

February 11, 2014

**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 SURREPLY OF THE APPLICANT,  
ONTARIO POWER GENERATION INC.  
RE: DRAFT ISSUES LIST**

**OPG SURREPLY TO SEC:**

OPG has reviewed SEC's submissions and makes the following submissions in surreply:

1. OPG disagrees with the need to include discussion of all deferral and variance account balances as part of issues 9.1 – 9.4 for the reasons set out in OPG's initial submission, dated January 24, 2014 (pages 5-6).
2. OPG disagrees with the inclusion of the issue "[i]s the overall increase in 2014 and 2015 revenue requirement reasonable given the overall bill impact on customers" for reasons set out in OPG's reply submission, dated January 31, 2014 (page 14).

**OPG SURREPLY TO BOARD STAFF SUBMISSIONS:**

OPG has reviewed Board Staff's submissions and makes the following submissions in surreply:

1. OPG disagrees with the need to include discussion of all deferral and variance account balances as part of issues 9.1 – 9.4 for the reasons set out in OPG's initial submission, dated January 24, 2014 (pages 5-6).
2. In regard to Board Staff's reply to HDI, OPG agrees with the following legal propositions:
  - A tribunal has only those powers that are expressly or implicitly conferred on it by statute.
  - 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.

- A tribunal's authority to consider duty to consult issues extends only to the matters that are actually before it in a proceeding.
- 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.
- Although OPG conducts innumerable activities which incur the costs that form the revenue requirement, the Board approves payment amounts and does not actually approve these activities.

Notwithstanding that Board Staff properly relied on the foregoing propositions, and submitted that HDI did not raise any issues that "fall within the scope of the Board's approval authority in this proceeding that could trigger the duty to consult", Board Staff proposed 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 disclosed?"

OPG submits that the issue proposed by Board Staff is inappropriate and should not be placed on the issues list because (i) the OEB lacks the jurisdiction to consider the matter as there is no nexus between the approval sought and the activities that could possibly give rise to alleged infringement and impairment of treaty rights and interests and (ii) the HDI did not raise any impacts on Aboriginal or treaty rights which flow from the decision before the Board to trigger the duty to consult in the first instance.

Under section 78.1 of the *Ontario Energy Board Act*, the Board's only authority is to approve the payment amounts. Accordingly, the approvals sought by OPG relate only to the approval of the payment amounts for 2014-2015 test years.

Section 78.1 does not provide the OEB with the authority to approve OPG's business activities or to prohibit them. The OEB can consider the cost consequences of such activities on the basis of prudence and reasonableness to establish the payment amounts. It can prescribe certain cost treatments in respect of these activities and decide whether those costs of certain activities can be recovered in the payment amounts. Given the OEB's determination on cost recovery, it is up to OPG to enhance or to stop the activities in question, but that choice remains OPG's, or that of its shareholder, and is not subject to the OEB's approval or rejection. As succinctly put by the OEB, there must be a "clear nexus between the matter before the OEB

(i.e. the application the OEB is being asked to approve) and the circumstances giving rise to the (possible) duty to consult.” (*ACH Limited Partnership Re; EB-2011-0065, EB-2011-0068*). However, notwithstanding how or on what basis the Board establishes the payment amounts, the activities allegedly impacting or infringing Aboriginal treaty rights or interests are not under the Board’s jurisdiction. Regulatory approvals for these activities exist with other regulatory regimes. In establishing OPG’s payment amounts there is no nexus between the approval of the payment amounts and the approval of the activities that could give rise to an alleged infringement or impact on treaty rights or interests.

On this basis, the issue is not appropriate for the issues list. Given that OPG’s approvals only relate to the cost consequences of its many activities and not the approval to carry out those activities and the approval sought exists independent of the activity that could give rise to a duty to consult, the inquiry is without meaning and not within the Board’s jurisdiction. In effect, in the absence of a nexus to the approval sought, the issue leads to: (i) an inquiry of OPG’s activities, which the Board has no jurisdiction to approve or reject; (ii) an evaluation of the alleged infringement or impacts on treaty rights or interests, which the OEB also does not have jurisdiction to evaluate; and (iii) a consideration of whether the duty to consult has been triggered, which the Board does not have the jurisdiction to determine.

However, it is important to note that as regulatory authority for OPG’s activities exists under other regimes, HDI is not without a remedy to pursue alleged infringements or impairments within those regimes or the courts. A decision by the OEB finding the issue to be inappropriate does not preclude remedial treatment for any rights which HDI may have.

All of which is respectfully submitted

*[Original signed by]*

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Charles Keizer  
Counsel for the Applicant,  
Ontario Power Generation Inc.