February 1, 2008

BY EMAIL & BY COURIER

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge St, Suite 2701
Toronto ON M4P 1E4

Ms. Walli:

Board File No. EB-2007-0905
Payment Amounts for Ontario Power Generation Inc.'s Prescribed Facilities
Energy Probe – Written Submissions on Interim Order

Pursuant to Procedural Order No. 1, dated January 24, 2008, Energy Probe Research Foundation (Energy Probe) is hereby providing written submissions for the Board's consideration in respect of Ontario Power Generation's request for an interim order. An electronic version of this communication will be forwarded in PDF format.

Should you require additional information, please do not hesitate to contact me.

Yours truly,

David S. MacIntosh
Case Manager

cc. Barbara Reuber, Ontario Power Generation Inc. (By email)
Michael A. Penny, Torys LLP (By email)
Josephina D. Erzetic, Ontario Power Generation Inc. (By email)
Peter T. Faye, Energy Probe Counsel (By email)

Energy Probe Research Foundation 225 BRUNSWICK AVE., TORONTO, ONTARIO M5S 2M6

Phone: (416) 964-9223 Fax: (416) 964-8239 E-mail: EnergyProbe@nextcity.com Internet: www.EnergyProbe.org

EB 2007-0905

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an Application by Ontario Power Generation Inc. for an order or orders approving payment amounts for prescribed generating facilities commencing April 1, 2008.

Submission On Behalf Of

Energy Probe Research Foundation

February 1, 2008

Submission On Behalf Of
Energy Probe Research Foundation

The following are the comments of Energy Probe Research Foundation (Energy Probe) in response to the issues posed by the Board in Procedural Order No. 1 for this application in respect of the Ontario Power Generation's request for an interim order.

Issue 1: Can the Board declare the payment amounts prescribed by the *Payments Under Section 78.1 of the Act Regulation*, O. Reg. 53/05 to be interim?

According to s.21(2) of the Act, the Board cannot issue an order until it has held a hearing. If declaring the referenced payments interim constitutes an "order", then it could only emerge as the result of a hearing. An exception exists in S.21(4) that permits the Board to dispose of a proceeding without a hearing under certain conditions. The first condition is that no one requests a hearing on the subject and the second condition is that the matter doesn't *adversely affect in a material way* anyone but the applicant.

It may be argued that both these conditions are met in the circumstance of just confirming what is already in place with current payments. However, as discussed later in Question 2, there are a number of consequences to issuing an order that are difficult to evaluate at this preliminary stage of the hearing. Energy Probe cautions against making an interim order without a full understanding of what the implications are.

Energy Probe also submits that declaring existing payments interim is unnecessary because s.78(1) of the Act and O. Reg. 53/05 s.4 provides that those payments continue in effect until the Board makes its "first order in respect of Ontario Power Generation Inc.". OPG would not suffer any interruption in payments for its prescribed facilities, at least at the current rates whether or not the Board made those payments the subject of an interim order.

Clearly, though, OPG's interest is in having interim rates greater than those it is currently receiving.

In that case, the provisions of s.21(4)(b) are not met because other parties than OPG will be *adversely affected in a material way* by any increase in the payments it receives for its output. That is so because, any increased payments to OPG must eventually be reflected in higher electricity rates paid by consumers. Higher rates, in Energy Probe submission, would constitute *an adverse material affect*. It is also unlikely that no party will request a hearing under s.21(4)(a), the other requirement that must be met for the Board to dispose of a proceeding without a hearing.

The argument may be made that the Board's scheduled hearing on February 7, 2008 constitutes a hearing for the purposes of s.21(2) and so it might legitimately issue an order at the conclusion of that proceeding.

S.21(7) of the Act permits the Board to make "interim orders pending the final disposition of a matter before it". Therefore, Energy Probe takes no issue with the Board issuing an interim order but submits that such an order must still respect the principle set out in s.21(2) that it be based on a hearing of the applicable evidence. The evidence that must be considered for the proposed 7% interim increase in payments is, in Energy Probe's submission, the same evidence that will be considered in the main application. This cannot possibly be covered in a single day. Therefore, the February 7, 2008 proceeding cannot satisfy the requirements of s.21(2) to justify a Board interim order to increase the current payments received by OPG.

Issue 2: Would an interim order of the Board declaring the current 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?

Energy Probe submits that a plain language reading of the Act leads to the conclusion that any order that provides a payment calculation method applicable to OPG would be an order under s.78.1.

The section provides authority for the IESO to make payments to a generator that is prescribed by the regulations as OPG is. It sets out two ways in which those payments are to be calculated according to the period they relate to:

1. **s. 78.1(2)(a) provides that payments relating to periods between January 1, 1995 (the day the section came into force) and the later of April 1, 2008 (the day prescribed in the regulation for the subsection) and "the effective date of the Board's first order in respect of the generator" are to be made as prescribed by the Regulation. S.4 of O.Reg. 53/05 provides how those payments are to be calculated.**

Once the Board makes an order in respect of OPG the effective date of that order marks the end of the period for which payments prescribed under s.4 of the Regulation can be made.

2. **s.78.1(2)(b) provides that payments relating to periods on or after the later of April 1, 2008 and "the effective date of the Board's first order under this section in respect of the generator" will be "in accordance with the order of the Board then in effect".**

Read together, these sections raise a theoretical possibility that the IESO could be precluded from making any payments to OPG at all for a period of time. This could occur if the "first order in respect of the generator" in s.78.1(2)(a) does not provide for a payment calculation method and has an effective date before the effective date of the "first order under this section in respect of the generator" in s.78.1(2)(b) that does provide a payment calculation method.

In that case, the payments prescribed by s.4 of the Regulation would have expired before there was an order in effect on which the IESO could rely for authority to calculate and make payments under s.78.1(2)(b).

Because it may be assumed that the legislature intended OPG to receive payments for its output without interruption, it follows that the prescribed payments were intended to carry on until a Board order provided a different payment calculation method. Any order that marks the end of the regulation prescribed payments would necessarily have to provide a substitute method of calculating payments and that would make it an order under s.78.1.

Therefore, Energy Probe submits that an interim order either confirming the current payment amounts or setting new payment amounts would be the Board's first order for the purposes of s.78.1 of the Act and s.4 of O.Reg. 53/05.

The implications of making the first order appear to be:

1. **IESO's authority to make payments to a prescribed generator will be limited to what is authorized under a Board order. If the first order is delayed until the Board's decision on OPG's application, the IESO would continue to make payments under the Regulation. Losing the ability to make payments set out in the Regulation may not have any practical consequences as long as the Board's first order provides an alternate payment method.**

2. **The effective date of the Board's first order affects the way OPG records in deferral accounts its revenue requirement for nuclear decommissioning liability. It is not clear to Energy Probe at this time, what, if any, consequences result from different effective dates of the Board's first order under s.78.1 of the Act.**

3. **Some of the rules in s. 6 governing determination of payment amounts by the Board are affected by the effective date of the Board's first order. S.6(2) provides that certain costs associated with modifications to a generation facility will be automatically recoverable if within budgets approved by OPG's board of directors**

prior to the effective date of the Board's first order. Costs not approved by the board of directors before the effective date of the Board's first order are subject to a prudency review.

The consequences of delaying the effective date of the Board's first order on the amount of costs that might be excluded from a future prudency review is not clear to Energy Probe at this time.

4. **Section 6(2) paragraphs 5 and 6 requires the Board to accept OPG's most recent audited financial statements for certain balance sheet and income statement elements at the time that it issues its first order. Presumably, an interim order would trigger this acceptance. The consequences of that action are not clear to Energy Probe at this time.**

Issue 3: If an interim order declaring the current payment amounts to be interim can be granted:

a) Should the Board grant such an order?

Energy Probe believes that the consequences of actions triggered by the Board's first order discussed above will become clearer through the evidentiary process of a full hearing. Therefore, it would be prudent to have the Board's first order coincide with its decision on the application to avoid unforeseen effects. In addition, Energy Probe can see no benefit to an order confirming current payment amounts when the Act and Regulation provide for their continuance until the Board makes its decision on the Application.

Therefore, Energy Probe submits that the Board should not grant such an order.

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 payment amounts increase?

Energy Probe submits that interim relief should be confined to unusual circumstances that create an urgent need to avoid adverse consequences. According to the evidence that OPG has filed, most of the requested increase in payments are to bring its ROE up to 10.5% (Exhibit A, Tab 3, Schedule 1, Page 8, Line 10). This is not an urgent matter that requires early intervention to preserve the company's financial integrity or continue its normal operations.

By contrast, granting interim relief on the basis that the applicant would like to make more money for its shareholders during the hearing period would send a signal that the Board is prepared to grant relief on relatively trivial grounds. There may be some argument and precedent for granting interim relief to ensure that a utility's current rate of return is not jeopardized during the course of a lengthy hearing because it could negatively affect its financial condition. However, OPG is not alleging that its current ROE is in jeopardy or that waiting for a final decision would adversely affect its financial condition. It is also relevant to consider whom the shareholder and beneficiary of increased ROE is in this instance. The Ontario Government can probably wait until the Board's final decision for increased dividends without any real impact on its financial viability.

Energy Probe also submits that increased payments authorized by the Board prior to hearing the evidence supporting them could be seen as anticipating and possibly colouring a final decision on the application. This might raise questions of procedural fairness that would unnecessarily complicate the hearing process.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 1, 2008

Peter T. Faye
Counsel