



Borden Ladner Gervais LLP
Lawyers • Patent & Trade-mark Agents
Scotia Plaza, 40 King Street West
Toronto, Ontario, Canada M5H 3Y4
tel.: (416) 367-6000 fax: (416) 367-6749
www.blgcana.com

J.MARK RODGER
direct tel.: (416) 367-6190
direct fax: (416) 361-7088
e-mail: mrodger@blgcana.com

February 1, 2008

Courier and Email

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2700
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Ontario Power Generation Inc. (“OPG”) Application for Approval for payment amount increases for Prescribed Generating Facilities – AMPCO’s Response to OPG’s Request for Interim Relief and Comments on the Proposed Issues List – OEB File No. EB-2007-0905

We are counsel to the Association of Major Power Consumers in Ontario (“AMPCO”) in the above-captioned matter. Among other relief, OPG has requested an Order declaring its current payment amounts for its prescribed assets to be interim as of April 1, 2008 and increasing the payment amount. Please accept this letter as AMPCO’s response to those requests. Accompanying this letter is a version of the draft issues list containing AMPCO’s requested revisions.

AMPCO takes no position in this letter on questions 1 and 2 set out in the OEB’s Procedural Order No.1. AMPCO will consider the submissions of the parties to this proceeding on those questions, and may express its support for one or more of them. This letter addresses question 3 - if an interim order can be granted, should it be; and if an order increasing the payment amounts can be implemented by the IESO, should the payment amounts be increased and by how much?

In short, AMPCO urges the Board to reject both of OPG’s requests. There is no need for interim relief because the current payments consumers make to OPG are more than adequate to meet OPG’s financial needs. The lead time that has been available to adjust rates in a considered way in time for April 1, 2008, had such an adjustment been justified, has been so long that to declare rates (and particularly increased rates) interim without due consideration of the underlying need for a rate change would be to treat the interests of consumers carelessly.

There is no financial integrity concern for OPG:

AMPCO has no quarrel with OPG when it says, “the efficient, cost-effective, and reliable operation of the prescribed assets is critical to the reliability and security of the electricity system” (A1/T3/S1 p. 4). If OPG’s financial integrity were threatened, the Board would be justified in at least entertaining a motion for interim relief. However, OPG’s financial results indicate no sign of financial distress. OPG’s net income in 2005 was \$366 million after absorbing a writedown of \$265 million on Lennox, P2 and P3. In 2006, net income was \$490 million. In the first 3 quarters of 2007, net income was \$409 million.

As OPG notes in its pre-filed evidence, in May 2006, Standard & Poor’s upgraded the Company’s short-term Canadian Scale Commercial Paper debt rating to A-1 (low) from A-2. In August 2006, Dominion Bond Rating Service issued a rating report confirming OPG’s long term debt rating and short-term Commercial Paper rating of A (low) and R-1 (low), respectively. (A2/T3/S1)

The prices consumers pay today for the prescribed assets were set deliberately by the Province, based on submissions by OPG and after review by the Ministries of Energy and Finance, by an outside advisor and with input from stakeholders, including customer interests. OPG’s financial position was enhanced over the previous regime by a large increase in revenues designed to cover forecasted costs and also by extensive deferral account protections for costs that are difficult to forecast. Incentives to drive efficiencies are a prominent element of the existing regime. In obvious consideration of balancing consumer interests and also in consideration of OPG’s special status as a government entity not reliant on the market for its equity capital, the government adopted what might be described as a hybrid ROE of 5% – part public, part private and reflective of the heritage nature of the prescribed assets. Setting the ROE at a level to attract equity capital – an approach that is normal and accepted for typical utilities – was clearly understood by the Provincial government to be unnecessary or undesirable or both in the unique case of OPG.

As the Board will hear from AMPCO throughout this case, OPG’s claim for an adjustment to boost the equity component of its capital structure and its ROE, which it is asking the Board to accept as part of its request for interim relief, is flawed. AMPCO suggests that when OPG says, “A move to a commercial rate of return is required for OPG to operate as a financially sustainable and commercial enterprise in accordance with the Memorandum of Agreement...”, what OPG is really claiming is that the MOU is flawed. AMPCO takes the opposite view. AMPCO submits that the MOU explicitly reflects the will of the shareholder, represents a reasonable balancing of interests, and is more than sufficient for the time being and until the Board has concluded its present review.

The rate regime set out in O.Reg. 53/05 represented a delicate balancing. The prevailing rate regime should certainly not be adjusted without due care. Rate retroactivity, even if it were a well accepted regulatory approach, which it is not, is unnecessary as demonstrated by more than adequate returns OPG has achieved since 2005.

Adequate Time Was Available to Avoid Retroactivity:

AMPCO is firmly of the view that not only is OPG financially sound and not requiring interim rate relief, but the lead time that has been available to adjust rates in an appropriately considered way in time for April 1, 2008, has been so long that to declare rates interim without due consideration of the underlying need for a rate change would be to treat the interests of consumers carelessly.

The chronology of this case extends back so far and has been so clear and stable in the policy environment over time, that customers have a firm basis to expect that they will not be subjected to any rate increases, and certainly no retroactive rate increases, without due consideration of the underlying need for any potential increase.

The current rates arose from a policy process that began in 2004. In March of 2004, almost four years ago, the report of the OPG Review Committee was released with a number of recommendations, including that rates for recovery of OPG costs become subject to OEB oversight.

The current payment amounts became effective since April 1, 2005 arising from a regulation established almost exactly 3 years ago.

The OEB conducted a consultation on the form of regulation of OPG (EB-2006-0064). On November 30, 2006 the Board issued a report in EB-2006-0064 entitled “A Regulatory Methodology for Setting Payment Amounts for the Prescribed Generation Assets of Ontario Power Generation Inc.”

While all of this was going on, the Ontario Legislature Standing Committee on Government Agencies issued its Review of Ontario Power Generation (OPG) on February 26, 2007.

Interestingly, before OPG’s application to the Board was even published, other government agencies appeared to have detailed information on the application. The IPSP was released two weeks before OPG’s application was filed. In Discussion Paper #7, issued in November 2006, the OPA had provided an outlook for prices that assumed that OPG’s rates on prescribed assets would continue unchanged. However, in the IPSP filed with the Board in August 2007, we see the OPA operating on the assumption that OPG’s not yet applied for rates will be approved by the Board.

OPG’s decision to delay filing its application with the Board is difficult to understand, particularly in light of OPG’s foreknowledge of the normal Board schedule for review of applications and the clarity of the Regulation with respect to the commencement of the Board’s authority with respect to rates for prescribed assets. OPG has suggested that its delay in filing is attributable to the timing of the release of the Board’s filing guidelines. While we accept that the timing of its application is OPG’s prerogative, it is unfair and unreasonable of OPG to expect that the process should be rushed, truncated or bypassed in any way to accommodate its preferred timing. Because of the first-of-a-kind and unique nature of this application, the complexity of the material filed and the potentially significant impacts it may have on consumers, we submit that a thorough review of the



evidence is required before any decisions be made as to the appropriate level of payment amounts to be set by the Board.

Conclusion:

When the Board settled on the forward test period as part of the finalized filing guidelines, it commented: "The Board cautions interested parties that the selection of these dates as the forward test period does not mean that payment amounts will be set by the Board for that same period." AMPCO members have taken comfort from the Board's reassurance. AMPCO reiterates its request that the Board reject OPG's request for interim relief. There is simply no justification for the imposition of electricity price increases on Ontario consumers in the absence of appropriate consideration through the Board's normal process. While an interim order would provide for adjustments at a later date, the impact of such an order on AMPCO members would be an immediate increase in their electricity costs. The sheer magnitude of the increase requested by the applicant would cause significant and immediate hardship for customers even if there is some possibility that the requested adjustment is ultimately rejected.

Yours very truly,

BORDEN LADNER GERVAIS LLP

A handwritten signature in black ink, appearing to read 'J. Mark Rodger', is positioned below the firm name.

J. Mark Rodger
JMR/ld
Encl.

Copies to: Adam White, President, AMPCO
Michael Penny, OPG Counsel
Josephina Erzetic, OPG Counsel
Parties of Record

::ODMA\PCDOCS\TOR01\3739220\2