

June 30, 2015

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COURIER and RESS

Ontario Energy Board
P.O. Box 2319
27th Floor, 2300 Yonge Street
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Attention: Ms. K. Walli, Board Secretary

Dear Sirs/Mesdames:

**Re: Ontario Power Generation Inc. - Application for Disposition of Deferral and
Variance Accounts (EB-2014-0370)**

We are counsel to the applicant, Ontario Power Generation Inc. ("OPG"), in the above-referenced proceeding. Please find enclosed a copy of OPG's Argument-in-Chief.

Yours truly,



Charles Keizer

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CK/ed
Enclosure

c: All intervenors
Ms. Violet Binette
Gary Hendel, OPG
Carlton Mathias, OPG

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. for an order or orders approving the disposition of the balances as of December 31, 2014 in its deferral and variance accounts.

ARGUMENT-IN-CHIEF OF ONTARIO POWER GENERATION June 30, 2015

Introduction

1. Ontario Power Generation Inc. (“**OPG**”) filed an application with the Ontario Energy Board (the “**OEB**”) on December 18, 2014 under section 78.1 of the *Ontario Energy Board Act, 1998*, (the “**OEB Act**”), seeking approval for an order or orders related to deferral and variance accounts, including disposition of account balances as at December 31, 2014. On June 16, 2015, OPG filed a settlement proposal (the “**Settlement Proposal**”). With the exception of one disputed issue, OPG and the intervenors who participated in settlement discussions reached a settlement. Subject to the disputed issue, the Settlement Proposal was accepted by the OEB on June 23, 2015.
2. As noted in Section B1 of the Settlement Proposal, with the exception of the Pension and OPEB Cost Variance Account, entries made into the accounts relating to the period January 1, 2014 through October 31, 2014 (the “**Disputed Period**”) are disputed by certain parties to the Settlement Proposal (the “**Disputing Parties**”).¹ These are OPG’s submissions in respect of this disputed issue.
3. The dispute relates to the basis on which amounts were recorded in those accounts over the Disputed Period. OPG has made entries into the accounts based on the difference

¹ AMPCO, CME, CCC, EP, LPMA and SEC. The Society of Energy Professionals and PWU take no position on the unsettled matter under the settlement.

between actual amounts and forecast amounts underpinning the rates approved in EB-2010-0008. The Disputing Parties dispute that accounting, saying instead that the amounts recorded for that period should be the difference, if any, between actual amounts and forecast amounts included in the revenue requirement approved by the OEB in the Decision and Order issued in EB-2013-0321, which came into effect on November 1, 2014.

4. Simply put, the issue before the OEB is the proper reference amounts to be used to calculate the appropriate variance for the Disputed Period. A description of the account entries in dispute is set out at Attachment 1 to the Settlement Proposal. A copy of Chart 1 of Attachment 1 to the Settlement Proposal is included at Tab 1 of OPG's Book of Authorities.
5. OPG has correctly recorded the amounts in its deferral and variance accounts for the Disputed Period as it was entitled to do so under the OEB's orders in EB-2012-0002 and EB-2010-0008 and as explicitly recognized in the OEB's Order in EB-2013-0321. The revenue requirement and forecast costs determined by the OEB in EB-2013-0321, which apply prospectively from November 1, 2014, should not be used as a reference point for the recording of entries for the Disputed Period. The use of EB-2013-0321 revenue requirement and forecast costs in this manner would:
 - be the application of an order prior to its effective date and would be wrong in law;
 - be contrary to the OEB's Orders in EB-2010-0008, EB-2012-0002 and EB-2013-0321;
 - result in an incorrect variance that does not reflect the true under/over recovery of costs and revenues such that any resulting payment amount or rider would not be just and reasonable; and
 - be non-compliant with O. Reg 53/05 with respect to recovery of amounts in the Nuclear Liability Deferral Account, Bruce Lease Net Revenues Variance Account and the Capacity Refurbishment Variance Account.

The OEB's Final Decision and Order in EB-2013-0321 Is Not Applicable Prior to November 1, 2014.

6. The position asserted by the Disputing Parties is that the right to record amounts pursuant to the orders in effect when amounts were recorded can be ignored and terminated by retroactively imposing a new reference amount and a new basis upon which entries in the accounts are to be recorded. This is asserted even though no order was in effect during the Disputed Period to establish that new basis for recording such amounts. In effect, the Disputing Parties are asserting that EB-2013-0321, can be used to retroactively amend the orders in EB-2012-0002 and EB-2010-0008 to establish a new basis of recording amounts in the account after the fact. As OPG will show, there is no basis for doing so under the Order in EB-2013-0321 or under such other powers available to the OEB.
7. The OEB established November 1, 2014 as the effective date of the EB-2013-0321 Order, which means that without express authority that Order does not operate in respect of the Disputed Period.
8. The term “effective date” has been interpreted to mean “the date of coming into operation”.² In law, no order may take effect prior to the date it is made without express authority. Otherwise, orders must be prospective in effect.³
9. At no time did the OEB indicate that the EB-2013-0321 Order was to be effective prior to November 1, 2014. In fact, as noted in more detail below, the Order itself specifically states that EB-2010-0008 and EB-2012-0002 are effective prior to November 1, 2014. As such the OEB cannot legally retroactively amend the EB-2010-0008 and EB-2012-0003 Orders, both of which are final orders, and impose a new reference point for purposes of recording balances in the particular accounts. This would have the effect of relieving OPG of the right to record balances in these accounts which it was entitled to do under valid and effective orders in the Disputed Period.

² Edmonton (City) v. J.J.C. Holdings Ltd., 1984 ABCA 179 (See Book of Authorities, Tab 2); Cartareal Corporation N.V. v. Canada (Minister of Public Works and Government Services), 2005 CanLII 36715 (ON SC) (See Book of Authorities, Tab 3).

³ S. Blake, Administrative Law in Canada, 5th ed., LexisNexis, 2011 at p. 133 (See Book of Authorities, Tab 4).

10. The foregoing was clearly and explicitly recognized by the OEB in the wording of the EB-2013-0321 Order referenced below. To have done otherwise would have been wrong in law.

OPG's Account Balances are Consistent with the OEB's Payment Amounts Orders

11. OPG's account balances were recorded in accordance with the OEB orders in effect at the time the costs were incurred and recorded during the Disputed Period. The balances recorded also accord with the explicit terms found in the OEB's most recent Order in EB-2013-0321. As such, OPG was entitled to record those amounts and to recover those amounts subject to the consideration by the OEB of prudence to the extent it has jurisdiction to make such a determination. Subject to the OEB's determination on the disputed issue, the Disputing Parties do not dispute the prudence of the costs reflected in the entries made in the accounts during the Disputed Period.

(i) EB-2010-0008

12. In May 2010, OPG filed a cost of service application (EB-2010-0008) seeking payment amounts based on a test period from January 1, 2011 to December 31, 2012. The Decision was issued March 10, 2011 with an effective date of March 1, 2011. In that proceeding, OPG sought and the OEB granted authority to clear the actual audited December 31, 2010 balances in all accounts.
13. In EB-2010-0008, like in the current proceeding, the effective date of the OEB's Order did not coincide with the beginning of the test period. Instead, the effective date was part way into the test period (March 1, 2011). As such, although balances in accounts were cleared as of December 31, 2010, there remained a stub period of January and February 2011 applicable before the effective date of the EB-2010-0008 Order.
14. Respecting that the EB-2010-0008 Order was not legally effective prior to March 1, 2010, the OEB confirmed that the correct reference for account entries for January and February 2011 was the prior decisions and orders of the OEB, which continued to be in effect up to February 28, 2011. In particular, at page 2 of Appendix F of the April 11, 2011 Payment Amounts Order in EB-2010-0008, the OEB stated:

For the period January 1, 2011 to February 28, 2011, OPG shall continue to record entries into the variance and deferral accounts established by O. Reg. 53/05 and the Board's decisions and orders in EB-2007-0905, EB-2009-0038 and EB-2009-0174 pursuant to the methodologies established by O. Reg. 53/05 and the above decisions and orders.

15. For the period after March 1, 2011, the OEB provided that OPG continue to record amounts in the variance and deferral accounts (including those in dispute in the current proceeding) set out in Appendix F of the EB-2010-0008 Order, a copy of which is included at Tab 5 of the Book of Authorities. The Order stipulates that for those accounts the reference for calculating variances is the EB-2010-0008 forecast amounts underpinning the rates then in effect. As set out below, the Order in EB-2010-0008 remained in effect until October 31, 2014.

(ii) EB-2012-0002

16. The EB-2010-0008 Order was in effect at the time of OPG's application to clear deferral and variance account balances for the January 1, 2011 to December 31, 2012 time period.
17. In September 2012, OPG filed an application (EB-2012-0002) seeking disposition of its account balances as of December 31, 2012 for all but 3 accounts. As set out in the EB-2010-0008 Order, entries made for January and February 2011 were calculated with reference to amounts underpinning the payment amounts that were approved in EB-2007-0905 and the methodologies approved in EB-2009-0174 and EB-2009-0038, which is the same basis used to derive the balances as at December 31, 2010 that were cleared in EB-2010-0008. For the period from March 1, 2011 to December 31, 2012, the reference amounts were determined based on the forecast amounts underpinning the payment amounts that were approved in EB-2010-0008, on a pro-rata basis. As stated at Exhibit H1-1-1, p. 3 of the Application in EB-2012-0002:

Entries made for January and February 2011 have been calculated with reference to amounts underpinning the payment amounts approved in EB-2007-0905 in accordance with methodologies approved in EB-2009-0174 and EB-2009-0038 and used to derive the OEB approved account balances as at December 31, 2010. Entries made and projected to be made during the period March 1, 2011 to December 31, 2012 have been calculated with reference to

amounts underpinning the payment amounts approved in EB-2010-0008.

For applicable accounts, the monthly reference amounts for the period March 1, 2011 to December 31, 2012 have been determined as 1/24 of the forecast amounts underpinning the two-year revenue requirement approved in EB-2010-0008. This is referred to as the “standard approach.” This approach captures 22/24 of the approved revenue requirement consistent with the effective date of the current payment amounts of March 1, 2011.

18. The parties reached a settlement of all issues in the EB-2012-0002 proceeding, which included agreement that the balances for recovery in each of the accounts - calculated using the methodology detailed above - were appropriate. The resulting riders were made effective January 1, 2013 pursuant to a Payment Amounts Order dated April 13, 2013.
19. According to the EB-2012-0002 Payment Amounts Order, effective January 1, 2013:

Unless otherwise stated in this Order, effective January 1, 2013, OPG shall continue to record entries into the deferral and variance accounts authorized by O. Reg. 53/05 and the applicable decisions and orders of the Board pursuant to the methodologies established by O. Reg. 53/05 and such decisions and orders, as outlined in OPG’s Application at Ex. H1-3-1 and as summarized below.
20. As the quote above demonstrates, Exhibit H1-3-1 set out the forecast underpinning the EB-2010-0008 payment amounts as the reference amounts. Furthermore, as set out in detail at Appendix B of the EB-2012-0002 Payment Amounts Order, a copy of which is included at Tab 6 of the Book of Authorities, the accounts at issue in the current proceeding were authorized to continue with the applicable reference amounts being those established in the EB-2010-0008 Order, which remained in effect.

(iii) EB-2013-0321

21. For the balances recorded from January 1, 2013 onward, the methodologies required by the OEB’s Orders in EB-2010-0008 and EB-2012-0002 continued to apply until the November 1, 2014 effective date of the OEB’s Order in EB-2013-0321. There was no intervening order that modified the methodology prior to November 1, 2014.

22. The foregoing was accepted by the OEB in the EB-2013-0321 Payment Amounts Order. There the OEB explicitly confirmed that the correct reference point for account entries in respect of the Disputed Period will be the prior decisions and orders of the OEB, particularly EB-2010-0008 and EB-2012-0002, which continued to be in effect up to October 31, 2014. Page 1 of Appendix G of the Payment Amounts Order, a copy of which is included at Tab 7 of the Book of Authorities, states:

With respect to the deferral and variance accounts established by O. Reg. 53/05 and the Board's decisions and orders in EB-2007-0905, EB-2009-0038, EB-2009-0174, EB-2010-0008, EB-2011-0090, EB-2011-0432 and EB-2012-0002, the Board approves the recovery of the December 31, 2013 balances in the accounts or portions of accounts, as provided the following table, over the twelve month period, January 1, 2015 through December 31, 2015...

For the period January 1, 2014 to October 31, 2014, OPG shall continue to record entries into the deferral and variance accounts established by O. Reg. 53/05 and the applicable previous decisions and orders of the Board pursuant to the methodologies established by O. Reg. 53/05 and such decisions and orders.

23. This can be contrasted with the manner in which the OEB describes how account entries are to be made for the period from November 1, 2014 onward, as set out beginning at p. 2 of Appendix G of the Order. For the post-November 1, 2014 period, the OEB is clear that the reference points are the forecast revenues and costs for 2014 and 2015 as established in EB-2013-0321. For example, for that period, with respect to the Capacity Refurbishment Variance Account ("CRVA") the OEB states that OPG shall record variances between actual capital and non-capital costs and those forecast costs "reflected in the revenue requirement approved by the OEB for 2014 and 2015" (p. 10 of Appendix G).
24. Thus the EB-2013-0321 Payment Amounts Order unambiguously establishes that the OEB did not impose the 2014 and 2015 revenue requirement on the amounts recorded prior to November 1, 2014. The OEB used distinct methodologies for the two periods. For the Disputed Period, amounts are to be recorded as required by the Regulation 53/05 and in accordance with the relevant prior decisions and orders, being EB-2010-0008 and

EB-2012-0002. For November 1, 2014 to December 31, 2014 and for 2015, amounts are to be recorded relative to the forecast costs and forecast revenues that are reflected in the 2014 and 2015 rates established in EB-2013-0321, and that went into effect November 1, 2014.

25. In this regard, the Payment Amounts Order in EB-2013-0321 is a final order. The Disputing Parties are in effect seeking to have the OEB reconsider its final decision where there is no existing right of appeal or review. There is no legal basis for the OEB to do so.⁴
26. OPG's basis for recording amounts in the disputed accounts and the basis of recovery in this proceeding is wholly consistent with the EB-2012-0002 and EB-2010-0008 Orders in effect during the Disputed Period. As such, OPG was legally entitled to record amounts and is entitled to seek the recovery of the balances in question. There is no legal basis to deny that right and it would be a legal error to do so.

There Is No Legal or Policy Basis to Retroactively Apply the 2014-15 Revenue Requirement to the Period When the 2011-12 Rates Were in Effect

27. There is no basis in policy or law for the proposal by the Disputing Parties to retroactively apply portions of the 2014-15 forecast costs (underpinning rates made effective November 1, 2014 in EB-2013-0321) to a reconciliation of rates and costs for the period when the 2011-12 rates were still in effect. The OEB approves the creation of deferral and variance accounts and authorizes OPG to record amounts in such accounts as part of the rate setting process for a particular test period. These accounts are established in recognition of the fact that there is uncertainty about certain costs and revenues expected during the test period and the costs and revenues are in the ratepayers' interest and would ordinarily be recovered in rates but for the uncertainty in forecasting. So it is in the interest of both regulated companies and their customers that the actual amounts be tracked for comparison with the amounts included in rates and any difference be recovered from or returned to ratepayers after approval by the OEB. This is what OPG has done with respect to the disputed entries and what the OEB has consistently approved

⁴ Ibid, at p. 135.

in other cases. OPG is not aware of any examples where an amount other than the amounts included in rates has been used as the reference amount in the disposition of deferral and variance accounts.

28. The OEB's well-established practice is that the creation of a deferral or variance account is predicated on the OEB being persuaded that the account satisfies the criteria of causation, materiality, management inability to control and reasonableness. "Reasonableness" refers to the OEB's determination that the proposed expenditures are properly attributed to ratepayers recognizing that the prudence of the amounts actually expended will be subject to a subsequent review at the time of disposition.⁵
29. The account entries and resulting balances pending the OEB's review in this proceeding arise from the OEB's prior determinations in EB-2010-0008 and EB-2012-0002 that OPG was entitled to record entries (reflecting approved forecast costs or revenues as well as amounts required to be recorded under O. Reg 53/05) in the applicable accounts for the period in which the approved rates were established. The imposition of reference amounts based on forecasts underpinning the revenue requirement established in EB-2013-0321 on the Disputed Period, rather than using as a reference forecasts that were used to derive the actual rates in effect during the Disputed Period, would create a mismatch between the EB-2010-0008 payment amounts, through which forecast costs are recovered or revenues credited, and the actual costs incurred or revenues earned in the period. As a result, the determination of the balances in the deferral and variance accounts using the EB-2013-0321 forecasts as the reference in the Disputed Period would produce an incorrect variance since it would not reflect the true variance between forecast amounts in rates and actual amounts expended or earned during that period.
30. Under the Disputing Parties' position, there would be no nexus between the rates through which the reference forecast costs are recovered and the actual costs incurred. A variance arising from using EB-2013-0321 forecasts in the Disputed Period would be just a mathematical result with no meaning from a regulatory perspective for purposes of

⁵ OEB, Decision and Order re Application by Hydro One Networks Inc. to Establish a Deferral Account (EB-2012-0180), July 12, 2012 at pp. 2-3 (See Book of Authorities, Tab 8).

setting just and reasonable rates, and would provide no assurance that the amounts tracked in the variance accounts are properly recovered from ratepayers

31. The Disputing Parties' proposed disposition of the deferral and variance account balances conflicts with the concept of properly matching revenues and expenses. The Disputing Parties are comparing actual incurred expenses for calendar year 2014 against a pro forma level of revenues for the entire 2014 calendar year, based upon rates that only came into effect on November 1, 2014. Adoption of this approach would deny OPG the opportunity to recover, via rates, its actual, prudently incurred expenses. Such treatment is in conflict with the purpose of deferral and variance accounts.
32. For example, although using the EB-2013-0321 revenue requirement may result in a smaller variance account entry, it would also mean that the utility will not have recovered and will never recover the costs in the rates that the smaller EB-2013-0321 variance suggests since the utility is only earning revenues based on rates and forecasts established in EB-2010-0008. Under this approach, costs that have not even had their prudence challenged would be unlawfully denied recovery due to the mismatch between the periods used to establish the revenue requirement and the payment amounts.
33. It is for these reasons that the OEB's Orders in EB-2012-0002 and EB-2013-0321 properly apply the EB-2010-2008 forecast of costs and revenues for purposes of recording entries and do not impose the EB-2013-0321 revenue requirement onto the Disputed Period.

Using the Revenue Requirement Established in EB-2013-0321 as the Reference Point Would Violate the Provisions of O. Reg 53/05

34. For certain of the accounts at issue here, the provisions of O. Reg. 53/05 act to prevent the retroactive imposition of the EB-2013-0321 forecasts on the Disputed Period when EB-2010-0008 rates were in effect. For ease of reference, a copy of O. Reg. 53/05 is included at Tab 9 of the Book of Authorities.
35. For the Nuclear Liability Deferral Account, paragraph 6(2)7 of O. Reg. 53/05 requires the OEB to ensure that OPG recovers the balances recorded in the deferral account

established under 5.2(1) of the Regulation. This subsection requires OPG to establish a deferral account to record the revenue requirement impacts of changes in its nuclear decommissioning liability. Pursuant to paragraph 6(2)7 of O. Reg.53/05, the OEB only has discretion on the basis of whether the revenue requirement impacts are accurately recorded in the account. Once the OEB is satisfied that the amounts are accurately recorded, it must permit their recovery.

36. In the case of the Nuclear Liability Deferral Account, OPG has made an entry of \$81.6 million for the Disputed Period. The variance reflects the revenue requirement impacts of changes in OPG's nuclear decommissioning liability that have not been recovered in rates because these changes occurred after EB-2010-0008 rates were established. The Disputing Parties suggest that after the imposition of the EB-2013-0321 revenue requirement, that there is a zero dollar entry and no recovery is warranted. This could only be true if OPG had already recovered all the revenue requirement impacts of changes in OPG's nuclear decommissioning liability in rates. But it has not. The facts of the matter are that OPG did not recover those impacts and never will recover them if the EB-2013-0321 forecast is used as a reference point in the Disputed Period when the rates established in EB-2010-0008 applied, but did not reflect the increased nuclear decommissioning liability. As OPG had no the ability to recover those impacts during the Disputed Period under the rates then in effect, the entries recorded by OPG must be recovered in order to comply with O. Reg 53/05.
37. The Bruce Lease Net Revenues Variance Account involves similar considerations. In its EB-2007-0905 Decision the OEB determined that it was necessary for OPG to establish this account in order to give effect to paragraphs 6(2)(9) and 6(2)(10) of O. Reg 53/05.⁶ The OEB held that paragraph 6(2)9 requires the OEB to ensure that OPG recovers all of the actual costs OPG incurs with respect to the Bruce Nuclear Generating Stations. The OEB held that the actual, not forecast, excess revenues over costs be used to offset payment amounts for Pickering and Darlington. The OEB directed OPG to establish a variance account to capture the difference between (i) the forecast costs and revenues

⁶ OEB, Decision and Order re Application by OPG for Payment Amounts (EB-2007-0905), November 3, 2008, p. 112 (See Book of Authorities, Tab 10).

related to Bruce that are factored into the test period payment amounts for Pickering and Darlington and (ii) OPG's actual revenues and costs in respect of Bruce. Paragraph 6(2)10 provides that OPG's revenues earned from the Bruce Nuclear Generating Stations relative OPG's costs in respect of those stations be used, to reduce OPG's revenue requirement for purposes of the payment amounts under Section 78.1(1) of the *OEB Act*. Here again, the OEB must ensure that OPG actual revenues are used as an offset to the payment amounts and actual costs are recovered.

38. For the Bruce Lease Net Revenues Variance Account, OPG has made an entry of \$41.1 million for the Disputed Period, representing an under recovery by OPG because the forecast underpinning the revenue requirement in EB-2010-0008 did not permit full recovery of Bruce Lease Costs. However, the proposal by the Disputing Parties results in OPG providing a refund to rate payers of \$79.7 million for the Disputed Period. This would imply that not only should OPG forgo the recovery of the insufficiency, but also should provide additional funds as if it had actually over collected during the disputed period. Once again, the facts are that OPG did not recover all of its costs that it incurred with respect to Bruce and never will if the Disputing Parties' position is adopted since rates at the applicable period did not permit it to do so. It is impossible to comply with paragraph 6(2)9 of the regulation when (i) cost with respect to Bruce have been incurred in the first instance cannot be recovered and (ii) the added refund proposed by the Disputing Parties is based on amounts that were never recovered in rates.
39. For the Capacity Refurbishment Variance Account, the OEB found in its Decision in EB-2007-0905 that this account is required because of the obligation imposed on the OEB by paragraph 6(2)4 of O. Reg. 53/05.⁷ Under 6(2)4, the OEB is required to ensure that OPG recovers its capital and non-capital costs, together with firm financial commitments, incurred to increase the output of, refurbish or add operating capacity to a generation facility, subject to the cost being prudently incurred. Retroactive imposition of the EB-2013-0321 revenue requirement for the Disputed Period would frustrate this provision.

⁷ OEB, Decision and Order re Application by OPG for Payment Amounts (EB-2007-0905), November 3, 2008, p. 123 (See Book of Authorities, Tab 11).

40. For the Disputed Period, OPG incurred such capital and non-capital costs and made entries into the Capacity Refurbishment Variance Account in order to recover those costs based upon the Orders of the OEB then in effect. OPG made entries in this account for the Disputed Period of \$117.3 million and \$3.9 million of capital and non-capital cost for hydro-electric and nuclear projects, respectively. The OEB cannot retroactively eliminate those costs by applying the EB-2013-0321 Order prior to its effective date.

Conclusion

41. Entries made by OPG in the accounts in question were correctly made in accordance with the Orders in effect during the Disputed Period, are consistent with the OEB's explicit direction and are compliant with O. Reg. 53/05. The retroactive application of the EB-2013-0321 forecast revenue requirement as the reference points for the Disputed Period would not be valid in law and would not result in just and reasonable rates.

All of which is respectfully submitted this 30th day of June, 2015.

ONTARIO POWER GENERATION INC.

By its Counsel

Torys LLP

for

Charles Keizer