



EB-2009-0038

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 an application by Ontario Power
Generation Inc. pursuant to Rule 42 of the *Rules of Practice
and Procedure* for an Order varying part of the Ontario
Energy Board's Decision with Reasons made November 3,
2008.

BEFORE: Howard Wetston
Presiding Member and Chair

Pamela Nowina
Member and Vice Chair

**DECISION AND ORDER ON MOTION TO REVIEW AND VARY
(Notice of Motion filed January 28, 2009)**

On January 28, 2009, Ontario Power Generation Inc. ("OPG") filed a Notice of Motion (the "Motion") for a review and variance of the Ontario Energy Board's (the "Board") Decision with Reasons dated November 3, 2008, file number EB-2007-0905 ("Payments Decision"). The Motion has been assigned file number EB-2009-0038.

amount in the context of any regulatory tax loss calculations resulting from an analysis of prior period tax returns in OPG's next case.¹⁵

CME argued that any finding that was not based on evidence should be corrected. Assuming that the linkage between mitigation and the tax losses was restored, and a variance account was created as requested by OPG, the amount of the regulatory losses to be brought into the variance account should be corrected also; this correction could occur at the next payment amounts hearing when the tax loss analysis was placed into evidence, and tested by the intervenors and the Board.

SEC argued that as OPG's proposed revenue reduction was entirely voluntary, it should be required to live with the consequences of its own proposal. In support of its characterization of the proposed reduction as voluntary, SEC cited a portion of the transcript of the original hearing where Mr. Barrett of OPG describes returning the tax loss benefit to the ratepayers in the following way, "Yes, we do not believe this treatment is required, but we do believe that it is appropriate".¹⁶ Therefore, SEC argued, the Board gave OPG what it asked for and the company should not be able to overturn the decision now because the tax calculations modified by the Board's decision result in a significantly lower regulatory tax benefit than OPG anticipated.

OPG and SEC both stated that the issue of the tax calculations was not raised in the hearing. SEC pointed out that while intervenors may have questioned the Board's decision in regard to those calculations, they could not move for review since the Board maintained the approximate revenue reduction as proposed originally by OPG.

Board Findings and Disposition of the Motion to Review

OPG and PWU argued that the Board disposed of the regulatory tax loss and mitigation issue on a basis that was never raised or argued during the hearing, depriving parties of the opportunity to make submissions; by doing so, it was alleged that the Board denied OPG procedural fairness and breached the rules of natural justice.

While being provided the opportunity to make submissions is desirable, there is no general rule precluding the Board, a specialized economic energy regulator, from

¹⁵ OPG Written Submission, para. 53.

¹⁶ OPG Compendium of Evidence, Tab 4, Hearing Day 15, June 20, 2008, p. 75, ls. 20-21.

reaching decisions based on its own analysis of the record or on its own expertise or on the basis of some combination of the two. Ultimately the determination of whether fairness is breached in particular circumstances turns on the circumstances. In this case, the Board finds it unnecessary to make a specific finding on this issue.

The Board finds that the evidentiary record established and supported a link between the regulatory tax losses and the revenue requirement reduction. The oral and written evidence provided by OPG consistently linked the tax losses with the revenue requirement reduction. That evidence was not challenged by any party.

If a reviewing panel is satisfied that an identifiable error that is material and relevant to the outcome of the reviewed decision has been made, the Board may vary, suspend or cancel the order or decision, or if they find it appropriate, remit the matter back to the original panel.¹⁷ As noted above, the Board has determined that identifiable errors that are material and relevant to the outcome of the reviewed decision have been made.

The Board varies the Payments Decision in a manner that links the revenue requirement reduction and regulatory tax losses, and orders the establishment of a tax loss variance account to record any variance between the tax loss mitigation amount which underpins the rate order for the test period and the tax loss amount resulting from the re-analysis of the prior period tax returns based on the Board's directions in the Payments Decision as to the re-calculation of those tax losses.

The clearance of this account will be reviewed in OPG's next payment application hearing when a future panel of the Board reviews the tax analysis ordered in the Payments Decision.¹⁸ The Board anticipates that any issues related to tax calculations will be dealt with at the next payment amounts hearing.

¹⁷ *A Review of Certain Parts of the Natural Gas Electricity Interface Review Decision of November 7, 2006 and Conducted Pursuant to the Board's Review Decision of May 22, 2007*, EB-2006-03221-340, Decision with Reasons, July 30, 2007, p. 1.

¹⁸ Payments Decision, p. 171: "The Board also expects OPG to file an analysis of its prior period tax returns that identifies all items (income inclusions, deductions, losses) in those returns that should be taken into account in the tax provision for the prescribed facilities. That analysis should be based on the principle that if OPG is proposing that electricity consumers should bear a cost (or should benefit from revenues) they will receive the related tax benefit (or will be charged the related income taxes).