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March 2, 2015

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
Suite 2700
2300 Yonge Street
27th floor
Toronto, ON
M4P 1E4

VIA E-Mail
5 pages

Dear Ms. Walli:

**Re: Board File No. EB-2014-0369 Ontario Power Generation Inc. (OPG)
Submission of Vulnerable Energy Consumers Coalition (VECC)**

On behalf of the Vulnerable Energy Consumers Coalition (VECC) we have attached their response to the application of the OPG to review and vary the Board's Decision in EB 2013-0321.

As per Procedural Order No. 1 we have also copied all parties via email.

Thank you.

Yours truly,

A handwritten signature in black ink, appearing to be 'Michael Janigan', written in a cursive style.

Michael Janigan
Counsel for VECC

Cc: All parties via email

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 IN 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.

SUBMISSIONS OF THE VULNERABLE ENERGY CONSUMERS COALITION (VECC)

1. Ontario Power Generation ("OPG") has made a motion to review and vary the Ontario Energy Board's Decision in EB 2013-0321 with respect to the following matters:
 - (a) the disallowance of the addition to rate base of \$88.0M out of the proposed \$1,452.6M for the Niagara Tunnel Project; and
 - (b) the direction to OPG to reduce its 2014 income tax provision to account for and to recognize the carry forward of its regulatory tax loss in 2013.
2. In support of the motion, OPG has alleged that the Decision contained material factual errors that constitute grounds pursuant to Rule 42.01(a) and which are sufficient to meet the threshold test required of such motions under Rule 43.01.

3. The threshold test referred to above has been considered in the *Natural Gas Electricity Interface Review Decision* (NGEIR Review Decision)¹. In that Decision, the Board stated that there must be facts raised that give reason to raise a question concerning the correctness of the impugned decision. There must be a genuine error not just disagreement with the result.
4. In this proceeding, while the circumstances of the NTP by its nature involve highly technical and complex arrangements, the actual errors alleged by the applicant OPG in the Decision are relatively straightforward to disprove.
5. VECC has had the advantage of a review of submissions of Board Staff responding to the motion filed herein and adopt the statements of relevant facts set out therein.
6. In relation to the ground set out in 1(a) above, while OPG maintains, in essence, that rock conditions were described incorrectly in the contract documents. This necessitated a compromise settlement with Strabag, the contractor, for the project to continue to completion and gave rise to the necessity of additional payments to the contractor Strabag after mediation, report, and recommendations by Dispute Resolution Board (DRB). The DRB's report urged a compromise settlement.
7. OPG puts all its eggs in the basket that \$28M constitutes essentially unavoidable expenses as set out in paragraph 7 of its application: "The additional cost of construction of the NTP was due entirely to the extremely difficult rock conditions encountered by Strabag, which were significantly more challenging than expected".

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

8. The problem for OPG is that this argument collides with the factual record in that :
 - (a) The \$90M in losses claimed by Strabag was actually \$ 77.4M;
 - (b) Of the five DRB findings associated with delay in tunnel construction only 2 detailed circumstances where additional costs incurred could be within the responsibility of OPG as a result of Geotechnical Baseline Report. No evidence was available allocating Strabag's losses in each of the aforesaid two categories making a sharing of losses for two of the five categories a reasonable settlement for OPG and a subsequent disallowance of \$28M under this heading;
 - (c) The payment of \$60M in incentives under a new Design Build Agreement occurred in the context of a new Agreement that had given hundreds of millions of dollars more to the contractor. Under the circumstances, the Board's conclusion that the \$60M was excessive, cannot be challenged simply by the reassertion that it was what was required, and without which the contractor would have walked away from the contract.
9. To succeed in obtaining the relief sought, the applicant must show that the Board's decisions were based an erroneous view of the material facts. However, apart from the Applicant's repackaging of the same facts alleged in its initial argument, there is little foundation for the attack on the Board established facts that underpin this Decision.
10. OPG's case for relief associated with grounds set out in 1(b)above relies on assertions whose facts are even more ephemeral than its support of its settlement with Strabag. Here, OPG resists the carry forward of its 2013 tax loss into the 2014 revenue requirement as a credit.

11. OPG's best case for the use of the 2013 tax loss to reduce 2014 revenue requirement revolves around the limited concept of allocating the benefit to the stakeholder that incurred the cost. As Board staff have noted, OPG obtained the benefit of the 2013 tax loss in its receipt of taxes in rates for that year that it didn't have to pay. The tax loss carried forward compensates the ratepayers for that overpayment (p.28 of Board Staff argument).
12. Similarly, OPG cannot be given the benefit of credit for lethargy as a result of its failure to claim for 2013 payment amounts associated with anticipated losses related to lower nuclear performance at Darlington when the facts could have reasonably be discovered in a timely fashion. VECC submits this concept, advanced by OPG, is a backdoor equivalent to retroactive ratemaking.
13. While OPG makes its arguments for variance with new vigour, they are simply recapitulations of their original argument for regulatory treatment already rejected by the Board. There is little by way of new facts or substantiation of the operating conclusion of their application that the Board misapprehended the facts.
14. In VECC's view, the threshold test has not been met and the within application should be dismissed.
15. VECC requests its reasonable costs associated with its participation in this proceeding.

Dated at Toronto this 2nd day of March 2015