by the Prescribed Facilities during the period that precedes the "effective date of the Board's first order", the IESO must make payments to OPG on the basis of the Regulated Payment Amounts.

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[5] The date on which section 78.1 of the Act came into force.
[6] The date prescribed for this purpose in section 3 of Regulation 53/05.

Board staff notes that the date of an interim order could be the "effective date of the Board's first order" under two scenarios: (i) where the interim order is considered to be the Board's first order; or (ii) where the Board's determines it appropriate for its final order to be effective as of the date of the interim order.

C. Interim Order as Board's First Order

Characterization of an interim order as the Board's first order for the purposes of section 78.1 of the Act and of section 4 of Regulation 53/05 would appear to enable the IESO to commence making payments on the basis of the interim order immediately following its issuance. This consideration appears to be of practical relevance only to an interim order that increases the payment amounts.

Board staff notes that Regulation 53/05 contains prescriptive rules about the Board's first order under section 78.1 of the Act. Most significant for purposes of this discussion is Paragraph 5 of section 6(2) of Regulation 53/05. That paragraph states that, in making its first order, the Board must accept amounts for certain matters (assets, liabilities, the amount in certain deferral accounts and the costs and revenues associated with the Bruce nuclear generation facility) as set out in the most recently audited financial statements approved by OPG's board of directors.

Characterization of an interim order as the Board's first order could have the effect of rendering the constraining provisions of paragraph 5 of section 6(2) of Regulation 53/05 inapplicable to the Board's final (i.e., second) order.

Board staff also notes that the Board recently addressed a similar issue in connection with an application by Great Lakes Power Limited ("GLPL") to approve rates under section 78 of the Act (proceeding EB-2007-0744). As part of its application, GLPL requested that its current rates be made interim as of the date of filing of its application. At issue in the proceeding was the interpretation of section 1(3) of Ontario Regulation 445/07, *Reclassifying Certain Classes of Consumers as Residential-Rate Class Consumers: Section 78 of the Act*, which states that customer reclassifications "take effect on the date of the distributor's next rate order made on or after August 15, 2007". In its December 20, 2007 Decision and Order, the Board determined that the reference to "the distributor's next order" in Ontario Regulation 445/07 is to the effective date of the Board's final rate decision.

D. Date of Interim Order as Effective Date of Board's First Order

Were the Board to make the Regulated Payment Amounts interim, the date of issuance of the interim order could be the "effective date" of the Board's first (i.e., final) order if the Board were to determine that this is an appropriate outcome.

An interpretation of the statutory provisions to the effect that an interim order is not the Board's first order, but may yet be the "effective date" of the Board's first order, would:

- be consistent with the Board's decision in the GLPL rates proceeding referred to above;
- ensure that the constraining provisions of paragraph 5 of section 6(2) of Regulation 53/05 apply to the making of the Board's final order; and
- dispense with any need to have specific regard to the matters identified in paragraph 5 of section 6(2) of Regulation 53/05 for purposes of the making of the interim order.

One consequence of this approach is that the IESO would appear to be required to make payments to OPG based on the Regulated Payment Amounts until such time as the Board issues its final order and determines the effective date of that order. Were the effective date to be the date of issuance of the interim order, then subject to the resolution of any implementation issues (considered in the section on Issue 3 below), the IESO could retrospectively give effect to any increase in payment amounts that apply during the period between the date of the interim order (the "effective date of the Board's first order" for purposes of section 78.1 of the Act and section 4 of Regulation 53/05) and the date of the final order.

This approach would also have consequences for the application of paragraph 4 of section 6(2) of Regulation 53/05 and section 5.1 of Regulation 53/05, both of which make reference to the "effective date of the Board's first order":

i. Paragraph 4 of section 6(2) of Regulation 53/05 requires the Board to ensure that OPG recovers certain costs and firm financial commitments if they were within the project budgets approved by OPG's board of directors before the effective date of the Board's first order, and otherwise only if the Board is satisfied that the costs were prudently incurred or the firm financial commitments were prudently made.

ii. Section 5.1 of Regulation 53/05 requires OPG to establish a transitional nuclear liability deferral account to record certain amounts for the period up to the effective date of the Board's first order. A separate nuclear liability deferral account is to be established to record amounts of the same nature on and after the effective date of the Board's first order.

With respect to item (i), whether there are any practical consequences associated with the date of an interim order being the "effective date of the Board's first order" would depend on whether OPG incurs costs or makes firm financial commitments beyond those in any project budgets approved by OPG's board of directors before the date of issuance of the interim order. With respect to item (ii), because Regulation 53/05 contemplates the creation of an enduring nuclear liability deferral account, the practical consequences may be limited to the date on which amounts cease to be recorded in the transitional account and commence to be recorded in the enduring account.

Issue 3: If an interim order declaring the Regulated Payment Amounts to be interim can be granted: (a) should the Board grant such an order; and (b) if an interim order increasing the payment amounts as requested by OPG can be implemented by the IESO, should the payment amounts be increased and, if so, by what amount should the Regulated Payment Amounts increase?

The Board has, in the past, made rates interim pending issuance of a final rate order. This was most recently done in the GLPL proceeding noted above. Having made rates interim, the Board then clearly has authority to determine the date on which the rates should take effect. The effective date can be any time from the date on which the rates were set interim onwards. The effective date is selected by the Board after consideration of all of the relevant circumstances. Board staff is not aware of any compelling reason why the approach in respect of rates should not apply equally to payment amounts.

Board staff notes that the Board's general practice is not to apply rates retrospectively where there is a rate increase, so as not to harm ratepayers. For that reason, the Board tends to retrospectively apply rates only where rates decrease, although increases have been applied retrospectively as well. Instances where the Board has granted an interim order increasing rates exist but are not typical.

There is currently no evidence before the Board as to whether and how the IESO can give effect to an interim order in the nature of that requested by OPG.

Board staff notes that this is not simply an issue of the payment amounts to be paid to OPG. Rather, the matter is complicated by the fact that the value of the payment amounts is an input to the calculation of the Global Adjustment. As such, any retrospective adjustment to the payment amounts actually paid to OPG pending issuance of the Board's final order could trigger the need for a retrospective adjustment to the calculation of the Global Adjustment for the same period, and a corresponding adjustment to the settlement statements issued to wholesale market participants.

Board staff submits that further evidence regarding the implementation by the IESO of an interim order in the nature of that sought by OPG is required to enable the Board to determine the implications of granting such an interim order.

Board staff also notes that OPG has not quantified the impact of granting an increase in payment amounts on an interim basis. OPG has stated that the requested interim increase is to address OPG's need for additional revenues and to "smooth the implementation of the new payment amounts for consumers" (Summary of Application,

Exhibit A1, Tab 3, Schedule 1, page 10).[7] Board staff notes that the need for such smoothing is not clear. This is so because quantification of the total impact on consumers of an increase in payment amounts is a function not only of the payment amounts ultimately determined by the Board in its final order, but also of the market price for electricity at any given time. An increase in the payment amounts on an interim basis may indeed reduce payment amount adjustments that might need to be made after the Board's final order is issued. However, an interim increase could also increase those payment amount adjustments, depending on the market price during the period between the date of issuance of the interim order and the date of the final order.

Finally, Board staff notes that OPG has not identified the harm that it would sustain if the Board were to make the Regulated Payment Amounts interim but without increasing them on an interim basis.

All of which is respectfully submitted.

January 30, 2008

[7] Exhibit K1, Tab 1, Schedule 4, page 1, lines 19-25 provides the following rationale: "OPG believes that smoothing the increase in the payment amounts over the period will reduce the implementation issues associated with the proposed increase. Recovery of 50 percent of the proposed revenue deficiency reflects a balance between OPG's interest in earning revenues sufficient to offset the cost of service associated with operating its prescribed facilities and ratepayer interests associated with rate stability (e.g., minimizing retrospective charges for consumption during the period after March 31, 2008) as well as allowing for better matching of the true cost of electricity with the appropriate time period."