

February 13, 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 SUBMISSION OF THE APPLICANT,
ONTARIO POWER GENERATION INC.
RE: DRAFT ISSUES LIST**

(RESPONSE TO SURREPLIES)

OPG RESPONSE TO WATERKEEPER SURREPLY:

OPG disagrees with the need to include a separate issue to consider Darlington Refurbishment Project costs that arise as a result of Environmental Assessment Proceedings. As set out at page 15 of OPG's Reply Submission (dated January 31):

...[i]ssues 4.8 and 6.7 provide for the review of test period Darlington Refurbishment capital and operating costs, respectively. Given the existence of these issues, the proposed issue is unnecessary. Moreover, as set out above in the discussions on Issue 4.8, matters related to compliance with the Federal Environmental Assessment are exclusively within the jurisdiction of the Federal Government and are not appropriately considered in this proceeding."

Therefore, in OPG's submission, a review of OPG's costs related to the Darlington Refurbishment project is adequately covered on the list already. This is true whether those costs are incurred for reasons of environmental compliance or for some other reason. There is no need to parse out additional cost-related issues. In summary, the costs themselves are reasonable to review, and already covered by the existing issue, but an assessment of whether

the actions taken appropriately discharge responsibilities that arise pursuant to federal environmental proceedings is not.

OPG RESPONSE TO ENERGY PROBE SURREPLY:

OPG disagrees with the need to expand the scope of this issue for the reasons set out in OPG's reply submission, dated January 31, 2014 (pages 5-6). Further, exhibits filed by OPG in its application include discussion of the costs of long-term and short-term debt. The information provided in those exhibits contributes to a full understanding of those costs. OPG disagrees with Energy Probe's assertion that OPG has raised issues that are beyond the cost of its debt.

OPG RESPONSE TO ENVIRONMENTAL DEFENCE SURREPLY:

OPG continues to disagree with Environmental Defence in regards to issues associated with the Darlington Refurbishment Project. As set out in OPG's January 31, 2014 reply submission (at pages 7-8), "[a] consideration of whether the Darlington Refurbishment Project is the lowest cost alternative goes to need and is not an appropriate issue." This proceeding is not the forum to consider need. The consideration of whether the costs are prudently incurred is the subject of this proceeding.

Similarly, in regards to Pickering Continued Operations, Environmental Defence attempts to blur the line between the OEB's assessment of costs in determining just and reasonable payment amounts, and a request to assess Pickering's cost-effectiveness as compared to other generation options. While the former is a reasonable and required action of the Board in the execution of its duties, the latter, which relates to the preferred mix of generation to meet Ontario's electricity needs, is addressed in the LTEP. In OPG's submission, expansion of issues to deal with LTEP considerations should be uniformly rejected by the Board.

OPG RESPONSE TO HDI SURREPLY:

The submissions made by HDI in its surreply should be rejected by the OEB. HDI asks the OEB to pursue a process of inquiry and a remedy that is clearly outside the OEB's jurisdiction.

Notwithstanding the issues that HDI has proposed previously in its original submission, HDI has made explicit in its surreply what it ultimately seeks to achieve from its intervention in this proceeding. Based on its surreply, HDI seeks the following:

- i. the consideration of the question of whether the OEB has jurisdiction **to consider whether OPG and/or the Crown have breached fiduciary duties** allegedly owed to the Haudenosaunee **arising from alleged infringements and impairments to treaty rights** occasioned by OPG and/or Crown conduct in bringing the subject application; and
- ii. if the OEB concludes it has jurisdiction, a determination of whether OPG has breached a fiduciary duty in respect of Haudenosaunee arising from alleged infringements and impairments to treaty rights occasioned by OPG operations and conduct in bringing the application.

In question (i), HDI makes reference to “OPG and/or Crown conduct in bringing the subject application”. In question (ii) there is reference as well to “OPG operations” but no reference to the Crown. HDI uses OPG and the Crown interchangeably. However, this is not correct and it is key to note that OPG, in law, is explicitly not the Crown and is distinct from the Crown. In particular, section 53.1(2) of the *Electricity Act* provides that OPG is not an “agent of Her Majesty for any purpose, despite the *Crown Agency Act*”. OPG is a private actor and has no fiduciary duty to the Haudenosaunee. As such, OPG’s conduct, like that of any other applicant, is irrelevant to an alleged fiduciary duty and the OEB has no jurisdiction to consider the questions posed by HDI. Furthermore, with respect to the actions of the Crown, the Board does not regulate the Crown’s conduct and it is beyond the OEB’s jurisdiction.

HDI has made a distinction between the duty to consult and a fiduciary duty and has indicated that an alleged fiduciary duty exists. A fiduciary duty is akin to a trust, wherein a person having the duty deals with the property of another. It does not exist in all relationship aspects between the Crown and an Aboriginal community. It does not arise solely on the basis that a treaty right exists as proposed by HDI. Its existence is factually dependent. Both questions effectively deal with the same aspect and in order for the OEB to pursue such an inquiry it would have to have the statutory authority to: (i) assess the rights of Haudenosaunee under the 1701 Treaty of Albany; (ii) determine if there was a fiduciary duty owed by OPG; (iii) assess the details of OPG’s operations and (iv) hear evidence on the facts as to whether a fiduciary duty has been breached. This would involve an extensive factual inquiry involving historical analysis and details of OPG operational activities in conjunction with actions by the Crown which the OEB has no jurisdiction to approve or disallow.

As a remedy, HDI is requesting that the “amount applied for” must include an amount that is reflective of the treaty rights and interests of Haudenosaunee and that that amount be negotiated as between OPG, the Crown and the Haudenosaunee through a mediated process with the OEB as mediator.

Under section 78.1 the OEB is obligated to establish payment amounts that are just and reasonable. In considering the cost consequences of OPG activities on the basis of reasonableness and prudence, the OEB establishes payment amounts of general application payable by all rate payers and remitted to OPG by the Independent Electricity System Operator. This is not what HDI appears to be seeking. In effect, the HDI is asking the OEB to undertake a factual inquiry related to its treaty rights and to assess damages against OPG for an alleged breach of fiduciary duty. This is the jurisdiction of a court and not the OEB. Other than an assessment of costs at the end of the proceeding, there is no statutory authority for the OEB to assess an amount to be paid by the applicant to a particular party. Such a payment is not a form of a rate as contemplated by section 78.1 of the OEB Act. In this regard, as noted in OPG’s surreply, a finding by the OEB that it has no jurisdiction does not preclude Haudenosaunee from seeking remedy in another forum.

HDI indicates that “the rate cannot be reasonable if it does not consider that a forecast revenue requirement must consider, ..., the costs associated with treaty impairment.” This is a matter beyond the OEB’s jurisdiction. Any such alleged costs or contingent liabilities must be evaluated by OPG and a determination made as to whether they are reasonable costs to forecast for the test period. Neither OPG nor the Crown is aware of any pending claim for damages for infringement and impairment of rights arising from OPG’s operations, but for the HDI’s submissions in this application. OPG is not forecasting any costs related to any Haudenosaunee claims for the test period and it would be inappropriate to do so where there is no reasonable prospect that the costs would be incurred in the test period. An amount imputed by the OEB would not result in just and reasonable rates as there is no cost basis to establish an amount and the OEB has no authority to require OPG make a payment directly to Haudenosaunee.

As in the case of the duty to consult, there must be a nexus between the approval sought under section 78.1 of the OEB Act and the circumstances allegedly giving rise to the infringement of treaty rights and a fiduciary breach. For the same reasons as set out in OPG’s surreply no such nexus exists in the circumstance expressed by HDI in its surreply and as such the OEB has no jurisdiction to pursue the matter as requested by HDI.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

[Original signed by]

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