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File 22332

VIA RESS FILING and COURIER

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

Dear Ms. Walli:

Re: OPG - EB-2014-0369 re Motion for review and variance
Submissions of the Power Workers' Union

Attached please find the Power Workers' Union's Submissions in connection with the above-noted proceedings. An electronic copy has been filed through the Board's RESS filing system, and two paper copies will follow by courier delivery.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Richard P. Stephenson
RPS:pb

Attach.

c: J. Sprackett
K. McKenzie
B. Kidane
All Participants

Doc 1375746 v1

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;

AND INT THE MATTER OF a motion by Ontario Power Generation Inc. pursuant to Rule 42 of the Ontario Energy Board's *Rules of Practice and Procedure* for an order or orders to vary the Decision with Reasons EB-2013-0321.

PWU Submission – OPG Motion (EB-2014-0369)

1. These are the submissions of the Power Workers' Union ("PWU") in respect of Ontario Power Generation's ("OPG") motion for review and variance of the Ontario Energy Board ("OEB" or "Board") panel's Decision with Reasons dated November 20, 2014 in EB-2013-0321 (the "EB-2013-0321 Decision") .

2. Rule 45.1 of the OEB Rules of Practice and Procedure sets out that the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting a review on the merits of the motion. In Procedural Order No.1, dated January 13, 2015, the Board determined to consider the threshold question for OPG's motion and invites parties to make submission on both the threshold issue and the ultimate merits of the Motion.

3. The PWU was an intervenor and active participant in EB-2013-0321. The PWU supported OPG's application, including its position with respect to the subject matter of this motion.

4. The PWU's submissions are in response to the Board's request to the parties to make submissions on both the threshold issue and ultimate merits of OPG's motion.

Overview

5. In its Submissions dated January 26, 2015, OPG sought, by way of its motion, an Order:

a. (i) Varying Board's finding in the EB-2013-0321 Decision that $88.0M of the Niagara Tunnel project (the "NTP") capital expenditures were not prudently incurred;

(ii) finding that the $88.0M portion of the NTP capital expenditures were prudently incurred; and

(iii) finding that the full amount of the $1452.6M in NTP capital expenditures should therefore close to rate base in the test period;

b. (i) Varying the finding that OPG reduce its 2014 income tax provision to account for and to recognize the carry-forward of its $211.6M regulatory tax loss that was incurred in 2013 due to the shortfall of nuclear production; and

(ii) finding that OPG is entitled to receive the benefit of the $211.6M regulatory tax loss and that it does not need to reduce its 2014 income tax provision to account for and to recognize the carry-forward amount; and

c. Varying the amount of OPG's test period revenue requirement by increasing the test period revenue requirement to reflect (a) and (b), above.

6. As outlined by OPG in its Submissions, over the course of the EB-2013-0321 proceeding, OPG adduced comprehensive and uncontradicted evidence regarding actual costs of the NTP, and regarding the process by which its original contractual arrangements were re-negotiated and the costs to OPG arising therefrom. No contrary evidence was adduced.

7. The Board's EB-2013-0321 Decision disallowing NTP costs is premised entirely on its fundamental misinterpretation of the meaning of the findings of the Dispute

Review Board ("DRB"). Properly interpreted, the DRB's findings support the conclusion that the entirety of the NTP costs were prudently incurred.

8. With respect to the tax loss carry-forward issue, the Board's EB-2013-0321 Decision is based on a misunderstanding and misapplication of the concept of the "benefits follow costs" principle.

9. Both of these are material errors, appropriate for correction by the Board by way of a review motion.

10. The PWU acknowledges that an applicant on a motion to review must satisfy the Board that the threshold for eligibility has been established. However, it is actually more straightforward to consider this issue after the substantive merits of the alleged errors has been reviewed.

The Merits of the Motion

a. **The NTP Issue**

11. The PWU submits that the Board should decide whether the panel in the EB-2013-0321 erred in two separate disallowances of portions of the claimed NTP costs on the basis they were imprudent. Specifically the Board disallowed:

a. $28M in relation to the settlement of Strabag's claims of $90M in pre-December 2008 losses; and

b. A further $60M is respect of additional costs arising from the re-negotiation of the Design Build Agreement ("DBA") between OPG and Strabag.

i. The $28M Disallowance

12. Under the DBA the responsibility for incremental costs arising from rock conditions different from the baseline conditions (i.e. "differing subsurface conditions" or "DSC") rests with the project owner.[1] This is a standard provision of project agreements

[1] Ex. D1-2-1, Attach. 7, pp. 5-6.

like the DBA. There was no suggestion that OPG was imprudent in agreeing to this contractual term at the time the DBA was negotiated.

13. The dispute wound up before the DRB. The issue for the DRB was to determine whether there was a DSC. Strabag raised five instances to demonstrate the existence of a DSC. The DRB concluded that three of the five did not demonstrate the existence of a DSC. However, the other two did.

14. Strabag had claimed losses of $90M in respect of DSC. After the DRB report OPG and Strabag settled for $40M.

15. That much is clear and beyond dispute. Where the Board erred was in the use it made of this DRB finding. The Board determined that what the DRB report "meant" was that OPG was only responsible for 50% of the two "proven" instances of DSC. As a result, it should have settled for no more than 20% of the total cost. After some rudimentary arithmetic it calculated the amount to be, in effect, $12M. Hence the disallowance of $28M (i.e. $40M - $12M = $28M).[2]

16. In fact, DRB made no finding (nor could it) that there were severable (and calculable) costs associated with each of the alleged instances of DSC. The DRB never suggested that was the task it was undertaking, nor did it in fact do so. The DRB's task was to determine where the existence of a DSC had been demonstrated. The DRB concluded that it had. Strabag "won" the case before the DRB. It was not a partial victory; it was a complete victory.[3]

17. What flowed from the DRB's finding was that OPG was to be responsible for all the costs associated with DSC. Rather than litigating this issue to conclusion, OPG settled it for $40M on the $90M claimed.

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[2] Decision p. 33

[3] Technically, of course, there was no "winner" at the DRB – since its decision was not binding on the parties. Nevertheless, it was understood that its decision would be highly influential on any negotiated resolution (and the OEB accepted as much).

18. The issue for the OEB was to determine (without using hindsight) whether this was a reasonable (not a perfect) settlement to make.[4] If the Board had not operated under a misapprehension regarding the effect of the DRB findings, it could not render any conclusion other than that the settlement was a reasonable one.

ii. The $60M Disallowance

19. In view of the DSC found by the DRB, it was apparent to both OPG and Strabag that, not only was the work that had already been undertaken more expensive than anticipated, the work that remained to be done would also be more expensive. As a result, the parties re-negotiated the provisions of the DBA in face of these new realities. Pursuant to the re-negotiated DBA, OPG paid Strabag more than under the original DBA.

20. The Board concluded that the terms of the re-negotiated DBA were unreasonably generous to Strabag. It concluded that OPG had significant bargaining power with Strabag that it failed to exercise. As a result, it disallowed $60M of the costs flowing from the re-negotiated DBA.

21. The Board's conclusion is entirely without foundation on the facts. It simply ignores a number of entirely undisputed facts, and proceeds on false premises.

22. First, it ignores the entirely undisputed evidence that the actual cost of the completed tunnel is the amount that OPG actually paid. Strabag did not make any windfall under either the original or re-negotiated DBA. If the parties had known, with perfect foresight, the actual rock conditions that they would ultimately encounter, the tunnel would have cost at least what OPG ultimately paid, if not more.[5]

23. Second, an implicit premise of the disallowance is that ratepayers were entitled to have $1.4B worth of work undertaken for their benefit and only be required to pay some amount less than that. In effect, the Board's conclusion is that OPG had Strabag "over a barrel" and it should have been able to use that bargaining power to get

[4] Bearing in mind the delays and uncertainties associated with litigation relative to settlement.

[5] Tr. Vol. 2, pp. 82, 148.

ratepayers something more than they were actually paying for. There is no definition of the prudence review that requires a utility to obtain a windfall on behalf of the ratepayers.

24. Third, another implicit premise of the Board's analysis is that Strabag was under a legal obligation to perform the balance of the project under the price of the original DBA. This premise ignores the following:

a. The DBA expressly made OPG responsible for incremental costs associated with DSC;

b. The DRB concluded that DSC had been established; and

c. It was anticipated and understood that the DSC which had already been encountered were going to continue to be encountered.[6]

25. As a result, there is no doubt that OPG would be legally obliged to pay (under the original DBA) a price more than the original contract price in order to complete the tunnel. The only question was: how much more?

26. Fourth, it is apparent that the Board proceeded on the implicit premise that, if Strabag refused to complete the project on the basis of the original contract price, OPG would be able to successfully sue Strabag for damages, and/or its corporate parent under the provisions of the parental guarantee and Indemnity Agreement.[7]

27. However, the Board expressly notes that the Indemnity Agreement was engaged only in the event of a "breach" of the DBA.[8] It would not be a breach of the DBA for Strabag to insist on receiving additional compensation as a result of additional work arising from DSC. As a result, it is not apparent how the parental guarantee/Indemnity Agreement would be engaged. Again, the Board's conclusion was driven by a faulty premise, without basis in the evidence.

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[6] This is the explanation for the realignment of the tunnel to emerge from the Queenston shale sooner than originally planned.

[7] Decision p. 33

[8] Decision p. 33

28. The Board's decision was not a reasonable one, in the sense that it was a reasonable exercise of judgment, based upon an assessment of uncertain factors. Rather, it was a faulty conclusion, lacking evidentiary foundation, based upon the various misapprehensions outlined above.

b. The Tax Loss Issue

29. This issue pertains to the regulatory treatment of the $211.6M tax loss experienced by OPG in 2013. The loss was attributable to nuclear production in 2013 which was well below forecast production assumed in the rates that were in effect in 2013. This loss was absorbed by OPG and its shareholder.

30. The PWU supports and adopts the submissions made by OPG with respect to this issue. The PWU makes the following additional brief submissions.

31. The PWU accepts that the Board is not legally bound to "follow" or "apply" its own precedent decisions or policy documents in disposing of a particular issue in a particular case. The Board can legitimately and properly distinguish existing precedents and policies; it can find that they are inapplicable or inappropriate to apply in the context of a specific case; or it can simply disagree with them.

32. However, what occurred in the instant case was none of those things. In this case the Board misconstrued its policies and precedents, and relied upon that misconstruction to determine the issue against OPG. That is an error of law.

The Threshold Issue

33. Rule 42.02 of the OEB Rules of Practice and Procedure states that any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision, while Rule 44.01states that a motion under Rule 42.02 is required to set out the grounds that raise a question as to the correctness of the order or decision.

34. Consistent with its customary practice, in Procedural Order 1 the Board determined that it would consider the threshold issue concurrently with its hearing of the merits of the motion.

35. As noted by OPG the threshold question was articulated in the OEB's Decision on a Motion to Review in the Natural Gas Electricity Interface Review Decision ("NGEIR Decision"[9]). In that decision the Board determined that the threshold question requires the motion to review to meet the following tests[10]:

- the grounds must raise a question as to the correctness of the order or decision;
- the issues raised that challenge the correctness of the order or decision must be such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended;
- there must be an identifiable error in the decision as 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; and
- the alleged error must be 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.

36. It is submitted that OPG has met the threshold test. The errors identified raise material questions as to the correctness of the Board's Decision with respect to the Niagara Tunnel Project and the tax loss carry-forward issues. The findings are contrary to the evidence and the Board misconstrued and misapplied its own precedents and policies. Once corrected, the amount that OPG will be permitted to add to rate base in respect of the NTP, as well as the amount of the tax expense approved for recovery in the test period, will be materially different than that set out in the Decision.

Conclusion

[9] Ontario Energy Board, EB-2009-0038, Decision and Order on Motion to Review and Vary, May 11, 2009

[10] *Supra,* Page 9-10

37. As a result, the OPG motion meets the requirement with respect to the threshold question and identifies errors in the EB-2013-0321 Decision; and that it is appropriate for the Board to vary its decision in the manner submitted by OPG.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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