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BY E-MAIL

January 31, 2014

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: Ontario Power Generation Inc.
Board File No. EB-2013-0321

Please find attached Board staff's reply submission with respect to the issues list for Ontario Power Generation Inc.'s 2014-2015 payment amounts proceeding.

Yours truly,

Original signed by

Violet Binette
Project Advisor, Applications & Regulatory Audit

Attach

ONTARIO POWER GENERATION INC.
2014-2015 PAYMENT AMOUNTS
ISSUES LIST

EB-2013-0321

Board Staff Reply Submission

January 31, 2014

Introduction

Ontario Power Generation Inc. ("OPG") filed an application, dated September 27, 2013, with the Ontario Energy Board under section 78.1 of the *Ontario Energy Board Act,1998,* S.O. 1998, c.15 (Schedule B) (the "Act") seeking approval for increases in payment amounts for the output of certain of its generation facilities, to be effective January 1, 2014.

On December 20, 2013, the Board issued Procedural Order No. 1 which included a draft issues list. OPG filed a draft issues list with its application at Exhibit A1, Tab 10, Schedule 1. The Board did not delete any issues, but added some potential issues, generally based on the approved issues list of the previous cost of service proceeding (EB-2010-0008). The Board made provision for submissions on the draft issues list, and made provision for reply submissions. Board staff only has a reply submission on the submissions of the Haudenosaunee Development Institute and OPG.

Haudenosaunee Development Institute

Background

The Haudenosaunee Development Institute ("HDI") filed a submission on the issues list on January 24, 2014. The submission raised a number of matters related to the Crown's duty to consult with Aboriginal peoples. HDI asked the Board to add 10 new separate issues to the issues list, and to modify another 8 issues that were part of the original draft. Generally speaking the proposed issues addressed the following topics: the Board's authority to consider the duty to consult, the role of the Board and OPG with respect to the duty to consult, the extent to which the duty to consult has been discharged, potential remedial steps if the duty to consult has not been discharged, a potential conflict of interest between the Board and OPG, and potential payment amount implications relating to costs OPG may incur for infringements or impairments to Haudenosaunee rights.

As permitted by Procedural Order No. 1, Board staff offers the following reply to the submissions of HDI. Board staff has not had the opportunity to see any reply that OPG (or other parties) may file.

Legal framework

The Crown has a duty to consult with Aboriginal groups prior to taking any action which may adversely impact an Aboriginal or treaty right or their interest in land. This duty exists even where a claim has been asserted but not proven. In some cases, the duty to consult may lead to a duty to accommodate. The precise extent of the duty to consult and, possibly, accommodate will vary depending on the facts of each situation.

The precise role of regulatory tribunals such as the Board vis-à-vis the duty to consult has been clarified to some extent by relatively recent court decisions. Perhaps most instructive in this regard is the Supreme Court's decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* ("Rio Tinto"). The facts bear some resemblance to the current case.

Rio Tinto involved an appeal of a British Columbia Utilities Commission ("BCUC") decision by the Carrier Sekani Tribal Council ("CSTC"). The BCUC is a provincial energy regulator similar to the Board. The BCUC had approved an application by B.C. Hydro (a Crown corporation) for approval of an energy purchase agreement that allowed it to purchase electricity from a hydro-electric generation facility in the CSTC's traditional lands. The CSTC maintained that the duty to consult had not been met with respect to the approval, citing a number of adverse impacts that had been caused by the hydro-electric facility (which, when constructed many years before, had reversed the course of a number of waterways). The BCUC held that the duty to consult was not triggered because the application before it did not lead to any new impacts to Aboriginal or treaty rights, as the energy purchase agreement essentially just maintained the status quo and would not involve any operational changes at the hydro-electric facility.

In its decision dismissing the CSTC appeal, the Supreme Court made a number of findings which are relevant to the current proceeding before the Board. It held that if a tribunal has the power to consider questions of law (which the Board does pursuant to section 19(1) of the Act), then it will generally have the power to consider Constitutional issues including the duty to consult. The Court further held that in most cases a tribunal will not be responsible for conducting the actual consultation itself:

> A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of

> claims, the tribunal must be expressly or impliedly authorized to do so. **The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law.** Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with consultation.[1] [Emphasis added]

The Court was also clear that a tribunal's authority to consider duty to consult issues extend only to the matters that are actually before it in a proceeding:

> [CSTC] argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. […] I cannot accept this view of the duty to consult. Haida Nation negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue – not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration. [Emphasis in original][2]

The Court recognized that there would be cases in which a potential infringement of Aboriginal or treaty rights occurred with respect to matters that were outside the tribunal's statutory oversight. For these matters, the Court stated that the appropriate remedy for an aggrieved Aboriginal group was not through the tribunal, but through the courts:

[1] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] S.C.J. No. 43, para. 60. See also para. 74.
[2] Rio Tinto, paras. 52-53.

> As the Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the Legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts.[3]

HDI's Proposed Issues: General

With this as background, Board staff offer the following thoughts on HDI's proposed issues.

The purpose of this proceeding is for the Board to set payment amounts for OPG. The Board's authority to set payment amounts for OPG (which is a prescribed generator) arises from section 78.1 of the Act:

> **78.1** (1) The IESO shall make payments to a generator prescribed by the regulations, or to the OPA on behalf of a generator prescribed by the regulations, with respect to output that is generated by a unit at a generation facility prescribed by the regulations.
>
> […]
>
> (4) 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.
>
> […]
>
> (5) The Board may fix such other payment amounts as it finds to be just and reasonable,
>
> (a) on an application for an order under this section, if the Board is not satisfied that the amount applied for is just and reasonable; or
> (b) at any other time, if the Board is not satisfied that the current payment amount is just and reasonable.

[3] Rio Tinto, para. 75.

The Board's role in this proceeding therefore is to set payment amounts: in effect the "rate" that OPG will be permitted to recover from electricity consumers in Ontario. OPG produces a forecast revenue requirement, which comprises their costs of doing business in the test period (plus certain deferral and variance account dispositions). The Board assesses these costs for reasonableness, and then divides them by the production forecast to arrive at a unit payment amount for each generation type.

Although OPG conducts innumerable activities which incur the costs that form the revenue requirement, the Board does not actually approve these activities. It approves payment amounts. A good example is the Niagara Tunnel Project ("NTP"). OPG commenced construction of the NTP in 2006 and completed it in 2013. At no point did OPG seek the Board's approval to build the NTP, and indeed no Board approval was required. Put simply, OPG did not need the Board's permission to build the NTP, and the Board is not an approval authority for that project.

What OPG does require from the Board in the current case is a payment order to allow it to start to recover the capital and operating costs of the NTP. However, since the Board had no role in approving the construction of the NTP, any impacts it may have had on Aboriginal or treaty rights are outside the scope of the Board's review.

HDI's Proposed Issues: Specific Requested Issues

It is not clear to Board staff from HDI's submission that there are in fact any duty to consult issues that lie within the scope of the application before the Board.

Board staff accepts that the Board has the authority (and the requirement) to consider whether the Crown has discharged the duty to consult for matters that arise within the Board's jurisdiction. Rio Tinto appears to confirm that a Crown owned business (such as OPG) can both trigger and discharge the duty to consult. If OPG is seeking approvals from the Board for conduct that triggers the duty to consult, Board staff submits that it is the Board's responsibility to ensure that the duty is discharged.

It is not clear to Board staff from HDI's submission, however, that there actually are any issues that are within the scope of the application before the Board that trigger the duty to consult. As noted above, the Board approves payment amounts, and generally speaking not OPG's actual activities. HDI has provided few details about the specific OPG conduct that HDI believes may have triggered the duty to consult. HDI references

OPG's "operations", the NTP, the proposed nuclear refurbishment, and the Government of Ontario's Long Term Energy Plan ("LTEP"). OPG does not require Board approval for the NTP or its proposed nuclear refurbishment, and it is the Province of Ontario, not the Board, that approved the LTEP. Even to the extent that OPG requires payment amounts to fund its ongoing "operations", OPG does not appear to be contemplating any significant changes to the way in which it operates its existing facilities. In any event, the "operations" themselves are not approved by the Board.

In short, HDI's submission does not in Board staff's view raise any matters that fall within the scope of the Board's approval authority in this proceeding that could trigger the duty to consult.

Board staff accepts however that it is conceivable that HDI (or another party) could point to matters for which OPG is seeking Board approval that could trigger the duty to consult, though Board staff is not currently aware of what those matters might be. In that light, Board staff would not be opposed to the addition of the following issue:

> To the extent that any of the approvals requested by OPG in this proceeding trigger the duty to consult, has that duty been sufficiently discharged?

Other issues raised by HDI

HDI proposed issues 8 and 9 raise the possibility of a real or perceived conflict of interest or a "structural bias" resulting from the fact that Board members are appointed by the Province of Ontario, which is also the sole shareholder of OPG. In Board staff's view there is no need to add this issue to the issues list. The Board regulates a number of Crown owned businesses, such as OPG and Hydro One Networks Inc. There has never been any suggestion that this amounts to a conflict of interest; indeed if it were a conflict of interest it is not clear how OPG could be regulated at all. Board staff further notes that in Rio Tinto the Supreme Court did not appear to take any issue with the fact that the BCUC - whose members are appointed by the Province of British Columbia - were charged with considering the consultation efforts of B.C. Hydro, which is a Crown Corporation.

HDI also argued in favour of adding a number of issues concerning whether or not OPG had adequately considered the costs it might incur (and the impact these costs would have on payment amounts) in addressing any infringements or impairments to HDI's

treaty rights: see proposed issue 10, and the proposed amendments to issues 3.1, 4.1, 4.2, 4.5, and 8.2. In Board staff's view, this is not a duty to consult issue *per se*, but rather an issue relating to the appropriateness of the proposed payment amounts. Board staff does not object to HDI asking questions and making submissions on these issues; however Board staff does not believe that adding these specific issues is necessary. These issues are already subsumed within the existing draft issues list: for example issues 4.2, 4.5, 6.1 and 6.3. If a party wishes to argue that OPG has not properly forecast all of the costs arising from its regulated activities, it will be free to make such an argument.

Ontario Power Generation

General Principles

In its submission on the draft issues list, OPG submitted that any matters decided in the last payment amounts hearing should not be reheard absent material changes or significant new information. While Board staff agrees that parties would likely be guided by the Board's prior findings on this matter when engaging in discovery and argument, Board staff observes that nowhere in Procedural Order No. 1 did the Board establish a definition of the issues list as only the issues that are expected to be contentious or that represent deviations from past Board findings or from prior OPG approaches. In staff's view, the issues list represents a comprehensive list of all the key determinations that the Panel must make in approving a final revenue requirement and production forecasts that will underpin the new payment amounts.

Board staff also observes that by excluding matters that are unchanged from the last application, OPG is prejudging the outcome of the Board's findings. While for most issues it is unlikely that a different approach to any of these matters is likely to surface, there is no guarantee of this, and indeed, there is no way that parties who have not had the opportunity to review the current application in its entirety, could possibly come to this conclusion at this stage of the proceeding. In staff's view, the issues that fall into this category are ones that could be identified as secondary issues. Indeed, this is one of the key reasons why the Board established the prioritization process in the first place; so that matters that are not contentious can be disposed in an efficient manner, and would not need to take up valuable hearing time. But to exclude them entirely from the issues list is in Board's staff view inappropriate, as it would defeat the purpose of the prioritization process and would prejudge the Board's findings on these matters.

Specific Issues

OPG submitted that issues 9.1 to 9.4 should be limited to only the four accounts for which OPG has sought clearance. This approach is inconsistent with issue 9.6 which questions OPG's proposal to not clear deferral and variance account balances in this proceeding other than these four accounts. Since this is a full cost of service proceeding, parties should have the opportunity, if they wish to do so, to either inquire about the reasons these other accounts are not being cleared in this proceeding or to request their disposition. In addition, parties should have the opportunity to assess elements of the revenue requirement in conjunction with any related deferral and variance account, regardless of whether or not a particular account is being brought forward for disposition. Accordingly, Board staff sees no adverse impacts in retaining the draft wording for issues 9.1 to 9.4.

All of which is respectfully submitted