Ontario Energy Board

P.O. Box 2319
2300 Yonge Street
27th Floor
Toronto ON M4P 1E4
Telephone: 416- 481-1967
Facsimile: 416- 440-7656
Toll free: 1-888-632-6273

Commission de l'énergie de l'Ontario

C.P. 2319
2300, rue Yonge
27e étage
Toronto ON M4P 1E4
Téléphone: 416- 481-1967
Télécopieur: 416- 440-7656
Numéro sans frais: 1-888-632-6273

BY E-MAIL

February 20, 2015

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: Ontario Power Generation Inc.
Board File No. EB-2014-0369

Please find attached the Board staff submission with respect to Ontario Power Generation Inc.'s notice of motion to review and vary the EB-2013-0321 Decision with Reasons.

Yours truly,

Original signed by

Violet Binette
Project Advisor, Applications

Attach

ONTARIO POWER GENERATION INC.
MOTION TO REVIEW AND VARY
DECISION WITH REASONS (EB-2013-0321)
EB-2014-0369

Board Staff Submission

February 20, 2015

A. 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, seeking approval for increases in payment amounts for the output of its nuclear generating facilities and previously regulated hydroelectric generating facilities, to be effective January 1, 2014. The application also sought approval for payment amounts for newly regulated hydroelectric generating facilities, to be effective July 1, 2014. The Board assigned the application file number EB-2013-0321. The Board issued its Decision with Reasons (Decision) on November 20, 2014.

On December 10, 2014, OPG filed a Notice of Motion to review and vary the Decision in relation to certain findings; in particular with regard to the Board's disallowance of the addition to rate base of $88.0M for the Niagara Tunnel Project and the Board's direction to reduce the 2014 income tax provision to account for the carry-forward of a regulatory tax loss in 2013. OPG seeks orders varying the findings, amending the payment amounts ordered in EB-2013-0321, and establishing a deferral account to record the impact of the Board's decision in this motion from November 1, 2014 to the effective date of the amended payment amounts. The Board has assigned this motion file number EB-2014-0369.

The Notice of Hearing and Procedural Order No. 1, issued on January 13, 2015, made provision for submissions on the "threshold question" and the merits of the motions.

B. The threshold and the purpose of a motion to review

Rule 43.01 (formerly Rule 45.01) of the Board's Rules of Practice and Procedure states:

> In respect of a motion brought under Rule 40.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Rule 42.01(a) provides the grounds upon which a motion may be raised with the Board:

> Every notice of a motion made under Rule 40.01, in addition to the requirements under Rule 8.02, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;
(ii) change in circumstances;
(iii) new facts that have arisen;
(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

OPG states that the errors of fact identified by OPG in the notice of motion and the OPG submission on the motion filed on January 26, 2015, satisfy the threshold test in Rule 43.01.

The Board's most thorough analysis of Rule 43.01 came from a decision on several motions filed in the *Natural Gas Electricity Interface Review Decision* (NGEIR Review Decision)[1].

> Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.
>
> With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.
>
> In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.
>
> The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

[1] Motions to Review the *Natural Gas Electricity Interface Review Decision*, EB-2006-0322/0338/0340, May 22, 2007, page 18

> In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

In EB-2007-0797, the Board further commented: "in the case of an applicant-driven motion to review, it is not sufficient to simply reargue the case, or to argue that a different outcome might have been preferred. The moving party must show that the decision at issue is incorrect in an identifiable, relevant and material way."[2] In a 2005 decision, the Board stated: "This [i.e. the motion to review] is not a hearing of the application *de novo*. In considering a motion to vary, the Board considers whether new evidence has been presented by the Applicant, or whether the original panel made an error in law or principle so as to justify the reversal of the original Decision."[3]

The purpose of a motion to review, therefore, is not simply to re-hear the original issue before the Board. Most issues before the Board require a significant exercise of judgment on behalf of the Board panel, and lend themselves to a number of possible outcomes. The purpose of a motion to review is not for a party to simply re-argue the same case in front of a different panel in the hope of achieving a different outcome.

Similarly, the task of a reviewing panel is not to consider the matter afresh – a motion to review is not a hearing *de novo*. The role of the reviewing panel is not to consider the evidence and decide what outcome it would have arrived at. A reviewing panel should instead look at the matter and determine if the original panel made an identifiable and material error of law or fact. If the answer to that question is "no", then the motion must fail. It does not matter if the reviewing panel might have come to a different conclusion on the evidence – if the original panel did not make an identifiable error then the reviewing panel should not consider the matter further.

In addition to being in keeping with the legislation, rules and Board precedent, there are solid policy reasons behind this approach. Most issues before the Board could result in a range of decisions – all of which would meet the broad test of being just and reasonable. A party should not be permitted two opportunities to argue the same case.

---

[2] Decision and Order, Hydro One and Great Lakes Power, EB-2007-0797, page 8
[3] Decision with Reasons, Natural Resource Gas Limited, RP-2004-0167/EB-2005-0188.

Absent an identifiable error, parties should have confidence that a Board decision is final. A motion to review also consumes significant Board and party resources, and regulatory efficiency demands that these motions only be permitted where a clear error has been made. If parties could simply re-argue any issue that they “lost” in the original proceeding before the Board, there would be little incentive for them to not file a motion to review. In this light Board staff observes that virtually every argument made by OPG on this motion was already made in the original proceeding.

The following is Board staff’s submission on the threshold issue and merits of the motion.

C. The Niagara Tunnel Project

OPG sought to add $1,452.6M to rate base in relation to the Niagara Tunnel Project in the EB-2013-0321 proceeding. Of this, the Board disallowed the addition of $88.0M. The disallowance was made up of $28.0M related to a settlement of a claim by the tunnel contractor, Strabag Inc. (the Pre-December 2008 Disallowance), and $60.0M related to incentives paid to Strabag to complete the Project after December 2008 (the Amended Design Build Agreement Disallowance).

<u>The Pre-December 2008 Disallowance</u>

In August 2005, OPG and Strabag entered into a Design Build Agreement. The Design Build Agreement was essentially the master contract between OPG and Strabag for the work Strabag would do on the Niagara Tunnel Project. The agreement set out the terms governing Strabag’s construction of the project and OPG’s requirements and payment for the work, and set a final completion date for the project of December 2009. Under the Design Build Agreement Strabag was to be paid $622.6M. The total budget approved by OPG Board of Directors for the Niagara Tunnel Project at that time was $985M.

One of the documents forming part of the agreement was the Geotechnical Baseline Report. The first Geotechnical Baseline Report was prepared by OPG. One of its chief purposes was to describe the subsurface conditions that would be encountered in drilling the tunnel. All the contract bidders, including Strabag, proposed modifications to the Geotechnical Baseline Report as part of their bids. The final Geotechnical Baseline

Report was negotiated by OPG and Strabag and, as noted, formed part of the Design Build Agreement. This final Geotechnical Baseline Report would be the basis on which any claims for differing subsurface conditions would be assessed.

Strabag commenced drilling the tunnel in September 2006. In summer 2007, Strabag began experiencing delays and cost overruns. Strabag filed dispute notices with OPG in 2007 and 2008, ultimately seeking to recover $90.0M of additional costs incurred up to November 2008. It was Strabag's position that the subsurface conditions were more adverse than those described in the Geotechnical Baseline Report. Those conditions led to overbreak (i.e. cracking and loosening of rocks above the tunnel boring machine cutterhead) more significant than expected, requiring remedial measures and slower progress. In Strabag's view this amounted to "differing subsurface conditions", i.e. geotechnical subsurface conditions which differed materially from those described in the Geotechnical Baseline Report, [4] and that OPG was therefore responsible for the increased costs. The Design Build Agreement states:

> The GBR will be used during the execution of the Contract for comparison of the assumed subsurface conditions with actual subsurface conditions as encountered during construction. Consequences associated with subsurface conditions consistent with, or less adverse than, the baseline conditions represented in the Contract Documents are the responsibility of the Contractor. Those consequences associated with subsurface conditions more adverse than the baseline conditions are accepted by OPG. The GBR is intended to assist the parties in the resolution of contractual disputes.[5]

OPG's position was that the overbreak was due to the means and methods employed by Strabag.[6] In OPG's view, there was therefore no differing subsurface condition, and under the terms of the Design Build Agreement Strabag was responsible for any additional costs.

Strabag and OPG were unable to resolve the matter, and, as permitted by the Design Build Agreement, the matter was referred to a Dispute Review Board. The Dispute Review Board assists in the resolution of disputes related to the performance of the

[4] Exh D1-2-1, Attachment 6, page 71
[5] Exh D1-2-1, Attachment 6, Appendix 5.4
[6] Tr Vol 2 page 151

Design Build Agreement. Its decisions are not binding. OPG and Strabag each nominated a member to the Dispute Review Board and these two members nominated a third person who served as chair.[7]

Strabag's position before the Dispute Review Board was that:

> …OPG remained responsible for the consequences of the geologic conditions different from those enumerated in the GBR and that the conditions actually experienced in tunnelling were different. Strabag claimed that DSC were evidenced by large block failures, excessive overbreak and inadequate "stand-up" time (i.e., insufficient time to install rock support prior to rock failure). Strabag further claimed that the Table of Rock Conditions and Rock Characteristics in the GBR failed to adequately describe the rock conditions encountered and either represented a DSC on its own, or alternatively confirmed the presence of DSC. Strabag's position was that any changes that it made to the means and methods of rock support were the result of DSC, rather than the cause of DSC. Finally, Strabag claimed that it was entitled to relief from DSC anywhere they were encountered, including under the buried St. Davids Gorge.[8]

OPG's position before the Dispute Review Board was that:

> … no DSC existed. Subsurface conditions were as described in the GBR and Strabag's proposed design reflected these conditions. During the course of construction, Strabag substantially modified its TBM design and rock support by abandoning the use of a ring erector and full perimeter steel sets in the Queenston formation. Strabag stopped using full perimeter steel sets, as shown in its design, not because of ground conditions, but because it could not make the ring erector work. OPG also claimed that, to the extent any DSC existed, the DBA required that these be addressed after the tunnel was completed and that Strabag was solely responsible for conditions under the buried St. Davids Gorge.[9]

As noted in the motion at paragraph 11 and the EB-2013-0321 reply argument at page 63, "Strabag offered five reasons that it believed supported its claim for [differing subsurface conditions]." The Dispute Review Board's report[10] summarized the five

[7] Exh D1-2-1, Attachment 6, section 11.1
[8] Exh D1-2-1, page 99
[9] Exh D1-2-1, page 100
[10] Exh D1-2-1 Attachment 7

disputed issues, as set out by Strabag, at pages 1-4 of the report, and the conclusions under those same five issues at pages 18 and 19 of the report, specifically: Large Block Failures, St. Davids Gorge, Insufficient Stand-Up Time, Excessive Overbreak and Inadequate Table of Rock Conditions and Rock Characteristics.

The Dispute Review Board held that for the first three issues (large block failures, St. David's Gorge, and insufficient stand-up time), there was no differing subsurface condition. On the excessive overbreak issue, the Dispute Review Board found that there was a differing subsurface condition. For the final issue (inadequate Table of Rock Conditions and Rock Characteristics), the Dispute Review Board found that the Table of Rock Conditions and Rock Characteristics is inadequate to define the subsurface conditions that were encountered.

The Dispute Review Board concluded that there is a Differing Subsurface Condition. The report at page 18 states, "Since the development of the [Geotechnical Baseline Report] was the mutual responsibility of both Parties, we recommend that the Parties negotiate a reasonable resolution based on a fair and equitable sharing of the cost and time impact resulting from the overbreak conditions that have been encountered and the support measures that have been employed."

The Board's Decision also made disallowances based on the findings of OPG's own internal audit of Strabag's claim. The OPG audit staff found that Strabag's actual losses were not in fact $90M, but were instead $77.4M: a difference of $12.6M. OPG had this information prior to reaching its settlement with Strabag as the audit was conducted in April 2009[11] and the business case seeking project funding (including payment of Strabag's claim) was prepared in May 2009.[12] The Board therefore held that the starting point for negotiations with Strabag should have been $77.4M, not $90M. OPG does not appear to contest this finding.

The Decision disallowing $28.0M in relation to the settlement of the Strabag claim stated the following:

[11] Exh L-4.5-SEC-41 Attachments 14, 15 and 16
[12] Exh D1-2-1 Attachment 8a

> As a result of the contract renegotiation with Strabag, OPG had the right to audit Strabag's claimed losses of $90M. To the extent that the $90M was not substantiated in the audit, the $40M payment could be reduced proportionately. OPG's witnesses testified that OPG's internal auditors conducted the audit and found that a total of $12.6M was not associated with legitimate expenses, resulting in a loss of only $77.4M.[13] The auditors did not recognize inter-company transfers within Strabag's organization, thereby reducing the amount from $90M to $77.4M.[14] OPG's evidence was that they could reduce the $40M settlement proportionately based on the audit, but did not do so.[15]
>
> The Board is unable to find that a $40M settlement of Strabag's claim was prudently incurred. In the absence of information regarding the costs attributable to each of the five issues, the Board must use its judgment of what is a reasonable amount. In determining the amount, the Board has decided to utilize the findings of the Dispute Review Board. As a result, the Board finds that OPG's ratepayers should not pay any amount for the three issues which OPG was not responsible, but should pay 50% of two issues for which OPG was jointly responsible. In addition, the Board is persuaded by the results of OPG's audit and considers the $77.4M to be the appropriate starting point for the Board's calculation, not the $90M claim by Strabag. There was no evidence or testimony provided supporting Strabag's claimed amount. As a result, the Board finds that ratepayers should only pay 20% of the $77.4M audited amount, or $15.5M. In addition, the Board denies the associated carrying costs of the disallowed $24.5M,[16] which results in a reduction of another $3.5M.[17] The Board finds this disallowance of $28.0M reasonable given the evidence provided.

OPG submitted that the Board failed to understand the nature of the Dispute Review Board process and the findings of the Dispute Review Board regarding the dispute between OPG and Strabag. OPG states in the notice of motion, and similarly at pages 62 and 64 of the EB-2013-0321 reply argument, that, "There was a single [Differing Subsurface Condition] dispute between OPG and Strabag that went to the [Dispute Review Board], which found that [Differing Subsurface Conditions] existed. Had Strabag offered ten reasons in support of its claim for [Differing Sub-surface Conditions] and the [Dispute Review Board] rejected nine of them, the same result would have been

[13] Exh L-4.5-SEC-41 Attachment 16
[14] Tr Vol 2 page 149
[15] Exh D1-2-1 page 106
[16] $40M – (20% x $77.4M)
[17] $24.5M x 5.25% x 33/12 months

obtained. The [Dispute Review Board] would have found that [Differing Sub-surface Conditions] existed."[18] OPG's argument on this motion is that the Board fundamentally misunderstood the decision of the Dispute Review Board, and that this amounts to an error in fact.

Board staff submits that there is no legal or factual error in the Decision, and that the motion with respect to the settlement of the Strabag claim meets neither the threshold test nor the test on the merits.

The Design Build Agreement specifies that OPG is responsible for the consequences associated with any differing subsurface conditions. Where additional costs were not caused by a differing subsurface condition, however, OPG is not responsible for the costs. Although the Dispute Review Board found that there was a differing subsurface condition with respect to excessive overbreak and inadequate Table of Rock Conditions, the evidence appears to show that not all of the $90M claimed by Strabag was in fact related to differing subsurface conditions.

In the OEB hearing, OPG was questioned about the costs that arose from each of the 5 issues identified by Strabag. Mr. Young stated that the individual issues were not quantified. Mr. Ilsley stated that procedurally, a dispute review board considers the allegations and deals with costs later. Mr. Everdell stated that the issues were interconnected and that OPG addressed them as a package. Mr. Everdell replied that he did not believe that OPG assessed individual issue costs after the Dispute Review Board's decision was issued.[19] The result of this is that it was not possible for the Board to determine precisely which portion of the claimed $90M was related to differing subsurface conditions, and which portion was not. To be clear, this is not because parties failed to ask for this information, it is because OPG did not have the information.

The evidence supports the conclusion that not all of Strabag's claimed costs related to differing subsurface conditions as concluded by the Dispute Review Board. Strabag identified concerns to OPG's representative in December 2007, one month after initiating tunneling under the St. Davids Gorge. In early February 2008, Strabag submitted a proposal for recovery of the additional costs it claimed due to Differing

[18] Notice of Motion paragraph 31
[19] Tr Vol 1 pages 63-71

Subsurface Conditions. By mid-February 2008, the parties agreed that they had reached an impasse and determined to take their dispute to the Dispute Review Board. As noted in the evidence, in the spring of 2008, the tunnel boring machine emerged from the St. Davids Gorge. OPG and Strabag agreed on horizontal realignment in May, but vertical realignment was put on hold pending review by the Dispute Review Board.[20]

It is clear that some of the $90M loss claimed by Strabag for the period up to November 2008 relates to the tunneling completed under the St. Davids Gorge. As described on page 2 of the Dispute Review Board report, "Strabag contends that it is entitled to relief from the more adverse excavation conditions resulting from such [Differing Sub-surface Conditions] in the Gorge area." As noted on page 10 of the Dispute Review Board report, the contractor raised the vertical alignment of the tunnel by 50 m under the St. Davids Gorge. The Dispute Review Board found that the Contractor was <u>not</u> entitled to make a claim of [Differing Sub-Surface Conditions] within the 800 m width of the St. Davids Gorge. Clearly, the losses associated with the tunneling under the St. Davids Gorge are not the result of a differing subsurface condition, and should not have been recoverable from OPG. Below is OPG's summary of the Dispute Review Board's conclusions as presented at page 101 of Exh D1-2-1 of the EB-2013-0321 application.

[20] Exh D1-2-1 pages 74-75

Table 5 - DRB Conclusions and Recommendations

Issue	Finding
Large Block Failures	There is no DSC. The actual conditions were adequately described in the GBR.
St. Davids Gorge	Given the provision of the DBA Section 5.5 (e), the Contractor has no claim for any DSC in this section of the tunnel.
Insufficient Stand-Up Time	There is no DSC based on insufficient stand-up time, as the Contractor's reliance on Rock Mass Rating values stated in the GBR was inappropriate.
Excessive Overbreak	"There is a DSC with respect to the excessive overbreak, provided the defective provisions of the GBR are overlooked, because the GBR contained potentially misleading statements that make the Contractor's position reasonable. Any substantial changes in the designs, means and methods of the support (i.e., Type 4S) were the result of DSCs encountered and not vice versa. Since the development of the GBR was the mutual responsibility of both Parties, we recommend that the Parties negotiate a reasonable resolution based on a fair and equitable sharing of the cost and time impacts resulting from the overbreak conditions that have been encountered and the support measures that have been employed. Both Parties must accept responsibility for some portion of the additional cost, but at the same time the Contractor must have adequate incentives to complete the Work as soon as possible." DRB Report, pages 18-19
Inadequate Table of Rock Conditions and Rock Characteristics	"The Table of Rock Conditions and Rock Characteristics is inadequate to define the subsurface conditions that were encountered. More importantly, the classification of support types based on the "closest match" to rock conditions and rock characteristics given in this Table, together with rock characteristics defined as "all other conditions", renders the concept of DSCs essentially meaningless and the GBR defective. The DRB recommends that the Parties jointly revise the Table of Rock Conditions and Rock Characteristics in such a manner that it describes the rock characteristics to be assumed in terms that are mappable (or otherwise quantifiable) so that it can serve as a clear basis for defining DSCs throughout the remainder of the tunnel excavation. The DRB also recommends that the terms 'closest match' and 'all other conditions' be removed from the GBR." DRB Report, page19

Board staff submits that there are no identifiable legal or factual errors in the Decision, and that the Decision is reasonable. The Board had a number of pieces of evidence before it that justified a disallowance for the amounts paid to settle Strabag's $90M claim.

Conclusion Re: The Pre-December 2008 Disallowance

Board staff submits that the motion with respect to Strabag's $90M claim fails both the threshold test and on the merits. The "error of fact" identified by OPG does not appear to have been an error at all. The Dispute Review Board - and apparently Strabag, which agreed to a settlement that provided less than half of what it was claiming – took the view that OPG and Strabag were jointly responsible for the costs related to differing subsurface conditions up to November 2008. OPG's position that it was responsible for all of the costs arising from the differing subsurface condition (even if one were to accept that the entire $90M claim was related to excessive overbreak) is belied by the findings of the Dispute Review Board. The Dispute Review Board was clear that, for the differing subsurface conditions issues that it found existed (excessive overbreak and inadequate Table of Rock Conditions), both parties bore some responsibility. It is also not clear that all of the $90M claimed by Strabag actually relates to the differing subsurface condition identified by the Dispute Review Board – at best the evidence is ambiguous in this regard, and through no fault of the Board or the intervenors. Finally, OPG failed to account for the fact that Strabag's claim of $90M was overstated by $12.6M. Based on its review of the evidence, the Board held that the sharing agreed to by OPG was not appropriate. Although OPG clearly does not agree with this Decision, none of this amounts to an error of fact. The Board exercised its judgment based on the facts on the record and there is nothing unreasonable about the conclusion that was reached. A motion to review is not an opportunity to re-argue a case.

<u>The Amended Design Build Agreement Disallowance</u>

The adverse conditions encountered by Strabag resulted in extra costs, and ultimately required that the route of the tunnel be changed in an effort to pass through more favourable rock conditions. This tunnel re-alignment and restoration operations to return the tunnel to a circular profile added significant costs to the Project. As noted in its report, the Dispute Review Board found that, "Both Parties must accept responsibility for some portion of the additional costs, but at the same time the Contractor must have adequate incentives to complete the Work as soon as possible." In response to this finding, Strabag and OPG negotiated an Amended Design Build Agreement.

The initial Design Build Agreement was signed by OPG and Strabag on August 18, 2005. That agreement was a fixed price contract for $622.6M.[21] After the receiving the Dispute Review Board's decision, OPG and Strabag negotiated an Amended Design Build Agreement that was based on the initial Design Build Agreement, but structured it as a target cost contract. The amended agreement, with a target cost of $985.0M,[22] was signed on June 4, 2009, and provided for completion incentives. A new total project cost of $1,600.0M was approved by the OPG Board of Directors.

The Decision disallowing $60.0M relating to incentives paid to Strabag stated the following:

> … the Board finds that the incentives offered to Strabag through the Amended Design Build Agreement were excessive. OPG understood that a contractor default was a potential risk, and indeed it took steps that should have mitigated that risk through a letter of credit and a comprehensive parental indemnity. However, when it came time to renegotiate the Design Build Agreement, OPG did not properly use its leverage to secure a more favourable deal. The Board will disallow recovery of $60M. The Board is mindful of the Dispute Review Board's recommendation that Strabag have appropriate incentives to complete the work. However, in the Board's view the Amended Design Build Agreement provided adequate "incentive" even without the specific incentive clauses. OPG agreed to pay Strabag hundreds of millions of extra dollars more than was provided for in the original Design Build Agreement. In the Board's judgment, the provision for incentives above this was not necessary and not prudent.

OPG states at paragraph 36 of the notice of motion that the Board erred in its reliance on the parental guarantee and indemnity provided by Strabag. In OPG's view, the Indemnity Agreement provided no leverage in negotiation of the Amended Design Build Agreement. Given the Dispute Review Board findings, OPG submitted that, if the matter were litigated, Strabag would likely have prevailed. OPG calculated that Strabag earned a profit of $26M on a $985M contract for a project lasting almost eight years. OPG further submitted that the Board misapprehended the evidence that Strabag would have abandoned the project had OPG not agreed to including the incentives in the Amended Design Build Agreement. OPG states that the Amended

[21] Exh D1-2-1 Attachment 5 page 11, Exh D1-2-1 Attachment 6 Appendix 1.1(J)
[22] Exh D1-2-1 Attachment 9 Appendix 1.1(TTT)

Design Build Agreement allowed the Niagara Tunnel Project to be completed at $120M below the $1,600.0M approved funding and nine months ahead of the revised completion date.

It is not clear to Board staff exactly what error of fact OPG is alleging. The amount of leverage that OPG had in its negotiations with Strabag for the Amended Design Build Agreement is not something that can be precisely quantified. Indeed OPG itself cannot know for certain exactly what leverage it had, as it could not be privy to Strabag's negotiating strategy and Strabag's assessment of its own risk. The amount of leverage OPG held – in other words its ability to extract favourable terms from Strabag – therefore, is subject to a considerable amount of interpretation and judgment. Although OPG disagrees with the Board's assessment of its negotiating power, this does not amount to an error of fact.

Board staff submits that the Decision is not in error and that the motion with respect to incentives paid to Strabag does not meet the threshold test. A Business Case Summary presented to the OPG Board of Directors in July 28, 2005 was provided in support of the request related to the original $622.6M Strabag contract. As noted in the Decision at page 32, the risk of the contractor abandoning the project due to non-performance or default was considered by OPG and the risk was mitigated from medium to low by the provision of letters of credit and a parental guarantee.

At paragraph 35 of the notice of motion, OPG states that, "having lost on the issue of a [Differing Sub-surface Condition], OPG simply did not have the leverage the Board wrongly believed that it did." At paragraph 42 of the notice of motion, OPG states that, "the Board misapprehended the uncontradicted evidence that Strabag would have abandoned the [Niagara Tunnel Project] had OPG not agreed to the incentives that were, in fact, included in the Amended [Design Build Agreement]." As noted above, OPG cannot have known whether Strabag would have abandoned the project had OPG not agreed to the exact incentives in the Amended Design Build Agreement. While OPG states that the Indemnity Agreement provided no leverage in negotiation and that Strabag would have walked away from the project without incentives, only OPG and Strabag were parties to those negotiations. The Board noted the damage to Strabag's reputation if it had walked away from the project in the Decision at page 33, and OPG agreed in its reply argument that Strabag had incentives to re-negotiate the Design Build Agreement.[23] Under cross examination OPG further agreed that Strabag was not entitled to simply walk away from the contract, and there would have been serious repercussions had it attempted to do so.[24]

In this motion, OPG argues that had the differing subsurface condition issue gone to court, OPG would likely have lost. While no one can know with certainty the outcome of litigation that did not occur, the facts suggest that OPG's position was not as weak as it now claims. The Dispute Review Board decision clearly found that both parties bore some of the responsibility for the extra costs, and that the costs should be shared between them. Strabag's conduct also strongly suggests that it did not believe it would have had an ironclad case before the courts. Strabag agreed to accept less than half of its claimed $90M loss, and further agreed to an Amended Design Build Agreement that was not weighted entirely in its favour.[25] Clearly Strabag felt that it was at some risk if the project did not proceed. OPG has not presented any new evidence or argument to suggest that the Board's assessment was incorrect. Board staff submits that OPG's motion on this matter fails the threshold test.

From the evidence that is and was in front of the Board, it is also not entirely clear which of the additional costs for Strabag's work relate directly to the differing subsurface condition identified by the Dispute Review Board. Board staff has annotated Table 8 from Exh D1-2-1, as filed with the application on September 27, 2013. See page 19 of this submission.

- Column A is the original release approved by the OPG Board of Directors in July 2005.
    - The fixed price contract with Strabag is represented by lines 1 to 17. The total of lines 1 to 17 is $622.6M.
    - OPG applied a contingency of $101.0M.
    - The Total Project Cost was forecast to be $985.2M, with completion forecast in June 2010.

[23] OPG reply argument, page 75
[24] Tr Vol 2 page 126
[25] Tr Vol 2 page 125-126

- Column B is the superseding release approved by the OPG Board of Directors in May 2009.
  - o The target price contract with Strabag is represented by lines 1 to 22. The total of lines 1 to 22 is $985.0M.
  - o Lines 23 to 28 itemize overhead recovery and incentives.
  - o OPG applied a contingency of $169.0M.
  - o The Total Project Cost was forecast to be $1,600.0M with completion forecast no later than December 2013.

The Amended Design Build Agreement was signed in July 2009 with an effective date of December 2008. The Amended Design Build Agreement notes that $302.2M was paid to Strabag prior to December 2008.

As noted in line 13 of the table, OPG agreed to pay Strabag an additional $282.5M for the Diversion Tunnel in the Amended Design Build Agreement. Lines 18 to 28 of column B include office and general cost, overhead recovery and incentives, and are not itemized in the original fixed price contract under column A. OPG's witnesses confirmed that these costs would have been embedded in the costs under column A, but OPG did not know where Strabag would have allocated these costs in the cost breakdown.[26] Under cross examination by the School Energy Coalition, the OPG witness stated that OPG did not know how much profit was built into the fixed price contract.[27] Board staff also notes that costs itemized on lines 23 to 28 (overhead and incentives) are not included in the $622.6M Strabag fixed price contract under column A. It is also not clear why contingency would increase by approximately 60% in the Amended Design Build Agreement when risk was considerably reduced at the 3 km mark of the 10 km tunnel.

While OPG and Strabag forecast $54.1M in office and general cost and $35.3M in overhead recovery in the target price contract, the estimated cost at completion (column C) was $77.7M in office and general cost and $36.4M in overhead recovery. Board staff submitted on August 19, 2014, that there should be a disallowance as there was no evidence regarding these amounts which were embedded in the original fixed price Design Build Agreement. The forecast amount of office and general cost and overhead

[26] Tr Vol 1 page 78
[27] Tr Vol 2 page 86

recovery in column B is 10% of the total of lines 1 to 21, while the final amounts in column C are 12% of the total.

Board staff submits that despite the 6,000 page[28] OPG filing for the Niagara Tunnel Project and cross examination, there was lack of clarity on the specifics of office and general cost and overhead recovery. Further, section 7.8 of the Design Build Agreement refers to change of work and "overhead <u>and profit</u>" fees. Through the Amended Design Build Agreement, OPG agreed to pay Strabag an additional $282.5M for the diversion tunnel and $89.4M for office and general cost and overhead recovery.

At paragraphs 38 and 39 of the notice of motion, OPG takes issue with the Decision finding that, "OPG agreed to pay Strabag hundreds of millions of extra dollars more than was provided for in the original Design Build Agreement. In the Board's judgment, the provision for incentives above this was not necessary and not prudent." Board staff submits that there is no question that Strabag was paid hundreds of millions of extra dollars more than was provided in the original Design Build Agreement. The Dispute Review Board did not define what it meant by "incentive", and the word does not have to be synonymous with "profit". Both Strabag and OPG were in a difficult position at the time of the Dispute Review Board's decision. A renegotiated Design Build Agreement which included hundreds of millions of extra dollars to complete the project can fairly be characterized as an incentive for Strabag, even if the overall profit margin for Strabag was in the end small.

The $40M schedule incentive (at line 27) was not part of the Amended Design Build Agreement or part of the business case that was approved by the OPG Board of Directors in May 2009. In amendments to the Amended Design Build Agreement, the target price was increased and the completion date was delayed. In providing an extension to the completion date, which proved to be unnecessary, OPG paid Strabag an additional $15M in incentive.[29] Board staff submits that it is not unreasonable for the Board to determine that OPG's actions relating to incentives were neither necessary nor prudent.

---

[28] Notice of Motion paragraph 22
[29] Tr Vol 2 page 35

Conclusion Re: The Amended Design Build Agreement Disallowance

Board staff submits that OPG's motion with respect to the Amended Design Build Agreement fails to meet the threshold, and also fails on the merits.

The chief error in fact alleged by OPG is its position that the Board mis-apprehended the amount of leverage OPG had in re-negotiating the Design Build Agreement. Board staff disagrees that this can be characterized as an error of fact. The Dispute Review Board decision, the indemnity, the parental guarantee, and the potential risk to Strabag's reputation all gave OPG negotiating leverage. Strabag clearly felt that OPG had some measure of leverage, as they made several concessions in the Amended Design Build Agreement.[30] In addition, there is not a clear connection between the additional costs and the differing subsurface condition identified by the Dispute Review Board.

The exact amount of additional concessions that could have been achieved cannot be known with certainty by OPG, or indeed the Board. The Board was therefore tasked with considering the evidence and exercising its judgment. It concluded that OPG could have done better. Again, OPG clearly disagrees with the Board's conclusion in this regard. However, that is not an appropriate ground for a motion to review. A motion to review is not an opportunity to re-argue a case. There is nothing in what OPG has presented in this motion that is particularly new; it is essentially an attempt to re-argue the same matters in the hope that the Board will arrive at a different conclusion. The motion should be dismissed.

[30] Tr Vol 2 page126

2013-09-27
EB-2013-0321
Exhibit D1
Tab 2
Schedule 1
Page 128 of 145

Table 8 - Total Project Capital

Item	A Original Release	B Superseding Release BCS	Actual Costs to June 30, 2013	C Estimated Cost at Completion (as of June 2013 forecast)	Delta To Superseding	% Difference
OPG Project Management	4.4	6.0	4.4	4.6	-1.4	-23%
Owner's Representative	25.4	40.4	35.2	36.2	4.2	-10%
Other Consultants	4.0	5.9	6.2	6.5	0.6	10%
Environmental / Compensation	12.0	9.6	8.7	8.7	0.9	-9%
Tunnel Contract (including Incentives)	723.6	1,181.7	1,095.4	1,140.8	-40.9	-3%
1 *Mobilize/Demobilize*	31.7	31.0	30.4	32.1	1.2	4%
2 *Maintenance Bond*	2.2	0.7	-	0.7	-	0%
3 *Performance LC*	1.0	5.4	6.8	7.2	1.7	32%
4 *Insurance Premium*	2.7	4.3	2.6	2.7	(1.6)	37%
5 *Design*	5.9	9.7	11.7	11.6	1.9	20%
6 *Intake Channel and Walls*	54.9	64.8	67.4	67.4	2.6	4%
7 *Diversion Outlet Canal*	12.7	12.9	15.4	15.4	2.5	20%
8 *Dewatering Shafts*	3.8	3.6	3.8	3.8	0.1	4%
9 *Intake Structure*	6.3	8.6	6.1	6.1	(2.5)	-29%
10 *Intake Gates*	2.3	2.5	4.7	4.7	2.3	91%
11 *Outlet Structure*	7.2	12.8	11.7	11.7	(1.1)	-9%
12 *Outlet Gates and Hoist*	6.0	3.6	4.7	4.7	1.1	31%
13 *Diversion Tunnel*	406.9	689.4	687.3	687.3	(2.2)	0%
14 *Tunnel Boring Machine*	78.2	78.2	78.2	78.2	-	0%
15 *Flow Verification Test*	0.1	0.6	0.3	0.4	(0.2)	-34%
16 *Demolish Dewatering Structure*	1.5	1.5	0.1	0.1	(1.4)	-96%
17 *ORG Estimated Cost*	0.2	0.4	0.3	0.3	(0.0)	-9%
18 *Scope Changes*		0.7	0.7	0.7	0.0	0%
19 *Provisional Sum*		0.2	0.2	0.2	(0.0)	0%
20 *Changes in Applicable Law*		0.2	0.1	0.1	(0.1)	-50%
21 *Warranty Administration Fee*		0.1	-	-	(0.1)	-100%
22 *Office and General Cost*		54.1	72.5	77.7	23.6	44%
23 *Overhead Recovery*		35.3	36.0	36.4	1.1	3%
24 *Interim Completion fee*		10.0	10.0	10.0	-	0%
25 *Substantial Completion fee*		10.0	10.0	10.0	-	0%
26 *Cost Performance Disincentive*		(20.0)			20.0	100%
27 *Schedule Incentive*			33.0	40.0	40.0	0%
28 *One Time Settlement Interest*			1.4	1.4	1.4	0%
Allowance for Proposed OHST Rebate		(7.9)		-	7.9	-100%
Contingency	101.0	165.0		29.8	(139.2)	-82%
Other Contracts / Costs	76.9	69.8	70.6	68.7	(1.1)	-2%
Interest	136.9	286.6	234.5	234.5	(52.1)	-18%
TOTAL PROJECT CAPITAL	985.2	1,600.0	1,455.1	1,500.0	(100.0)	-6%

D. Tax Loss Carry-Forward

Overview

OPG sought to recover income tax expense of $187.9M in 2014 and $123.7M in 2015 for the regulated facilities. In 2013, OPG incurred a regulatory tax loss, but did not apply the regulatory tax loss to reduce its forecast 2014 taxable income. In the Decision, the Board directed OPG to reduce its 2014 income tax provision to recognize and carry-forward the 2013 regulatory tax loss.

The operating loss related to the 6.3 TWh nuclear production shortfall in 2013 is estimated to be $325M.[31] The regulatory operating taxable loss was determined to be $211.6M.[32] The Board's decision to require OPG to apply the tax loss carry-forward to reduce its forecast 2014 taxable income resulted in a $70.5M reduction to the 2014 revenue requirement.

In the motion, OPG states that it absorbed the operating loss and that it should receive the benefit of the associated tax loss. OPG states that the Board erred:

- In concluding that the circumstances in EB-2013-0321 were distinct from Great Lakes Power Limited (GLPL) EB-2007-0744 and OPG 2008-2009 Payment Amounts EB-2007-0905;
- In its reference to the application of the 2006 Electricity Rate Handbook;
- By not applying the "benefits follow costs" principle in the Decision
- By giving weight to the fact that OPG did not apply for new payment amounts for 2013.

The essence of OPG's argument is that the Board failed to consider evidence, misinterpreted evidence and gave weight to irrelevant evidence.

In order to succeed on this motion, OPG must identify a factual or legal error that the Board made in its original decision. OPG must further show that the correction of this

---

[31] Notice of Motion, paragraph 46
[32] Undertaking J13.4

error would likely change the ultimate result of the decision. Board staff submits that no error has been identified, and that the motion should be dismissed.

As discussed in more detail below, Board staff disputes the arguments made by OPG. However, even if everything OPG alleges were correct, none of this would amount to an error of fact or law, and OPG has identified no appropriate grounds for a review. The Board is a regulatory tribunal, and it is not bound by its own decisions or policies. Although the Board is informed by its policies and previous decisions, it is not bound by them and it considers each case on its own merits. It is neither an error of fact nor an error of law for the Board to decline to follow its own precedents or policies. The alleged deficiencies in the decision that OPG has identified are not proper matters for a motion to review, and the motion with respect to the tax loss carry-forward should be dismissed at the threshold stage.

The Board's previous practice with respect to tax loss carry-forwards

It has been a long standing general practice at the Board to require utilities to use tax loss carry-forwards to reduce regulatory tax payable. The EB-2013-0321 Decision refers to the 2006 Electricity Distribution Rate Handbook (Handbook) and its policy on tax loss carry-forward. In preparation for 2006 Electricity Distribution Rates, the Board decided that any tax losses which existed at the end of 2005 would be used in the determination of rates for 2006. The decision of the Board was reflected in the Report of the Board (RP-2004-0188 page 57) and in the Handbook (page 61). The Board's general practice has been to apply tax loss carry-forwards since this time.

Since its issuance in 2005 (for rates effective in 2006), the Handbook has been reflected in the Excel Payments in Lieu of Taxes (PILs) models released by the Board annually to assist distributors. Tax losses which exist must be used in the determination of PILs or taxes for the historic, bridge and test years. Any forecast tax losses which exist at the end of the bridge year must be used in the test year. For ease of reference, with the issuance of the 2012 Filing Requirements (for rates effective in 2013), the Board included any remaining relevant sections of the 2000 and 2006 Electricity Rate Handbooks, including the requirement to identify any tax losses from prior years.

The following table lists examples of applications that have used tax loss carry-forwards to reduce PILs and have been approved by the Board.

File Number	Utility
RP-2005-0020/EB-2005-0335	Atikokan Hydro Inc.
RP-2005-0020/EB-2005-0359	EnWin Powerlines
RP-2005-0020/EB-2005-0428	Welland Hydro-Electric System Corp
RP-2005-0020/EB-2005-0412	PUC Distribution Inc.
EB-2005-0418	Terrace Bay Superior Wires Inc.
EB-2007-0879	Veridian Connections Inc.
EB-2007-0901	Espanola Regional Hydro Distribution Corporation
EB-2008-0232	Hydro One Remote Communities Inc.
EB-2009-0262/EB-2010-0121	West Perth Power Inc., Clinton Power Corporation
EB-2009-0056	Espanola Regional Hydro Distribution Corporation
EB-2011-0177	Kenora Hydro Electric Corporation Ltd.

In the cases listed above, the reasons for each of the losses were not specifically examined by the Board. Rather, since the tax losses existed in the bridge year which preceded the test year, the Board required the tax losses to be used to reduce or to eliminate the need for a tax provision in the test year's rates in accordance with the Handbook.

It is very unusual for tax losses to exist given that the Board has regulated the industry to allow a return on equity of approximately 9% for more than a decade. This is why there are few examples. However, Board staff is aware of only one case where a tax loss existed prior to a test year and the Board did not require the utility to use the tax loss carry-forward.[33] In that case, the Board made allowance for PILs expense in the

[33] Decision, Atikokan Hydro Inc., EB-2008-0014

test year in preparation for a period of rates under an incentive rate mechanism and given the weak financial condition of the company.

The Board has therefore considered tax loss carry-forwards on many occasions and has directed that taxable income in a future period be reduced in several proceedings. Board staff submits that this approach to tax loss carry-forwards is, in effect, Board policy. OPG's argument that the Board "misapplied" the Handbook is based on conclusions the Board reached in EB-2007-0744 (discussed further below). Although Board staff disagrees with this characterization, it is irrelevant in any event as the EB-2007-0744 decision does not amend the Handbook or the Board's policy. Several of the decisions cited in the table above in which tax loss carry-forwards were applied came after the EB-2007-0744 decision.

EB-2007-0744 and EB-2007-0905

OPG points to two Board decisions (GLPL EB-2007-0744 and OPG EB-2007-0905) where the Board chose to not require a utility to apply a tax loss carry-forward to regulated taxable income, and argues that these precedents should have been followed by the Board in the Decision. Board staff submits that the Board is not bound by precedent, and that this is not an appropriate topic for a motion to review. In any event, the two cases are distinguishable from the current case.

GLPL 2007 Distribution Rates

Two matters were considered in the GLPL EB-2007-0744 decision in relation to taxes:
- Tax losses related to expenses in the non-distribution part of GLPL. The Board found, "that the 2007 test year tax provision should be calculated without regard for corporate tax loss carry-forwards that arose due to losses in GLPL's non-distribution business."[34]
- Account 1574 Deferred Rate Impact – Sub Account Rate Mitigation. In an effort to mitigate rate increases, GLPL proposed rates that did not include the recovery of its full return on equity. Instead, it recorded these amounts (as well as some other

[34] Decision and Order, EB-2007-0744 page 40

> amounts including taxes) in account 1574.[35] In EB-2007-0744, GLPL proposed to recover the amounts that had accumulated in account 1574 from 2002 to 2007 from its ratepayers ($14.9M). The Board denied the request. This decision resulted in regulated operating losses for GLPL. The Board found, "that pre-2007 losses of the distribution business should not be used to eliminate the tax provision for the 2007 test period. The Board reiterates its view that the benefits of a tax loss should be realized by the party – shareholders or ratepayers – that bore the expenses or losses that gave rise to the tax loss. Since the Board has denied recovery of the amount accrued for rate mitigation in account 1574, the resulting losses should not be attributed to ratepayers but rather to GLPL, which sustained those losses and should retain the related tax benefits."[36]

At paragraphs 60 and 61 of the notice of motion, OPG states the Decision is in error for stating that the EB-2007-0744 "corporate tax loss carry-forwards arose due to losses in Great Lakes Power Limited's non-regulated businesses." OPG correctly notes that the Report of the Board (RP-2004-0188) and the 2006 Handbook were considered by the Board in EB-2007-0744. OPG also correctly notes that treatment of the balance in account 1574 was a consideration in the Board's tax loss carry-forward determination in EB-2007-0744.

Although the Board did not specifically refer to that portion of the GLPL decision, this does not amount to an error of fact. Further, the circumstances in EB-2007-0744 were distinguishable from the OPG case. Board staff submits that the EB-2007-0744 decision relating to tax loss carry-forward and account 1574 hinged on the clearance of any or all of the balance in account 1574. The EB-2007-0744 decision states, "<u>Since the Board has denied recovery of the amount accrued for rate mitigation in account 1574</u>, the resulting losses should not be attributed to ratepayers but rather to GLPL, which sustained those losses and should retain the related tax benefits." (Emphasis added) Board staff observes that account 1574, in addition to containing a portion of GLPL's return for the subject period, also contained the tax impacts, neither of which was disposed to rates. The key difference between EB-2007-0744 and the current case, therefore, is that in EB-2007-0744 ratepayers had not paid for any taxes in their

---

[35] EB-2007-0744, Great Lakes Power, Responses to Board Staff Interrogatories, February14, 2008, IR#39, Ref: Ex9/Tab1/Sch5/Pg1-6
[36] Decision and Order, EB-2007-0744, page 43

rates associated with the amount in account 1574. In GLPL ratepayers had not borne the “cost” that was identified in the OPG Decision.

OPG 2008-2009 Payment Amounts

As part of its EB-2007-0905 application, OPG identified tax losses in the period 2005 – 2007 (prior to Board regulation). OPG proposed to use the tax loss carry-forwards from these losses to reduce test period revenue requirement by $228M and to mitigate the increase in payment amounts from 19% to 14.8%.

The Board was not convinced that regulatory tax loss carry-forwards existed at the end of 2007. However, the Board accepted OPG’s proposal to use the $228M as mitigation, and to reduce the revenue requirement by that amount. The decision states:

> Although the Board is not convinced that regulatory tax loss carry-forwards existed at the end of 2007, or that OPG’s treatment of taxes is appropriate, the Board is not making a finding that all of the tax benefits of pre-2008 tax losses should accrue to OPG’s shareholder. The Board believes that the benefit of tax deductions and losses that arose before the date of the Board’s first order should be apportioned between electricity consumers and OPG based on the principle that the party who bears a cost should be entitled to any related tax savings or benefits. The Board has adopted this principle in other cases where a company owns both regulated and unregulated businesses.[37]
>
> …
>
> With respect to 2008 and 2009, the Board is not able to agree, for the reasons outlined above, with OPG’s position that “regulatory tax losses” permit it to eliminate an income tax provision. Because there is no evidence about the amount of pre-2008 tax benefits that appropriately should be carried forward to offset 2008 and 2009 PILs, the Board views OPG’s proposal to eliminate an income tax provision in the test period as simply mitigation. OPG has effectively agreed to absorb whatever tax provision would otherwise be required for those years. The Board finds that this mitigation should be retained in OPG’s calculation of the revenue requirement and payment amounts that flow from the Board’s findings in this decision. That is, OPG should not include any tax provision for 2008 and 2009 in respect of the prescribed assets.

[37] Decision with Reasons, EB-2007-0905, page 170

> As for OPG's proposed $228 million mitigation amount, the Board also does not accept that there is any connection between that amount and any regulatory tax losses. OPG's offer of $228 million of mitigation was made in the context of the revenue requirement, before mitigation, shown in OPG's application. The revenue requirement that results from the Board's findings in this decision will be lower than that proposed by OPG. The Board concludes that it would be unreasonable to hold OPG to its original offer of mitigation. The mitigation amount of $228 million was about 22% of the $1,025.7 million revenue deficiency shown in OPG's application. The amount of mitigation the Board will require OPG to provide for the test period will be equal to 22% of the revenue deficiency calculated based on the Board's findings in the decision. The Board estimates that this amount will be about $170 million, compared to the $228 million in OPG's application.[38]

OPG filed a notice of motion (EB-2009-0038) to review and vary the EB-2007-0905 decision. OPG stated that the revenue requirement reduction was without legal foundation and deprived OPG the opportunity to recover costs and return on equity, and that there was an error in finding no connection between regulatory tax losses and OPG's proposal to reduce revenue requirement. The review panel of the Board agreed and found that there was a link between the revenue requirement reduction and regulatory tax losses and ordered the establishment of the tax loss variance account to record any variance between the tax loss mitigation amount underpinning payment amounts and the tax loss amount resulting from re-analysis of prior period tax returns.

Examination of OPG's first cost of service proceeding, EB-2007-0905, was complicated by consideration of pre-regulation and post-regulation periods and regulated and non-regulated facilities. The Board's findings on OPG's proposed mitigation express the Board's concern with the complexity of the matter. Due to insufficient evidence, i.e. the absence of audited financial statements for the regulated facilities for the period 2005-2007, the Board made a rate mitigation finding instead of a reduction finding based on tax loss. The Board's Decision in EB-2013-0321 referred to the unique circumstances, i.e. the historical pre-regulation period. The Decision also notes the absence of information from the pre-regulation period.

[38] Decision with Reasons, EB-2007-0905, page 170-171

At paragraph 71 of the current notice of motion, OPG states that, "whereas the Board in EB-2007-0905 applied the principle of benefit follows cost and concluded that <u>none of the tax benefit arising from the loss should accrue to ratepayers</u>, the Board in the Decision ignores this finding and has instead determined that all of the tax benefit arising from the loss should accrue to ratepayers. As such, the Board has erred in the Decision by failing to consider or address these critical aspects from the EB-2007-0905 decision." (Emphasis added)

Board staff disagrees. At page 170 of the EB-2007-0905 decision, the Board opines on the principle that the party who bears a cost should be entitled to any related tax savings or benefits. The decision states:

> The practical consequences of this principle can be illustrated by reference to two of the items that OPG cites as causes for the 2005 to 2007 regulatory tax loss.
>
> - In 2005, OPG deducted $258 million of Pickering A return to service costs in computing taxable income for that year. For accounting purposes, OPG recorded those costs in the PARTS deferral account. As noted in Chapter 7 of this decision, the remaining deferral account balance at December 31, 2007 of $183.8 million will be recovered through future payment amounts for the nuclear facilities. <u>In the Board's view, the majority of the tax benefit realized by OPG in 2005 should be for the account of consumers given that the nuclear revenue requirement after 2007 will include $183.8 million to recover the deferral account balance.</u>
> - OPG's evidence indicated that in 2007 its regulated operations incurred an $84 million loss before income taxes (how much of that loss, if any, that relates to Bruce is unclear). <u>It would appear that the operating loss in 2007 was borne completely by OPG's shareholder. Consumers have not been required to absorb that loss because the payment amounts for 2007 were set in 2005 and did not change. Accordingly, in the Board's view, none of the tax benefit of that loss should accrue to consumers.</u>
>
> The Board does not have the information necessary to determine the tax benefits which should be carried forward to offset payment amounts in 2008 and later periods. (Emphasis added)

Board staff submits that the Board did not conclude that the losses identified by OPG in EB-2007-0905 were losses borne entirely by OPG's shareholder. As such, the EB-2013-0321 Decision is not in conflict with the EB-2007-0905 decision.

In conclusion, Board staff submits that the EB-2007-0905 decision does not provide sufficient guidance on the Board's practice pertaining to the use of tax loss carry-forwards given the complexities of the transition from the pre-regulated period. Even if the parallels between EB-2007-0905 and the current decision were much more clear, the Board is not required to follow its precedents and a disinclination to do so does not amount to an error of law or fact.

Benefits Follow Costs Principle

At paragraph 66 of the motion, OPG states that the Board erred in not applying the "benefits follow costs" principle in the Decision, and that the Board failed to interpret how the principle should be applied in OPG's circumstances.

Even if OPG's contention were correct – which is disputed – the benefits follow costs principle was not identified by the Board as the rationale for its decision. The Board decided to follow its clearly established policy of applying tax loss carry-forwards to reduce regulatory taxes (which is discussed in greater detail above). Although the Board has discussed the benefits follow costs principle in several decisions, it is not found in the Act or in any of the Board's guidelines or policy documents. OPG has not identified any appropriate ground for a motion to review, and the motion should fail for that reason alone.

Even if benefits follow costs is an appropriate test, the Board did consider benefits and costs in its decision. The "benefit" is the value of the tax loss carry-forward, approximately $70.5M. By definition, the tax loss carry-forward arises from something that happened in a prior period – OPG's net loss in 2013. This loss created a benefit in the form of the tax loss carry-forward that could be applied in a future year. The Board recognized, however, that ratepayers had borne a cost in 2013, in the form of tax payments that were embedded in rates that were never actually paid by OPG.

Absent the use of the tax loss carry-forward, ratepayers will be required to pay for taxes that OPG will not actually be required to pay itself. This is a cost borne by ratepayers.

This would be in addition to the tax amounts paid by ratepayers in 2013 for taxes that OPG did not pay (on account of its operating loss). The money paid by ratepayers in 2013 and 2014 for taxes that OPG was not required to actually pay amount to a “cost” to ratepayers. The Board’s decision is therefore consistent with the benefits follow costs concept.

Materiality

As noted, the 2013 regulatory operating taxable loss was determined to be $211.6M. The application of this operating loss against 2014 regulatory income tax would reduce the 2014 revenue requirement by $70.5M. In other words, had the Board accepted OPG’s arguments in the original Decision, OPG’s revenue requirement for 2014 would have been $70.5M higher than was actually approved. This works out to approximately $5.875M per month (70.5 /12).

However, the effective date of the Board’s order was November 1, 2014. Therefore, even if OPG is successful in its arguments, it would only be entitled to $11.75M ($5.875M for each of November and December 2014).

In Board staff’s view, ~$12M on a ~$9 billion test period revenue requirement borders on immaterial. The threshold for a variance analysis in OPG’s Filing Guidelines is $20M.[39] This can be viewed as analogous to the materiality threshold for the creation of a deferral and variance accounts for electricity distributors. OPG itself applies a materiality threshold of $10M to changes or updates to its filings. Board staff questions whether it is a good use of resources to hear motions to review related to such relatively small amounts.

In terms of merits of the motion, Board staff submits that there are no identifiable errors in the Decision on tax loss carry-forward, and that the OPG motion should be dismissed.

[39] Filing Guidelines for Ontario Power Generation Inc., EB-2011-0286, pages 14 and 16

No OPG Application for 2013 Payment Amounts

At paragraph 73, OPG states that the Board erred in giving weight to the fact that OPG did not apply for 2013 payment amounts, and that in making this choice OPG took a risk.

At paragraph 74 OPG says that it could not have known that it would end up having an operational loss in 2013. The operational loss in 2013 is related to lower nuclear production, in particular at Darlington. Board staff submits that there was a risk that OPG would have an operational loss in 2013 and that the risk was known. As noted at Exh E2-1-2 page 2, there were "two planned outages scheduled for Darlington in 2013 compared to a single outage scheduled in 2012 consistent with the 36-month outage cycle at Darlington." OPG transitioned to the 36 month outage cycle in 2008 and given the complexity of outages, planning and scheduling is done well in advance. Any delays in either of the outages in 2013 would have an impact on nuclear production.

Board staff agrees with the comment at paragraph 74 that an OPG application would have had to be filed in 2012 for 2013 payment amounts. Board staff notes that following release of the 2011-2012 payment amounts EB-2010-0008 decision, OPG started consultation on an independent compensation study in preparation for the "OPG Application for 2013-2014 Payment Amounts." That consultation started in July 2011. The Board consulted with stakeholders on filing guidelines for OPG's 2013-2014 payment amounts in September 2011 and issued the filing guidelines in November 2011. As this work was started and/or completed in 2011, the decision not to file in 2012 for 2013 payment amounts rests with OPG management.

Board staff submits that the risk of lower production was known and that OPG had the opportunity to file an application for 2013 payment amounts but chose not to file. Any consequences arising from that decision must rest with OPG.

E. Conclusion

For the reasons discussed above, Board staff submits that all elements of the motion to review should be dismissed.

The grounds set out by OPG cannot properly be characterized as an error of fact or an error of law. The arguments made by OPG in the motion are substantively the same as the arguments presented in OPG's argument in chief and reply argument in the original proceeding. OPG is essentially seeking to argue the same case in the hope of achieving a different result. As the Board has stated on many occasions, that is not the purpose of a motion to review.

All of which is respectfully submitted