

**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.

**WRITTEN ARGUMENT OF THE APPLICANT,  
ONTARIO POWER GENERATION INC.  
RE: INTERIM PAYMENT AMOUNTS**

**PART I – FACTS**

**Overview**

1. As part of this application, OPG has sought:
  - (1) an interim order making its current payment amounts interim effective April 1, 2008; and
  - (2) an interim order increasing OPG's payment amounts, on an interim basis to:  
  
\$35.35/MWh for hydroelectric production; and  
  
\$53.00/MWh for nuclear production.
2. The OEB has asked for written submissions on essentially three issues:
  - (1) the OEB's jurisdiction to make payment amounts interim;
  - (2) the implications of doing so; and
  - (3) whether, assuming jurisdiction, the OEB should do so.
3. The OEB has clear jurisdiction under section 21(7) of the *Ontario Energy Board Act, 1998* to make interim orders pending the final disposition of any matter pending before it. The

law is clear that such jurisdiction includes the power to review and to make retrospective adjustments to payment amounts once final amounts are determined.

4. There is nothing in the language of section 78.1 of the Act or section 4 of O.Reg. 53/05 that removes the power of the OEB to set interim payment amounts nor can such a restriction be implied as necessary to the operation of the legislative scheme.

5. Indeed, the language of these provisions, which recognizes that *when* an OEB order concerning payment amounts is made may well be different from the *effective date* of that order, supports the interpretation that the OEB's power to make interim orders applies to payment amounts under section 78.1.

6. An interim order is characterized by three important qualities:

- (1) it does not require any decision on the merits of an issue since these matters will be settled in a final decision; its purpose is to avoid any deleterious consequences resulting from the time required to conclude a proceeding;
- (2) it is temporary and subject to retrospective adjustment; and
- (3) it does not exist independently from a final order establishing payment amounts. One begins the process of setting just and reasonable payment amounts while the other concludes it.

7. Having regard to the language of section 78.1 of the Act and these characteristics of interim orders, an interim order of the OEB making payment amounts interim should not be considered the OEB's "first order" for the purpose of the Regulations. However, even if an interim order for payment amounts is considered to be the OEB's first order, there are no implications for the application of the Regulations specifically, and certainly none that require resolution before the final order is made.

8. OPG urges the OEB to act on its undoubted jurisdiction to make payments amounts interim effective April 1, 2008. There is no prejudice to anyone, as this order would make no change to the status quo and will be subject to review and retrospective adjustment in setting final payments amounts.

9. To mitigate the risk of accumulations of large retroactive charges pending the final resolution of the application, OPG also asks the OEB to grant an interim increase in the payment amounts representing recovery of approximately half of OPG's forecast revenue deficiency.

10. This order too will be completely without prejudice to all parties' rights. An interim increase, however, would recognize that payment amount increases are a real likelihood in this case, particularly in light of the origins of the current payment amounts (fixed by the government relying, in part, on 2004 data) and the existence of certain significant cost increases, the recovery of which is effectively required by the Regulations.

### **Background to OPG's Application**

11. In 2004, the Ontario government resolved to bring certain of OPG's generation assets under rate regulation by the OEB. Legislation and regulations passed in late 2004/early 2005 provided that payment amounts to OPG for the output of its prescribed assets would be determined initially by Regulation for a minimum of three years, from April 1, 2005 to March 31, 2008, and thereafter in accordance with orders of the OEB.

12. OPG initiated preliminary discussions with OEB staff in 2005 to ensure that the process for determining OPG's payment amounts post-March 31, 2008 was undertaken in a timely manner.

13. The formal process leading to this application began in March 2006 when the OEB issued a letter initiating a stakeholder consultation on the process for determining OPG's payment amounts. The OEB determined that the first step in the process would be a consultation on the methodology to determine payment amounts. The second step would be to develop filing guidelines "to provide direction to OPG in the preparation of a filing."

14. The OEB's March 21, 2006 letter contemplated a determination by the OEB on methodology in the summer of 2006 and a first draft of proposed filing guidelines for further public consultation to be issued by OEB staff in August 2006.

15. Several consultations and rounds of written submissions took place on the methodology issue and the OEB's report on the regulatory methodology it would use to determine payment amounts for OPG was released on November 30, 2006.

16. OEB staff released its first draft of the proposed filing requirements on March 30, 2007.

17. There were further stakeholder consultations on the filing guidelines and the OEB ultimately released the filing guidelines required to provide direction to OPG in the preparation of its filing, on July 27, 2007.

18. Working with the methodology report and the July 27, 2007 filing guidelines, over the four month period from August to November 2007, OPG worked to complete its application and prefiled evidence.

19. OPG sponsored two stakeholder sessions for interested parties on November 2 and 8, 2007 and then filed its application, with supporting evidence, on November 30, 2007.

20. OPG's application included, as part of the relief sought, an application for interim rates which has two components:

- (1) a request for an interim order making OPG's payment amounts interim effective April 1, 2008; and
- (2) a request for an interim rate increase representing approximately 50% of the increase being sought in the application.

## **PART II - ISSUES**

21. In Procedural Order No. 1, the OEB asked for written submissions on OPG's request for interim payment amounts focused on three issues:

- (1) can the OEB issue an order making the payment amounts prescribed by section 78.1 of the Act and by section 4 of O.Reg. 53/05 interim?

- (2) would an interim order of the OEB making the current payment amounts interim and/or increasing the payment amounts on an interim basis be considered the OEB’s “first order” within the meaning of the Act and Regulations? and,
- (3) if an interim order can be granted making the current payment amounts interim and/or increasing the payment amounts on an interim basis:
  - (a) should the OEB grant the order making the payment amounts interim; and
  - (b) should the OEB grant the order increasing the payment amounts on an interim basis and, if so, by how much?

### **PART III - ARGUMENT**

#### **The OEB Has Jurisdiction to Order Interim Payment Amounts**

22. Subsection 21(7) of the *Ontario Energy Board Act, 1998* provides:

The Board may make interim orders pending the final disposition of any matter before it.

23. Section 21(7) is broad and unrestricted. Although section 21(7) does not explicitly provide for retrospective reconsideration of all matters covered by the interim order, as will be discussed below, applicable judicial authority is clear that the power of retrospective reconsideration is a necessary incident of interim orders. Although many of the interim orders the OEB makes are procedural in nature, others are not. There has never been any question that, in exercising its authority to make orders under sections 36 (gas distribution, transmission and storage rate making power) and 78 (electricity distribution and transmission rate making power), the OEB has the power to make an order for interim rates pending final disposition of a rate hearing pending before it. The OEB made such orders recently in respect of Union Gas rates in EB-2007-0606 and Enbridge Gas Distribution rates in EB-2007-0615. In the case of Union, the OEB’s decision also provided for a rate increase, again on an interim basis. The OEB has also recently made interim rate orders in connection with electricity distribution rates (EnWin, EB-2007-0522) and the fees to be charged by the OPA (EB-2007-079) and the IESO (EB-2007-0816).

24. There can be no doubt that the OEB has the power to make interim orders and that this power includes the power to make rates interim pending final disposition of any matter pending before it.

25. The question affecting OPG, therefore, is whether there is anything in section 78.1 of the Act or O.Reg 53/05 that removes or restricts the OEB's otherwise clear jurisdiction to order interim rates.<sup>1</sup>

### **Nature and Effect of Interim Orders**

26. Before turning to these provisions and the specific questions posed by Procedural Order No. 1, however, it is necessary to review what an interim rate order is and what it means.

27. There are two leading cases on the jurisdiction of regulatory tribunals to make interim rate orders, one from the Alberta Court of Appeal and one from the Supreme Court of Canada.

28. These leading cases establish three essential characteristics of an interim order:

- (1) an interim order does not require any decision on the merits of an issue. That will be settled in the final decision. Rather, the purpose of an interim order is to provide relief from any deleterious effects caused by the length of the proceedings;
- (2) an interim order is temporary. It can be changed, retrospectively, once the final determination is made; and
- (3) an interim order assumes and requires that a final order will be made. One initiates the process and the other ends it.

29. In *Re Coseka Resources Limited*, (1981), 126 D.L.R. (2d) 705, the question was whether the Alberta Public Utilities Board exceeded its powers when, in replacing an interim order with a final order, it made new rates effective on a date subsequent to the interim rate order but nearly

---

<sup>1</sup> It should be noted that regulations depend on and are subordinate to legislative enactments. For a regulation to modify or limit an explicit power conferred by legislation would be highly unusual and would require the clearest and most explicit language. In the case of a conflict, the statute prevails.

three years prior to the date of the final order. The Court of Appeal held that the statutory power to “make an interim order” allowed the PUB, in setting a just and reasonable rate, to make an interim order and to replace it later with a final order containing different rates with effect for those final rates from any time back to the date of the interim order.

30. The principal argument against the PUB’s authority to make this order was that to prescribe an effective date for the new rates earlier than the date the final order was made would offend the principle against retroactive ratemaking. The Court of Appeal rejected this argument.

31. The Court found that:

instead of making a final order, the Board made an interim order and reserved the matter for “further direction” which it has now made. In my view, to say that an interim order may not be replaced by a final order is to attribute virtually no additional powers to the Board from s.52 [**similar to section 21(7)**] beyond those already contained in [**the enabling legislation**] to make final orders.

32. The Court concluded:

The provision for an interim order was intended to permit rates to be fixed subject to a correction to be made when the hearing is subsequently completed. It was urged during argument that section 52(2) was merely intended to enable the Board to achieve “rough justice” during the period of its operation until a final order is issued. However, the Board is required to fix just and reasonable rates not “roughly just and reasonable rates.” The words “reserved for further direction”, in my view, contemplate the changes as soon as the Board is able to determine those just and reasonable rates.

33. *Re Coseka* was considered and approved by the Supreme Court of Canada in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722. Bell had filed an application for a general rate increase. To avoid deterioration in Bell’s financial situation, Bell was granted an interim rate increase. Later, in dealing with its final order, the CRTC determined that Bell had earned excessive revenues in the interim period and ordered these excessive revenues to be credited back to customers.

34. Bell's appeal to the Federal Court of Appeal was allowed. On further appeal by the CRTC, however, the Supreme Court of Canada reversed and upheld the CRTC's jurisdiction to order that the credit from the time rates were interim be returned to customers. The Supreme Court held that the CRTC had the power to revisit the period during which interim rates were in force and that such power was implied in the power to make interim orders.

35. Bell argued that the powers of the CRTC were exclusively prospective and that if interim rates were approved on the basis that they were considered just and reasonable, they must remain so until changed, prospectively, by subsequent order.

36. The Supreme Court considered and agreed with the analysis of the Alberta Court of Appeal in *Re Coseka*. The Court held that one of the differences between interim and final orders is that interim decisions may be reviewed and modified in a retrospective manner by a final decision. The Court found that it was inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order.

37. In coming to this conclusion, the Supreme Court said:

if interim rate increases are awarded on the basis of the same criteria as those applied in the final decision, the interim decision would serve as a preliminary decision on the merits as far as the rate increase is concerned. This, however, is not the purpose of interim rate orders.

Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order *does not make any decision on the merits of an issue to be settled in a final decision* and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order. [emphasis added]



38. In response to the argument that, if the interim rates were found to be just and reasonable on the basis of the evidence filed on the motion for interim rates, they could not be supplanted except on a prospective basis by a new order, the Court said:

it would be useless to order a final hearing if the appellant was bound by the evidence filed at the interim hearing. Furthermore, the interim rate increase was granted on the basis that the length of the proceedings could cause a serious deterioration in the financial condition of the respondent. Only once such an emergency situation was found to exist did the appellant ask itself what rate increase would be just and reasonable on the basis of the available evidence and for the purpose of preventing such a financial deterioration. The inherent differences between a decision made on an interim basis and a decision made on a final basis clearly justify the power to revisit the period during which interim rates were in force.

### **1. Can the OEB Issue an Order Making Payment Amounts Interim?**

39. Having regard to the OEB's general powers and the nature of interim orders, the question becomes: is there anything about section 78.1 of the Act or O.Reg. 53/05 that restricts the otherwise clear jurisdiction of the OEB to approve interim payment amounts?

40. Section 78.1(2)(b) provides, in relevant part, that the payment amount shall be the amount determined:

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 date 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.

41. O.Reg. 53/05 specifies the amount, for the purposes of section 78.1(2), that the IESO is required to pay OPG for the output from the prescribed facilities from April 1, 2005 to:

the later of:

(i) March 31, 2008; and

(ii) the day before the effective date of the Board's first order in respect of Ontario Power Generation Inc.

42. Section 78.1 does no more than establish that the payment amounts are as prescribed by regulation until the later of March 31, 2008 and the effective date of the OEB's first order. The language of section 78.1 does not suggest that the OEB's power under section 21(7) to issue interim orders is in any way limited or abrogated, other than by the limitation that any such order could not purport to have an effective date before April 1, 2008.

43. More specifically, the language of section 78.1 does not suggest (nor does 78.1 require by necessary implication) that the OEB could not issue an order making OPG's payment amounts interim as of April 1, 2008 subject to further review and determination, with effect back to April 1, 2008, if deemed appropriate, when the final order is issued. The use of the words "effective date" is an acknowledgement that the date the OEB's first order is made may be different than the "effective date" of the OEB's first order. There is no suggestion in the Act or Regulations that the effective date of the OEB's first order must only be after, or must only be before, the date the order is issued.

44. Section 78.1(2) requires that each payment amount shall be determined "in accordance with the order of the Board then in effect," subject only to the limitation that the effective date of any order cannot be before April 1, 2008. If the order "then in effect" is an interim order which is subject to subsequent retrospective reconsideration, then any payment "in accordance with" that order would necessarily also be subject to subsequent retrospective revision if the final order approves payment amounts retrospectively which are different from the interim amount. In other words, assuming that an interim order is "then in effect," the payment amounts must be "determined" in accordance with that order at the time they are made. Because it is inherent in the nature of the interim order "then in effect" that those payment amounts are subject to retrospective adjustment once final rates are determined, any payment amount "in accordance with" the interim order would be subject to retrospective adjustment once the final order is made.

45. Section 4 of the Regulations tracks the language of section 78.1 of the Act and fixes the payment amounts until the later of March 31, 2008 and "the effective date of the Board's first order." This provision is, as discussed above, not only consistent with the making of an interim order but supports the jurisdiction of the OEB to do so. This is because the Regulations contemplates that the effective date of the OEB's first order may be different from the date it is

actually made and do not suggest that that date may only be after, not before, the date of the order. If an interim order is made declaring rates interim on April 1, 2008, the OEB may determine what payment amounts are just and reasonable in its final order and impose such just and reasonable amounts from the “effective date” of that order, April 1, 2008, or any later date that the OEB determines to be just and reasonable.

46. Further, section 6(1) of the Regulations provides that the OEB may establish “the form” and “the methodology” to be used in making an order that determines payment amounts for the purpose of section 78.1 of the Act. It is clear from the jurisdiction to establish the “form” and “methodology” to be used in making an order that the intention of the LGIC in passing the Regulations was to confer discretion on the OEB to determine what methodology is most likely to produce a just and reasonable result. It is a perfectly reasonable interpretation of section 6(1) to say that the discretion to determine the form and methodology used to set payment amounts could involve a two stage process under which an initial interim order is made, followed later by a final order. It is for the OEB to decide whether it is just and reasonable to provide relief against the deleterious effects of delays occasioned by the hearing process or to mitigate the risk of the accumulation of significant retroactive charges, by instituting interim payment amounts effective April 1, 2008.

47. In summary, the ability to fix just and reasonable payment amounts would be seriously thwarted if the OEB could only take action after holding a full and final hearing. The power to make interim orders is clearly conferred by the Act and is necessary for the protection of both customers and prescribed generators. This is a power that could only be abrogated by the clearest statutory language. There is no such language in section 78.1 or in the Regulations.

## **2. Would an Interim Order be the “First Order” for Purposes of Section 78.1 of the Act and Section 4 of the Regulations?**

48. The term “first order” is not defined in the Act or Regulations. Accordingly, the term must be interpreted purposively in accordance with the plain meaning of the words in their proper context, common sense and the object of the Act and the intention of the Legislature.

49. The modern approach to statutory interpretation has been expressed by the Supreme Court of Canada as follows:

It is now trite law that the words of an Act and regulations are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. Further, the scope of a regulation such as the provisions of the NOC Regulations is constrained by its enabling legislation, in this case section 55.2(4) of the Patent Act.

*AstraZeneca Canada Inc. v. Canada (Minister of Health)*, [2006] 2 S.C.R. 560

50. The object of the Act and the intention of the Legislature are neither complex nor obscure. The clear and sole purpose of section 78.1 of the Act and section 4 of the Regulations is to fix OPG's payment amounts for three years, until March 31, 2008, and to leave to the OEB thereafter the task of determining payment amounts that are just and reasonable, in accordance with the Regulations and the forms, methodologies and assumptions to be determined by the OEB.

51. For the reasons outlined below, it is OPG's submission that if a purposive, contextual and common sense interpretation is given to the relevant legislative provisions, little turns on the question of whether an interim order making payment amounts interim is the OEB's first order for the purposes of section 78.1 of the Act and section 4 of the Regulations. However, it is OPG's principal submission that an interim order would not constitute the OEB's "first order" under section 78.1 or the Regulations.

#### **(1) Need Not be Considered the "First Order"**

52. The argument that an OEB order making payment amounts interim is not, and need not be to have the desired effect, the OEB's first order starts with the proposition that the OEB has the jurisdiction to make interim orders and that nothing in section 78.1 of the Act or section 4 of the Regulations suggests otherwise. Whether an interim order of the OEB is the OEB's "first order" does not affect its validity or effectiveness in making payment amounts interim.

53. This is because the IESO is obliged to make payments to OPG "in accordance with the order of the OEB then in effect." If the order then in effect is an interim order, the IESO payment amounts must be made in accordance with that order and must also be interim in nature.

54. The proviso in section 78.1 invoking the language of the “effective date” of OEB’s “first order” does not relate to the payment amounts themselves but to a question of timing. Any payment the IESO makes in accordance with “an order” of the OEB must relate to a period that is on or after the later of March 31, 2008 and “the effective date of the Board’s first order.”

55. Section 78.1, therefore, does not say that for the IESO to make a payment the order must be the OEB’s “first order.” Nor does the section say that the period to which the payment relates must be after the later of March 31, 2008 and the OEB’s *first order*. What section 78.1 says is that the payment must be in accordance with *the order* of the Board then in effect and that the payment must relate to a period that is on or after the *effective date* of the OEB’s first order.

56. Thus, the language of section 78.1 (and section 4 of the Regulations) is entirely open the interpretation that an interim order is effective as an order of the OEB requiring the IESO to make payments without it being considered the OEB’s first order (because it is merely interim), provided that no order of the OEB has an effective date earlier than April 1, 2008. Under this approach, the OEB’s first order is interpreted to mean its first order determining just and reasonable payment amounts, which would be its final order in this proceeding.

57. Under the interim order OPG is seeking, IESO payments on the basis of the interim order would be “in accordance with the order of the OEB then in effect” and both the interim and final (first) order would have an effective date on or after April 1, 2008, thus meeting the two critical requirements of section 78.1.

58. The law is clear that the order that actually determines just and reasonable rates is the final order. It is a reasonable and purposive interpretation of the Act and Regulations to say that when they require the OEB to accept, for example, some value affecting the payment amounts, it is the OEB’s final order determining just and reasonable payment amounts that must reflect these requirements, not an interim order which, by definition, need not make any determinations on the merits and is subject to retrospective adjustments once final payment amounts are determined.

59. This is the interpretation of section 78.1 which OPG submits is the interpretation that is most consistent with the words of the Act and Regulations and with the underlying legislative intention and purpose.

**(2) Could Be Considered the OEB’s First Order**

60. There is also an argument that the interim order being sought, provided its effective date is not before April 1, 2008, could also be interpreted to fall within the phrase “the Board’s first order” for the purposes of section 78.1 of the Act and section 4 of the Regulations.

61. An interim order is an “order” of the OEB. Of course, Procedural Order No. 1 is also an “order” of the OEB but no purposive and contextual interpretation of the legislative scheme could reasonably conclude that Procedural Order No. 1 should be considered the OEB’s first order under section 78.1 of the Act and section 4 of the Regulations. An interim order making payment amounts interim would be, chronologically, the first order of the OEB having any effect or impact on payment amounts and, for this reason, might be considered the OEB’s “first order.”

62. However, given the temporary nature of an interim order, given that it makes no determination of just and reasonable payment amounts pending the final determination of the OEB and given that it is open to retrospective adjustment to the date of the interim order, a purposive and contextual interpretation of section 78.1 would suggest that the intention of the Legislature was not that an interim order would operate as the OEB’s “first order” but that an interim order would *determine the “effective date”* of the OEB’s first (and final) order for the purposes of the Act and the Regulations.

63. OPG’s submissions on this issue are generally aligned with those of OEB staff with one exception. At page 7 of its submission staff argues that if an interim order is not the first order, it could not determine payment amounts which are different from the prescribed amounts in section 4 of the Regulations. OPG disagrees.

64. There is nothing in section 78.1 or section 4 of the Regulations which requires that, for an order of the OEB to determine the payment amounts to be paid by the IESO, the OEB order must be the “first order.” Section 78.1 requires the IESO to make payments in accordance with the order of the OEB “then in effect.” An interim order of the OEB is the order “then in effect” as long as the order does not purport to have an effective date on or before March 31, 2008.

65. Whether it is an order making current payments interim or an order requiring different interim payment amounts is irrelevant. If the OEB has jurisdiction to order payment amounts

interim, then it also has the jurisdiction to order new interim payments pending its final order as long as these orders do not have an effective date before April 1, 2008.

**2(a). What are the Implications of the OEB Making an Interim Order Which Establishes Interim Payment Amounts?**

66. Whether an order of the OEB making payment amounts interim is considered to be the OEB's first order or not, it is OPG's submission that there are effectively no implications of making this order for the application of the Regulations which mention the OEB's first order.

67. In addressing the question of the implications of an interim order, it is important to remember what an interim order is. An interim order:

- (1) does not require any decision on the merits of issues that will be settled in a final decision;
- (2) is temporary and can be changed, with retrospective effect, once the final disposition of payment amounts is made; and
- (3) does not operate independently but requires and assumes that a final order will be made. An interim order begins the payment amount determination process by establishing a possible effective date of the final order and the final order brings the process to an end by determining just and reasonable payment amounts for the test period as determined in the final order.

68. If, as a result of applying these defining characteristics of an interim order, an order making OPG's rates interim effective April 1, 2008 is not considered to be the OEB's first order, there are clearly no implications for the application of the Regulations resulting from making an interim order.

69. It would be sufficient compliance with the requirements of those provisions of the Regulations referring to the OEB's first order that those requirements are complied with in making the OEB's final order determining just and reasonable payment amounts with an effective date on or after April 1, 2008.

70. The provisions of the Regulations which refer to the OEB's first order are sections 4, 5.1, 5.2, 6(2)4 and 6(2)5. Section 4 has already been addressed. The implications of an April 1, 2008 interim order being considered the OEB's first order are no more than to establish that the effective date for new payment amounts, as ultimately determined by the OEB, may be ordered to be April 1, 2008 and that payment amounts may be adjusted retrospectively back to or after that date.

71. Sections 5.1 and 5.2 of the Regulation are directed to OPG, not the OEB. These provisions require OPG to record certain amounts in accounts "up to" and "on and after" the effective date of the OEB's first order. There is nothing about the language of these provisions that is inconsistent with the OEB making payment amounts interim effective April 1, 2008 and later approving the disposition of the existing deferral account or considering balances in a new deferral account "effective" April 1, 2008 in its final order.

72. The underlining purpose of sections 6(2)4 and 6(2)5 seems to be to preclude hindsight review of certain historical decisions and costs that were made or that arose before the commencement of the OEB's jurisdiction to determine payment amounts for OPG's prescribed assets. The OEB's jurisdiction in these areas is restricted to a prospective review of these matters.

73. Section 6(2)4 of the Regulations provides that the OEB shall ensure recovery of certain costs incurred to refurbish the prescribed facilities. The relevance of the date of the OEB's first order to section 6(2)4 is that costs for the refurbishment of prescribed facilities that were approved by OPG's board before the OEB's first order are not subject to a prudence review whereas costs for the refurbishment of prescribed facilities that were not approved by OPG's board before the OEB's first order are subject to review for prudence.

74. However, whether the OEB's interim order or final order constitute the OEB's "first order" for purposes of determining which level of review is applicable to the recovery of refurbishment costs need not be resolved at this preliminary stage. That issue will only be a live issue in the hearing if OPG ultimately seeks recovery of any refurbishment costs that were not within budgets approved by OPG's board before April 1, 2008. OPG is not currently seeking any such costs and does not, at this point, anticipate doing so.



75. Section 6(2)5 directs the OEB, in making its first order under section 78.1, to accept certain amounts set out in OPG’s most recently audited financial statements that have been approved by OPG’s board.

76. From a contextual and purposive point of view, it makes no sense to interpret section 6(2)5 as requiring the OEB, in making an interim order, to “accept” certain amounts from OPG’s audited financial statements.

77. This is because an interim payment amount order is not, as the Supreme Court of Canada has said, a finding, or even a preliminary determination, on the merits of what a just and reasonable payment amount should be.

78. There is nothing about the interim order being sought that requires the OEB to “accept” anything. Section 6(2)5 is only sensible if it is interpreted to reflect the intention of the LGIC that, in determining the final just and reasonable payment amounts that should apply to generation from OPG’s prescribed assets, the OEB should accept as a starting point certain amounts established in OPG’s most recently audited financial statements that predate the effective date of the OEB assuming jurisdiction. These are matters that are more suited for determination at the hearing and in the final order once all the evidence, not just the evidence relating to section 6(2)5, has been presented to the OEB.

79. This conclusion is supported by the underlining purpose of section 6(2)5 which is, as noted above, to preclude “after the fact” review of decisions taken and costs incurred before the commencement of the OEB’s jurisdiction over payment amounts. OPG’s 2007 financial statements are expected to be audited and approved by the end of February, 2008. The year 2007, obviously, is a period which was subject entirely to payment amounts fixed by the Regulations and during which the OEB had no jurisdiction. It is consistent with the underlining purpose of section 6(2)5, therefore, that the relevant audited amounts from 2007 should form part of the baseline for the OEB’s first rate-setting exercise.

80. In any event, the OEB is precluded by section 78.1 of the Act and section 4 of the Regulations from making any order affecting payment amounts with an effective date before

April 1, 2008. OPG's 2007 financial statements are expected to be audited and approved by the end of February, 2008, well before the date any order of the OEB could take effect.

81. In summary, section 6(2)5 does not require the OEB to “accept” anything when making an interim order. It would be inconsistent with the nature of an interim order to do so. OPG also submits it would be wasteful of resources and contrary to common sense to interpret section 6(2)5 in a way that required the OEB, in the context of issuing an interim order, to make limited and specific factual findings related solely to the narrow issue of the audited financial statements. Nevertheless if, contrary to common sense and proper principles of statutory interpretation, section 6(2)5 is interpreted to require such an exercise, OPG will do whatever is necessary after February 2008 when the audited financial statements are available to enable the OEB to “accept” the required amounts from its 2007 audit financial statements for the purposes of making its interim order.

#### **Revenue Deficiency Deferral Account**

82. In EB-2006-0501 concerning Hydro One transmission rates, the OEB approved a revenue deficiency deferral account to record the difference between the revenue produced by the application of Hydro One's current rates and the utility's proposed revenue requirement.

83. A deferral account, the OEB held, is an accounting device which allows an entity to capture and record an aspect of operations, the final quantum and disposition of which is dependent on some future unknown event, which was, in that case, the final determination of the utility's revenue requirement.

84. OEB approval of a similar revenue deficiency deferral account for OPG would have exactly the same ultimate effect as an interim order making payment amounts interim but, by virtue of not establishing payment amounts, however, even on an interim basis, such a deferral account could not be considered the OEB's “first order” for the purposes of section 78.1 of the Act.

85. Under that scenario, there would be little doubt that the “first order” of the OEB would be the final order determining just and reasonable payment amounts. Those payment amounts could well include, however, as illustrated by the OEB's decision in the Hydro One transmission case,

disposition of accumulated balances in the revenue deficiency deferral account which would have exactly the same financial impact as retrospective adjustments of interim rates.

86. The Hydro One case is relevant in two respects. First, the very fact that exactly the same result that OPG is seeking through an interim order could be achieved by the approval of a deferral account strongly suggests that the term “first order” in section 78.1 was intended, as a matter of substance, to refer not to interlocutory and procedural measures merely intended to preserve rights pending the OEB’s final disposition but to the first order of the OEB that determines just and reasonable payment amounts, i.e., the final order.

87. Secondly, if, contrary to OPG’s submissions, the interim order being sought is considered to be the OEB’s “first order” and to trigger certain requirements under sections 5.1, 5.2, 6(2)4 and 6(2)5 of the Regulations, OPG submits that the simpler alternative of approving a revenue deficiency deferral account should be adopted.

88. This would avoid, for example, the necessity of having to “accept” certain values in OPG’s approved audited financial statements and the related procedural and evidentiary complications associated therewith. As indicated above, these are matters that are best suited for determination at the hearing in the context of all the evidence having been put before the OEB.

89. In summary, on question 2(a), it is OPG’s submission that an interim order has no particular implications for those sections (4, 5.1, 5.2, 6(2)4 and 6(2)5) of the Regulations that refer to the OEB’s “first order”.

**2(b). If an Interim Order is Not the OEB’s First Order, on What Basis Can the IESO Make Payments to OPG?**

90. As outlined in its written submissions on question 2(1) above, if an interim order is not considered to be the OEB’s first order, there is, nevertheless, a clear legislative basis for the IESO to make interim payments. This is because the IESO’s statutory obligation is to make payments in accordance with the order of the OEB then in effect, as long as the *effective date* of the first order is not before April 1, 2008. If the order of the OEB then in effect is for interim payment amounts, the IESO must make those interim payment amounts.

**3(a). Assuming Jurisdiction, Should the OEB Make Payment Amounts Interim?**

91. One of the essential purposes of interim rates is to relieve against the deleterious effects caused by the time it takes to process an application, particularly an application that is as unique and as complex as this one.

92. In OPG's submission, the case for making OPG's payment amounts interim effective April 1, 2008 could not be more compelling.

93. First, the mere act of making current payment amounts interim does not change those payment amounts. The status quo is not changed, even on an interim basis.

94. Second, making OPG's payment amounts interim is completely without prejudice to all parties' positions, at the end of the day, on whether and to what extent retrospective adjustments to those payment amounts should be made. There is, therefore, no harm to anyone, temporary or otherwise.

95. Third, making OPG's payment amounts interim not only creates no harm, it adds options that might not otherwise be available. At the very least, OPG and other interested parties who choose to do so must be permitted the opportunity to justify changes in payment amounts and recovery of those payment amounts retrospectively to the date the OEB might lawfully have issued an order determining payment amounts.

96. OPG submits that the length of time required to resolve the methodology, the form of the filing and to develop evidence, conduct stakeholder sessions, publish notice and conduct a hearing with appropriate due process, all in the context of a large, complex and previously unregulated undertaking where the company, the regulator and the stakeholders are dealing with entirely new legislation, have all created scheduling and other timing pressures not of OPG's making. In any event, the issue of whether and to what extent retrospective adjustments should be made need not, and should not, be decided now but should be left to the hearing and to final argument.

97. In summary, OPG submits that there can be no doubt that the OEB should issue an order making OPG's payment amounts interim effective April 1, 2008.

### **3(b). Should Interim Payments Be Increased and By How Much?**

98. It is clear on the law that interim payment amounts are subject to retrospective adjustment. Therefore, even an interim increase to OPG's payment amounts is completely without prejudice to all parties rights at the end of the day. If an interim increase is too little to recover the approved revenue requirement, retrospective increases will be ordered. If an interim increase is found to have exceeded the amount necessary to recover the approved revenue requirement, retrospective customer credits will be ordered.

99. The central issue is whether it is just and reasonable to take action to mitigate the risk of accumulations of significant retroactive charges as a result of delays occasioned by the hearing process in the implementation of final payment amounts.

100. OPG's current payment amounts were fixed by the government after obtaining certain information from OPG and consulting with the Ministries of Energy and Finance. The current amounts fixed by regulation were implemented in 2005, based on 2004 data. Unlike a case where there is a history of annual cost of service rate hearings and findings by the OEB that rates were just and reasonable, there can be, in this case, no presumption that current payment amounts are just and reasonable.

101. Net of tax loss mitigation, OPG is seeking recovery of a revenue deficiency of \$760.4M. (See Ex. K1-1-3, Table 1, line 6). While the evidence supporting this deficiency has not been tested in the hearing, it is at least *prima facie* evidence of a need for an increase in payment amounts.

102. OPG is not seeking an interim increase to cover the entire amount of its forecast revenue deficiency. Rather, OPG is seeking an interim increase in its payment amounts to mitigate the risk of significant accumulations of retroactive charges - an increase, therefore, based on only 50% of the forecast deficiency, \$380.2M.

103. The two most significant drivers of OPG's forecast deficiency are its application for a commercial rate of return on equity and the revenue requirement impact of OPG's nuclear liabilities.

104. The ROE assumed for the purposes of the LGIC-ordered current payment amounts was 5% with an assumed capital structure of 55% debt and 45% equity. OPG's cost of capital evidence supports a required return of 10.5% with a capital structure of 42.5% debt and 57.5% equity. It is not unreasonable in these circumstances to anticipate the possibility, if not the likelihood, of an increase in OPG's cost of equity.

105. By way of comparison, the commercial return on equity recently awarded to Hydro One Networks in its transmission rate application was 8.35%, with a capital structure of 40% equity. Even though it is almost inconceivable that any commercial return/equity level for OPG would be at or below these levels (given the relative risks associated with transmission versus electricity generation), if one were to use this conservative ROE and capital structure as a proxy for the purposes of an interim payment amount, the deficiency relative to the current cost of capital would be \$244M, grossed-up for taxes. It is not unreasonable in these circumstances to anticipate the possibility, if not the likelihood, of an increase in OPG's cost of equity.

106. OPG's nuclear liabilities are dealt with in the Regulations. There are deferral accounts covering periods both before and after the OEB's order setting payment amounts. Section 6(2)7 requires the OEB to ensure recovery of the balances in these accounts. Section 6(2)8 also requires the OEB to ensure that OPG recovers revenue requirement impacts arising from its current approved reference plan governing the cost of nuclear liabilities. The revenue requirement impact of the recovery of the nuclear liabilities deferral account alone for the period before the OEB's order is \$85.3M. This amount does not even consider the allowance in section 6(2)8 for recovery of these costs during the test period.

107. There are also other costs in respect of which the Regulations ensure recovery. OPG's test period recovery amounts for these costs include:

- (1) the variance account established under section 5(1) of O. Reg. 53/05 (\$8.9M);
- (2) Pickering A return to service costs (\$26.5M); and
- (3) costs associated with refurbishment or adding operating capacity (\$32.3M).

The total test period recovery amount of these costs as outlined in OPG's evidence is \$67.7M.

108. The accumulated total of these three elements is \$397M as illustrated in Table 1. This amount is greater than the \$380.2M (representing 50% of the forecast revenue deficiency) which OPG is seeking by way of interim increase.

Table 1

No	Description	Evidence Reference	Total
1	Cost of capital	C1-2-1 Tables 2 and 3 <sup>2</sup>	244.0
2	Nuclear liability deferral account	J1-2-1 Table 3, line 2	85.3
3	Recovery of specified deferral and variance account balances (\$M)	J1-2-1 Table 1, lines 1,2,7,9 & 10	67.7
4	Total (\$M)		397.0

109. In the face of this evidence and these regulatory constraints, there is clearly a significant likelihood of increases in payment amounts and, therefore, of significant accumulations of retroactive charges if no interim increase is awarded. Based on the \$760.4M revenue deficiency net of tax loss mitigation and the 21 month test period, the approximate amount of accumulated charges resulting from OPG's forecast deficiency if no interim increase is approved is \$36.2M per month.

110. OPG's request for an interim increase in its payment amounts, based on 50% of its forecast revenue deficiency, produces interim rates of:

---

<sup>2</sup> The cost of capital impact reflects the difference between the cost of capital for two different capital structures: (1) 45% common equity at 5% ROE, which was the basis for current payment amounts; and (2) 40% common equity at 8.35% ROE, the capital structure for Hydro One Networks transmission. The ROE impact is calculated by applying these equity components and ROEs to OPG's test period rate base. In addition to the impact on ROE, moving to these capital structures increases the debt component. The calculation costs the additional debt at the cost of other long term debt as per C1-2-1 Tables 2 and 3. The calculation is adjusted for the 21 month test period by using 75% of the 2008 values. The return on equity has been grossed-up for tax purposes using the income tax rates in Exhibit F3-2-1 table 7, line 31.

\$35.35/MWh for hydroelectric; and

\$53.00/MWh for nuclear.

111. These interim increases would have a customer impact of only \$1.40 per month for a typical residential customer.

#### **PART IV - ORDER REQUESTED**

Based on the foregoing, OPG respectfully requests from the OEB:

1. an interim order making OPG's payment amounts interim effective April 1, 2008;  
and
2. an interim order increasing OPG's payment amounts on an interim basis to:
  - (a) \$35.35/MWh for hydroelectric production; and
  - (b) \$53.00/MWh for nuclear production.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

ORIGINAL SIGNED BY Michael A. Penny

---

Michael A. Penny  
Of counsel for the Applicant, Ontario  
Power Generation Inc.

ORIGINAL SIGNED BY Josephina Erzetic

---

Josephina Erzetic  
Assistant General Counsel, Ontario Power  
Generation Inc.