

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

Submissions of the School Energy Coalition on Issues Associated with Request for an Interim Order

1. These are the submissions of the School Energy Coalition (“SEC”) on the issues raised in Procedural Order #1 in this proceeding. The issues raised by the Board are as follows:

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

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?

a) 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?

b) If not, on what basis can the Independent Electricity System Operator (“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?

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

a) Should the Board 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?

2. SEC would answer these questions as follows:

1. Yes, but only in compliance with the procedural requirements of Regulation 53/05. The Board has no authority to declare the rates set out in Regulation 53/05

interim, since those rates are legislated rates, not the Board's rates. The Board would first have to adopt those rates as rates ordered by the Board, and then declare them interim.

2. Yes. Such an order would be a "first order" but the statutory scheme governing making such an order precludes making it in a summary fashion. The first order must comply with the procedural requirements of Regulation 53/05.
3. No, an interim order should not be granted. The Board is not in a position to comply with Regulation 53/05 in a timely manner, and in any case there is no reason in law or in policy to do so.

Issue 1: Can the Board declare prescribed payment amounts interim?

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?

2. SEC believes these two questions are inter-related and should be considered together. The reason is that whether or not the Board can issue an interim order with respect to prescribed payment amounts depends on the statutory scheme directing how the Board is to issue an order to determine payment amounts.
3. In SEC's submission, the statute and regulations provide that the prescribed payment amounts for Ontario Power Generation ("OPG") are to remain in place until the Board issues a first order in respect of OPG. The legislation and regulations then sets out a detailed set of rules governing how the Board is to make such an order. Those rules preclude the Board from simply setting payment amounts, on an interim basis or on any basis, without a full evidentiary hearing.
4. In SEC's submission, s. 21(7) of the *Ontario Energy Board Act* (the "Act"), which gives the Board the power to issue interim rate orders, does not apply to payments under s.78.1 of the Act.
5. Section 21(7) of the Act reads as follows:

(7) The Board may make interim orders pending the final disposition of a matter before it.

6. Board Staff has suggested that that section “is expressed in unconditional terms” and that therefore “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.” [Board Staff submissions, pg. 3]
7. With respect, SEC disagrees. Section 21(7) gives the Board the general right to issue interim orders. The content of those interim orders, however, depends on the Board’s discretion with respect to the particular matter before it.
8. In the case of the Board’s power to set just and reasonable rates for the distribution of gas or electricity, the Board is given broad discretion to “adopt any method or technique that it considers appropriate” [S. 36(3) of the Act]
9. With respect to payments under s.78.1 of the Act, the provision specifically says that payments shall be the prescribed amount until the later of March 31, 2008 or the day before the “effective date of the Board’s first order in respect of Ontario Power Generation” [Ontario Regulation 53/05, s. 4(1)(a)(ii)]
10. The question, then, becomes whether the Board’s “first order” can be an interim order, and the relevance of the term “effective date” in the section.

Meaning of “First Order”

11. SEC believes that the statutory scheme envisions the Board making a “first order” after considering the evidence. If an interim order, made without hearing evidence, could be considered a “first order” under s.78.1, it would render the procedural directions given to the Board under the statute and regulations redundant.
12. In SEC’s submission, the statutory framework provides explicit rules as to how an order in respect of payment amounts for OPG can be determined.
13. For example, section 78.1(4) of the Act states as follows:

The Board shall make an order under this section in accordance with the rules prescribed by the regulations and may include in the order conditions, classifications or practices, including rules respecting the calculation of the amount of the payment.
14. The “rules prescribed by the regulations” refers to section 6 of Ontario Regulation 53/05. This rule sets out detailed directions for the Board to follow in making any order in respect of payment amounts, and additional directions that apply to a first order.
15. In SEC’s submission, the statutory and regulatory scheme clearly envisions that the payment amounts that are different from the prescribed payment amounts could only be determined after a full consideration of the evidence.

16. In SEC's submission, the regulations express the concern on the part of the Legislature and Lieutenant Governor in Council that the Board turn its mind to specific issues before determining payment amounts in respect of OPG. These provisions are in contrast to the much wider latitude given to the Board when setting just and reasonable rates for the distribution of gas or electricity.
17. Furthermore, when the Board declares rates interim in respect of gas or electric distributors, it does so on rates it has already approved. In SEC's submission, the legislative scheme was not intended to give the Board the same power with respect to a first order with respect to payment amounts to OPG.
18. If the Legislature or the Lieutenant Governor in Council had intended to allow a less rigorous process for setting payment amounts by way of interim order, SEC submits that such a provision would have been explicitly set out in the statutory and regulatory scheme. In the absence of such explicit direction, SEC submits that the general provision in s.21(7) of the Act giving the Board the authority to issue interim orders does not apply where it would over-ride the specific direction given to the Board in s.78.1 and the related regulations as to how to make a determination of a payment amount.

Relevance of term "effective date"

19. Board Staff has suggested in its submissions that the term "effective date" in s.78.1(2) of the Act suggests that the Board's first order can be effective on an earlier date on which the order is made.
20. With respect, SEC submits that Board Staff has made a logical leap that is not justified by the wording of the statute. That is, Board Staff assumes that the term "effective date" can mean a date that is earlier than the Board's order, and that that therefore means that the Board must also have the right to declare rates interim.
21. In SEC's respectful submission, if the legislature had intended that section to authorize the Board to issue a rate order to be applied retroactively, it would have done so explicitly.
22. In SEC's submission, the term "effective date" in section 78.1(2) of the Act refers to a date that is forward in time, not backwards. The Board's orders are frequently released on a certain date and the effective date of that order is sometime in the future. Retroactive rate making, on the other hand, is a contentious issue in Ontario.
23. In any event, if Board Staff's interpretation is correct, it would mean the legislature has given the Board the statutory authority to make its rate order effective on a date that is earlier than the date of the order. If that's the case, then the Board would not require the power to make rates interim: it could simply make its rate order retroactive because the legislation allows it to.

3. If an interim order declaring the current payment amounts interim can be granted, should the Board grant such an Order?

24. In SEC's submission, the spirit of the statutory scheme governing payment amounts to OPG envisions the Board setting a new payment amount only after hearing all of the relevant evidence and making a decision accordingly.
25. In doing so, the legislature recognized the importance of a fair and transparent process to determine payment amounts that are different from the prescribed payment amounts.
26. In addition, SEC believes retroactive ratemaking is unfair to ratepayers and diminishes the public's confidence in the regulatory compact.
27. OPG filed its application in a manner that could not possibly have allowed for the Board to have a full hearing of the matter in time to issue a rate order prior to March 30, 2008.
28. In SEC's submission there is no reason the Board should take extraordinary steps to ensure that the payment amounts to OPG are increased effective April 1, 2008.
29. OPG's argument for interim payments, or for an order declaring payment amounts interim so as to allow for a retroactive increase of payment amounts, is predicated on the fact that it did not file its application soon enough to have the Board issue new payment amounts by April 1, 2008. If OPG wanted to have new payment amounts in place by that date it was incumbent on OPG to file its application in a timely manner to allow that to take place after a full evidentiary hearing.

All of which is respectfully submitted this 1st day of February, 2008.

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