

February 1, 2008

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File 15119

**VIA COURIER AND EMAIL**

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street, 26th floor  
Toronto, ON  
M4P 1 E4

Dear Ms. Walli:

**Re: Application by Ontario Power Generation Inc. Under Section 78.1 of  
the Ontario Energy Board Act, 1998  
Board File No. EB-2007-0905**

Attached please find the Power Workers' Union ("PWU") Submissions in connection with the above-noted proceedings.

Pursuant to the Board's Procedural Order No.1, provided are two (2) hardcopies of the PWU's submission. An electronic copy has been provided by email, and copies of the submission have been provided to all interested parties via email.

Yours very truly,

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

  
Richard P. Stephenson

RPS:jr  
Encl.

cc: All Interested Parties (*via email*)

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**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 facilities.

**SUBMISSIONS OF THE POWER WORKERS' UNION  
(OPG REQUEST FOR INTERIM ORDER)**

1. These submissions are filed by the Power Workers Union ("PWU") pursuant to Procedural Order No. 1 issued by the Board on January 24, 2008, wherein the Board requested written submissions in respect of OPG's request for an interim order.
2. These submissions address and respond to the issues framed by the Board in Procedural Order No. 1 in the order they appear in Procedural Order No. 1.
3. Except as noted below, the PWU is broadly supportive of submissions made by Board Staff in respect of these issues, as filed with the Board on January 30, 2008.

**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 ("Regulation 53/05") to be interim?**

4. The PWU submits that provisions of the *Ontario Energy Board Act, 1998*, (the "Act") provide the Board with all of the authority required to make any interim order it deems appropriate under the circumstances.

5. The PWU submits that the appropriate analytical approach to this issue is as follows:
  - a. Does the OEB have the jurisdiction to make an interim order regarding payment amounts in the context of an application made pursuant to s. 78.1 of the Act; and,
  - b. If so, can an interim order with respect to payment amounts make the interim payment amount the amount prescribed by O.Reg.53.05?
- a. **Does the Board have the jurisdiction to make interim orders regarding payment amounts in an application pursuant to s. 78.1 of the Act?**
6. The power of Board with respect to the making of interim orders is prescribed by s.21(7) of the Act which provides as follows:

**The Board may make interim orders pending the final disposition of a matter before it. <sup>1</sup>**
7. Nowhere in the Act, either in s.78.1, or elsewhere is there any explicit or implicit restriction on the Board's jurisdiction pursuant to s. 21(7) in the context of proceedings pursuant to s.78.1.
8. Moreover, the PWU submits that, in view of the Board's general powers regarding interim orders pursuant to s. 21(7), there is nothing in the Act which precludes the exercise of this power in respect of making an order regarding interim payment amounts. In particular, while the PWU acknowledges that "payment amounts" pursuant to s.78.1 are not for regulatory purposes identical to "rates" pursuant to s. 36 or s. 78 of the Act, the PWU submits that, as a matter of substance, they are broadly analogous. It is clear that the Board's power to make interim orders pursuant to s. 21(7), when exercised in the context of applications made

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<sup>1</sup> OEB Act, 1998, S.O. 1998, c. 15, Sched. B, s. 21(7)

pursuant to s. 36 and s.78, includes the power to set interim rates. There is nothing in either s.78.1, or elsewhere in the Act which would dictate a different result in respect of payment amounts.

9. The imposition of interim rates at the earliest possible opportunity (i.e. April 1, 2008) is entirely consistent with Government policy, which favours Ontario electricity consumers facing the "true cost" of electricity and the Board's own objectives (transparently determined, cost based, just and reasonable) regarding the establishment of payment amounts.
10. In addition, the text of s. 78.1 of the Act which references the "effective date" of the Board's order with respect to payment amounts clearly contemplates that the new levels of payment amounts as determined by the Board can take effect on a date different than the date the Board's order establishing such payment amounts is issued. In particular, this provision clearly contemplates that the Board may make an order *prior to* April 1, 2008 which does not take effect until April 1, 2008, and likewise may make an order after April 1, 2008 (eg. a final order in this proceeding) which establishes payment levels having retrospective effect, back to April 1, 2008.
11. Indeed, one of the key practical effects of the establishment of interim payment amounts effective April 1, 2008 (at whatever payment levels the Board determines to be appropriate) is to give the Board the ultimate power when making its final decision in this matter to set payment levels effective April 1, 2008, even though the final decision in this matter is likely to occur several months after that effective date. The PWU submits that this result is consistent both with Government policy and with the Board's own objectives in setting payment levels because it results in payment levels which are more cost based, and more transparently costs based, at the earliest possible date.

b. **Can the Board make an interim order establishing payment amounts pursuant to s. 78.1 at the same level as the prescribed payment amounts in Regulation 53/04?**

12. The PWU submits that there is no legal restriction on the Board ordering any particular level of payment amounts in an interim order, including making the payment amounts at the level prescribed by Regulation 53/05. The Board's flexibility with respect to the determination of the level of interim payment amounts is entirely justifiable, once it is understood that any decision with respect to interim payment amounts will inevitably be superseded and subsumed within the Board's final order in the proceeding. The Board's final order will determine the appropriate payment amounts based upon the complete evidentiary record and all of the statutory and regulatory requirements, on a fully retroactive basis, back to the effective date of the order setting interim payment amounts.

**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 to be the Board's first order for the purposes of s. 78.1 of the Act, and s.4 of Regulation 53/05?**

13. The term "first order" is not defined in s. 78.1 or elsewhere in the Act. The PWU submits that the term should be interpreted in a manner consistent with the words used, in the context of the Act as a whole and consistent with the purposes of the Act and particularly s. 78.1 thereof.

14. The PWU submits that an interim order is the "first order" for the purposes of s. 78.1 of the Act and 2.4 of Regulation 53/05 only in the sense that it establishes the earliest possible effective date of the Board's final order. It is not a "free standing" first order in the sense of rendering the Board's final order in the proceeding its "second order". By its nature, an interim

order has no permanent effect; it has only such effect as determined by the Board in its final order.

15. As noted by Board Staff, one of the key features of O. Reg. 53/05 are the constraints it places on the Board in terms of the evidence it can consider in making its first order. It is totally inconsistent with any reasonable view of the Legislature's intent to suggest that the constraints the Legislature and the Government imposed on the Board would be exhausted by virtue of the Board making an interim order with respect to payment levels, where, by definition, any such interim order will be reviewed and supplanted in its entirety by the Board's final order in the proceeding.<sup>2</sup>

**Issue 2(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?**

16. The PWU agrees that the provisions of Regulation 53/05 referencing the Board's first order will be spent and will have no further force or effect at the conclusion of this proceeding, once the Board makes its final order herein.

**Issue 2(b): 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 section 4 of Regulation 53/05?**

17. The PWU submits there is no restriction which limits the Board, in making an interim order, to set payment amounts equal to the levels prescribed by the regulation. To the contrary, the PWU submits that the language of s. 78.1 of the Act is clear, after April 1, 2008, the IESO is required to pay payment amounts, "in accordance with the order of the Board then in effect". The PWU that an interim order, made effective April, 2008 would

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<sup>2</sup> As noted by Board Staff in its submissions, this interpretation is entirely consistent with the decision of the Board in EB-2007-0744.

such an order "then in effect". There is nothing to prevent the Board from making an interim order, prior to April 1, 2008 which would become "effective" on April 1, 2008, which establishes payment amounts higher (or lower) than the amounts prescribed by O. Reg. 53/05.

18. The fact that such an interim order established payment amounts different than the amounts prescribed by O. Reg. 53/05 would not convert that interim order into a the "first order" under s. 78.1 (in circumstances where an identical order establishing interim payment amounts at current levels would not be a first order). In either case (i.e. whatever the level of the payment levels established by the interim order), the final determination of:

- a. the effective date of the final order;
- b. the new payment amounts;
- c. the period of retroactivity (if any) of the new payment amounts; and
- d. all other implementation issues

would be made as a part of the Board's final decision in the proceeding, which would then constitute the "first order".<sup>3</sup>

**Issue 3(a) If an interim order declaring the current payment amounts to be interim can be granted, should the Board grant such an order?**

19. The PWU submits that if the Board is satisfied that such an order can be made (and the PWU submits that it can), the Board should make such an order. At a minimum, an interim order should be made declaring the current payment amounts to be interim, because that will allow OPG the

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<sup>3</sup> In the highly theoretical circumstances that the Board made an interim order increasing the payment amounts from current levels, and then determined after hearing the application on the merits that the payment amounts going forward should be *lower* than the interim payment amounts, the Board would retain the jurisdiction to order a refund of the excess amounts collected in the interim. This, like all other issues, would be determined at the conclusion of the case on the merits.

opportunity to seek full retroactivity of the payment amounts established by its final order in the matter, back to April 1, 2008.

20. To the extent there is any issue as to whether the Board should ultimately make an order making a new level of payment amounts retroactive to April 1, 2008, it is submitted that the appropriate time for the issue to be resolved is at the conclusion of the hearing of the proceeding on its merits. If the denial of the request for interim rates would have the effect of foreclosing that argument, this is a powerful reason why the request for an interim order should be allowed.

**Issue 3(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?**

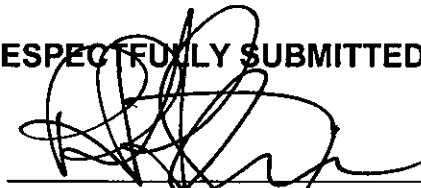
21. The PWU is not aware of the existence of any technical issues which would prevent the IESO from implementing an interim increase in payment amounts. If the IESO establishes the existence of such issues, the PWU concedes that would be a compelling reason for denying OPG's request for an interim order which increases payment amounts.
22. Assuming that there is no technical reason preventing the IESO from implementing an interim rate increase, it is incumbent upon OPG to satisfy the Board as to whether an increase payment amounts on an interim basis is justified. Ultimately, that will depend upon the nature and quality of the evidence filed by OPG. However, the PWU submits that intuitively, there would appear to be justification for some increase in payment amounts on an interim basis. The PWU submits the following considerations are relevant:
  - a. Unlike most circumstances, there is no basis for the Board to assume that the current levels of the payment amounts are at a level that the Board would consider to be cost based or "just and



reasonable". Because the current payment levels were not determined through any kind of a transparent process, neither the Board nor consumers can have any assurance that the current levels are either cost based, or just and reasonable. As a result, it is submitted that the *status quo* lacks the degree of legitimacy that exists in the context of other rate setting proceedings;

- b. OPG's application provides the Board with an evidentiary basis (albeit untested at this stage) which demonstrates that the current payment levels do not compensate OPG for its costs in relation to the output from the prescribed assets. The PWU acknowledges that, once fully tested, the record made justify payment amounts at a level different than that sought in the application, may be appropriate; and
- c. However, on the face of the application, there are certain factors which are highly unlikely to be affected over the course of the hearing, under any reasonable scenario. In particular, the current payment levels are premised upon a return on equity of 5%. Even if the ROE sought by the applicant is not ultimately approved, there is no reasonable scenario whereby the approved ROE would not be a significant increase over the current level. The PWU submits this factor alone justifies a higher level of payment levels on an interim basis.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**



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