2nd March, 2015

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VIA Canada Post, email and RSS Filing

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge St.
Toronto, ON
M4P 1E4

Re: EB-2014-0369 Ontario Power Generation Inc.
- Motion to Review and Vary the EB-2013-0321 Decision with Reasons
The Society of Energy Professionals Submission

Dear Ms. Walli,

Further to the OEB's Notice of Hearing and Procedural Order No.1, dated 13th January, 2015, in the above noted proceeding, attached please find the submission of The Society of Energy Professionals. We have also directed via email copies of the same to the Applicant and all parties of record.
Thank you.

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ONTARIO ENERGY BOARD

IN THE MATTER OF THE *Ontario Energy Board Act, 1998;*
AND IN THE MATTER OF AN APPLICATION BY
ONTARIO POWER GENERATION INC.
MOTION TO REVIEW AND VARY
DECISION WITH REASONS (EB-2013-0321)
EB-2014-0369

SUBMISSION
OF
THE SOCIETY OF ENERGY PROFESSIONALS

2ND MARCH, 2015

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EB-2014-0369: SUBMISSION OF THE SOCIETY OF ENERGY PROFESSIONALS

I. SUMMARY

1. The Society of Energy Professionals ("The Society") supports the position taken by Ontario Power Generation Inc. ("OPG") in its motion to review and vary the Ontario Energy Board's (the "Board") Decision with Reasons dated November 20, 2014 in EB-2013-0321 (the "Decision").

2. Specifically, The Society agrees with OPG that in its Decision, the Board made material factual errors with respect to the following issues and that an order should be made as follows:

   (a) (i) varying the finding that $88.0M of the Niagara Tunnel Project (the "NTP") capital expenditures were imprudently incurred, (ii) finding that the $88.0M portion of the NTP capital expenditures were prudently incurred, (iii) finding that the full amount of the proposed $1,452.6M in NTP capital expenditures should therefore close to rate base in the test period, and (iv) varying the amount of OPG's test period revenue requirement by increasing the test period revenue requirement to reflect this;

   (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 a 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 (iii) varying the amount of OPG's test period revenue requirement by increasing the test period revenue requirement to reflect this.

3. The Society disagrees with the view put forward by Board staff in its submission dated February 20, 2015 that "the grounds set out by OPG cannot properly be characterized as an error of fact or an error of law … [and that] OPG is essentially seeking to argue the same case in the hope of achieving a different result". [1] Rather, The Society agrees with OPG's submissions that the Board made key factual errors in the Decision, and as such has met the threshold test.

4. The following highlights key specific factual errors made by the Board in the Decision and which OPG has identified in its submissions.

II. MATERIAL ERRORS RELATING TO THE NTP

a) The pre-December 2008 Disallowance Error

The following five points extracted from the OPG submissions[2] outline the error made by the Board in assuming that the Dispute Review Board ("DRB") had determined that the Strabag claim should be apportioned between 2 of the 5 items in dispute. In fact, the DRB agreed with

[1] Board Staff Submission, EB-2014-0369 "OPG Motion to Review (EB-2014-0369)", dated February 20, 2015, Page 31.
[2] Submissions of OPG, dated January 26, 2015 pages 10, 11

Strabag that Differing Subsurface Conditions ("DSC") existed and that the two parties should find a fair and equitable way of sharing the total costs incurred by Strabag.

5. The Board viewed the five items in dispute before the DRB as being independent from one another. The Board stated:

> There were five issues of dispute that were referred to the Dispute Review Board. The dispute Review Board found that OPG was not responsible for three of the five issues and that OPG had only joint responsibility for the remaining two issues. No evidence was filed on the relative value or cost of the five issues. OPG's witnesses testified that the individual issues were not quantified.[3]

6. This view of the DRB dispute is factually incorrect and inconsistent with the evidentiary record before the Board. This view also shows that the Board fundamentally misunderstood the nature of the DRB process and the findings of the DRB with regard to the dispute between OPG and Strabag over the NTP. There was a single DSC dispute between OPG and Strabag that went to the DRB, which found that DSC existed. Had Strabag offered ten reasons in support of its claim for Differing Subsurface Conditions ("DSC") and the DRB rejected nine of them, the same result would have obtained. The DRB would have found that DSC existed.

7. The Board's failure to understand the nature of the DRB process and the findings of the DRB with regard to the dispute between OPG and Strabag was a fundamental misapprehension of the evidence. As OPG's evidence explains:

> Strabag's fundamental position was that OPG remained responsible for the consequences of the geologic conditions different from those enumerated in the Geotechnical Baseline Report ("GBR") and that the conditions actually experienced in tunneling 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.[4]

8. The DRB summarized the test for DSC in the Design Build Agreement ("DBA") and the allocation of responsibility among the parties as follows: "The Contractor is responsible for design and construction of the Work. The Owner is responsible for more adverse subsurface conditions than are represented in the GBR.[5]

9. It was materially wrong for the Board to conclude, as it did, that OPG's ratepayers should not bear the consequences "for the three issues [for] which OPG was not responsible". The dispute with Strabag was not over the individual reasons that Strabag gave for claiming DSC, or "the relative value or cost of the five issues" (as the Panel expressed the matter), but rather whether

[3] Decision, p. 31
[4] Ex. D1-2-1, p. 99
[5] Ex. D1-2-1, Attachment 7, pp. 5-6

the conditions being experienced in mining the NTP constituted DSC. In evaluating this dispute, the DRB agreed with Strabag that DSC existed.[6]

b) The Amended Design Build Agreement Disallowance Error

In its Decision, the Board incorrectly concluded that OPG had leverage which it did not use in the negotiations with Stabag over the terms of the amended DBA. However, in reality OPG had no leverage having lost on the DSC dispute. As summarized by OPG:

> The Board's disallowances rest on the conclusion that Strabag having sustained a $40M loss during the first three years of the contract, would have worked at cost for nearly five more years, without the possibility of earning any profit at all, to complete the NTP on budget and ahead of schedule. There is no evidentiary support in this conclusion. [7]

Further details on the Board's errors are outlined in the following points extracted from the OPG submissions.[8]

10. The Board's error is plain in its reference and reliance on the parental guarantee and indemnity provided by Strabag (the "Indemnity Agreement"). The Indemnity Agreement provides no leverage to OPG. It is an agreement to indemnify OPG in the event of a default by Strabag. However, given the DRB findings there was no reasonable basis to conclude that Strabag was in default; if the matter were litigated (and Strabag had issued a notice of arbitration following the DRB Report), based on the DRB finding of DSC, Strabag, not OPG, was likely to prevail.

11. The Board failed to apprehend the nature of the "incentives" paid to Strabag as part of the Amended DBA. At page 33 of the Decision, the Board held that: 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. [Emphasis added].[9]

12. The finding that incentives included in the Amended DBA were unnecessary because OPG was agreeing to pay Strabag "hundreds of millions of dollars" in additional costs is inconsistent with the Board's own recognition that the incentives encouraged Strabag to complete the NTP ahead of schedule and below target cost. Strabag began working on this project in August 2005 when the DBA was signed.[10] The amended contract meant that Strabag had worked for more than three years to achieve what it considered to be a $50M loss ($90M in claimed loss minus the $40M settlement of past costs) and that going forward, Strabag was agreeing to work for another four and half years at cost (from December 2008, the effective date of the ADBA to June, 2013 the targeted completion). Without the negotiated incentives, Strabag would have had no reason to

[6] Ex. D1-2-1, Attachment 7, pp. 18-19
[7] Submissions of OPG, dated January 26, 2015 page 13
[8] Submissions of OPG, dated January 26, 2015 pages 11, 12, 13
[9] Decision, p. 33.
[10] Ex. D1-2-1, p. 132

seek out schedule and cost savings because the benefits of any successful efforts would have flowed entirely to OPG, while the cost and risk of undertaking these efforts would have remained with Strabag.

13. At the time the Amended DBA was agreed to, it was highly uncertain that Strabag could achieve the incentives. While the Amended DBA was being negotiated (Fall 2008 through Spring 2009), the NTP was tunneling through difficult rock in the Queenston formation and was falling further behind schedule.[11] Of course, in hindsight, Strabag was able to complete the project months ahead of the target schedule and did earn incentives as a result, but this was far from known or knowable when the contract was executed.

14. Using OPG's $77M figure for Strabag's losses (accepted by the Board), Strabag earned a profit of $26M on a $985M contract (or about 2.64 percent) for a project lasting almost eight years. This is a very low level of profit by any estimation for a project of the size, length and complexity of the NTP and nowhere near "hundreds of millions of dollars".[12]

15. The Board also misapprehended the uncontradicted evidence that neither Strabag's parent-company guarantee nor its $70M letter of credit would have dissuaded it from walking away from the NTP (even if available which, as set out above, they were not).[13] [14]

III. TAX LOSS CARRY FORWARDS

16. The Society supports the position put forward by OPG regarding the principles surrounding tax – loss carry forward in its submissions.[15] Specifically, the Board: (i) incorrectly characterized the nature of OPG's 2013 operating loss, (ii) misapplied the 2006 DRH, (iii) did not apply the principle of benefits follows cost, and (iv) gave weight to a circumstance that has no factual basis ie that OPG was aware of impending losses in 2013 and could have applied for new rates on a timely basis in 2012.

Giving Weight to a Circumstance That Has No Factual Basis

17. Of particular concern to The Society is the last point, the Board's assumption that OPG was aware of impending losses in 2013 and could have applied for new rates on a timely basis:

> OPG made a decision to maintain its (then current) payment amounts for 2013. OPG decided not to apply to the Board to change its payment amounts for 2013 based on updated information, including an updated nuclear production forecast. [16]

As OPG outlined in its submissions, it would have made its application for 2013 payment amounts in 2012 based on forecast production levels for 2013. At the time of such a submission,

[11] Ex. D1-2-1, pp. 75-76
[12] Tr. Vol. 2, p. 124-125
[13] Tr. Vol. 2, p. 126.
[14] Tr. Vol. 2, pp. 147-148
[15] Submissions of OPG, dated January 26, 2015 pages 16-24
[16] Decision, p. 102

"OPG could not have known that it would end up having an operational loss in 2013 or the magnitude of that loss where such loss would give rise to a tax loss". [17]

18. In addition, based upon the timeline of the EB-2013-0321 proceeding in issuing the Decision, if OPG had submitted a full and complete application for 2013 payment amounts in September 2012, the earliest a Decision would have been issued was roughly August 1st, 2013 with rates effective on August 1st. Even if OPG was aware of the full financial impact of its nuclear production issue to allow it to update its 2013 evidence prior to an oral hearing in early 2013, with rates effective on August 1st, it would have only been compensated for less than half of its 2013 losses. For the seven months of 2013 prior to the new rates coming into effect, OPG would have faced a similar financial dilemma regarding financial losses as well as the elimination of the tax loss carry forward.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 2nd DAY OF MARCH 2015

[17] Submissions of OPG, dated January 26, 2015 pages 23, 24