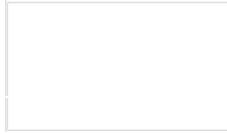


APPENDIX B
to Energy Probe Submission (EB-2014-0101)



**Ontario Energy
Board**

**Commission de l'énergie
de l'Ontario**



EB-2013-0321

IN THE MATTER OF AN APPLICATION BY

ONTARIO POWER GENERATION INC.

**PAYMENT AMOUNTS FOR PRESCRIBED FACILITIES
FOR 2014 AND 2015**

DECISION WITH REASONS

November 20, 2014

APPENDIX B
to Energy Probe Submission (EB-2014-0101)

EB-2013-0321

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.

BEFORE: Marika Hare
Presiding Member

Christine Long
Member

Allison Duff
Member

DECISION WITH REASONS

NOVEMBER 20, 2014

APPENDIX B

to Energy Probe Submission (EB-2014-0101)

11 IMPLEMENTATION

(Issue 12.1)

OPG requests an effective date of January 1, 2014 in respect of the previously regulated hydroelectric and nuclear facilities, and an effective date of July 1, 2014 for the newly regulated hydroelectric facilities. With respect to the newly regulated hydroelectric facilities, section 6(2)11 of O. Reg. 53/05 states the following:

In making its first order under section 78.1 of the Act in respect of Ontario Power Generation Inc. that is effective on or after July 1, 2014, the following rules apply:

- i. The order shall provide for the payment of amounts with respect to output that is generated at a generation facility referred to in paragraph 6 of section 2 during the period from July 1, 2014 to the day before the effective date of the order.

At OPG's request, the Board issued an interim payment amounts order on December 17, 2013, declaring the payment amounts for the previously regulated hydroelectric and nuclear facilities interim as of January 1, 2014, and the newly regulated hydroelectric facilities as of July 1, 2014.

OPG argues that: "having declared current payment amounts interim as of the dates set out above, the OEB is obliged to make the payment amounts it determines to be just and reasonable after a review of the application effective from those dates. The time taken to process and review OPG's application is legally irrelevant."¹²¹ In its Argument-in-Chief, OPG relied on *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 ("Bell"). The Bell decision establishes that the Board has the power to retrospectively set the implementation date of the decision back to the date that payment amounts were declared interim. OPG argues that this power, when coupled with the requirement that the Board must ensure that at all times payment amounts are just and reasonable, amounts to a legal requirement that the Board set the effective date of the order back to the date payment amounts were declared interim.

With respect to the newly regulated hydroelectric facilities, CME submitted that section 6(2)11 of O. Reg. 53/05 cannot override the Board's powers to set just and reasonable

¹²¹ Argument-in-Chief, page 146.

APPENDIX B

to Energy Probe Submission (EB-2014-0101)

rates. The overall impact on consumers of OPG's proposals needs to be considered in the context of the retroactivity component of the relief OPG seeks. CME submitted that none of the retroactive amounts should be recoverable from ratepayers. OPG disagreed with CME's submission observing that there is no conflict between the Act and the regulation as the Act provides for combined operation of section 78.1(2) and the regulation.

Board staff argued that the Bell case gives the Board the ability to retrospectively adjust final rate orders back to the date the interim order was issued, but it does not require the Board to do so.

Several other parties disagreed with OPG and proposed a range of different effective dates for the respective payment orders. SEC and CCC argued that the timing of the filing of the application was entirely within OPG's control. SEC pointed to the extensive updates that were filed by OPG throughout the proceeding, which resulted in additional delay. These parties submitted the effective date for the previously regulated assets should be the month following the date of the payment order. Board staff submitted that July 1, 2014 should be the effective date for all payment amounts as it was the earliest possible date a decision and payment order could have been completed based on a September 27, 2013 filing.

Board Findings

The Law Respecting Interim Orders

The Board does not accept that there is a legal requirement that it set the effective date of its final orders to the date that rates were declared interim. OPG's view is not supported by the wording of the legislation, the case law, nor the Board's practice.

The Board's power to set interim rates derives from section 21(7) of the Act: "[t]he Board may make interim orders pending the final disposition of a matter before it." As the use of the word "may" reveals, there is no requirement that the Board issue interim rate orders at all. As the decision to issue an interim order is discretionary, it follows that any decision to draw the effective date of the final payments order back to the date of the interim order is also discretionary. Nothing in the legislation suggests that the issuance of an interim order in any way ties the Board's hands with respect to the effective date of the final order. If the Legislature had intended that the Board be

APPENDIX B to Energy Probe Submission (EB-2014-0101)

required to match the effective date of an order to the date interim rates were declared, it would have written that into the legislation. This was not done, and the Legislature has instead left the matter to the Board's discretion.

The Bell decision referred to by OPG establishes that interim rate orders give the Board the *ability* to retrospectively alter rates (or in this case payment amounts) back to the date the interim order was issued. As the Board stated in its decision in EB-2005-0361, nowhere does Bell state, or even suggest, that the Board is *required* to do so. Instead, the language of Bell suggests a permissive or discretionary approach. The Court stated: "It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order."¹²² The Bell decision does not support OPG's conclusion that the Board is legally required to align the effective date to the interim date, and OPG has not pointed to any other cases which support its position.

The Board issued the interim payment amounts order on December 17, 2013 at OPG's request and without any input from any other party. The Board was clear that by declaring rates interim it was not committing itself to ultimately setting the effective date of the final order to match the interim date: "This determination [i.e. the order declaring payment amounts interim] is made without prejudice to the Board's ultimate decision on OPG's application, and should not be construed as predictive, in any way whatsoever, of the Board's final determination with regards to the effective date for OPG's payment amounts arising from this application."¹²³

Although OPG questioned in final argument whether the Board even has the ability to set an effective date to some date other than the interim date, it made no comment on this point when it made its request for interim payment amounts, nor when the interim order was issued. Given that the sentence quoted above is commonly included in the Board's interim orders, the Board is surprised to hear for the first time in OPG's final argument that OPG feels the Board lacks this authority. The very reason that the Board generally issues interim orders without seeking submissions from parties is that parties will be given the opportunity to ask questions and make submissions about the effective date of the final order throughout the hearing process. If the Board is legally required to match the effective date to the interim date, as OPG argues, then the issuance of the interim order without process arguably represents a breach of the "right to be heard"

¹²² Bell, page 1752 (emphasis added)

¹²³ Interim Payment Amounts Order, December 17, 2013

APPENDIX B

to Energy Probe Submission (EB-2014-0101)

principle. In the current case, ratepayer groups would be responsible for hundreds of millions of dollars in costs relating to the “interim” period without being afforded any opportunity for comment at all.

OPG argues that the Board has an obligation to ensure that rates are just and reasonable at all times. As a general statement, this is true. However, the Board’s power to consider and set what makes a just and reasonable rate is very broad and allows significant flexibility. The obligation to ensure that rates are always just and reasonable does not mean that the Board must examine and adjust a utility’s rates on a constant basis. Most utility’s rates are set on a forecast basis, for example, and invariably these forecasts turn out to be inaccurate to some extent. Absent extraordinary circumstances, the Board does not intervene to adjust rates simply because actual costs or revenues are different from what was forecast – even though the Board has the power to do so. In other words, there is a measure of “wobble room” in a just and reasonable rate. Just and reasonable rates can fall within a range, and there is no defined line past which rates immediately become “unreasonable”. Indeed, under incentive regulation rates are deliberately de-coupled from a utility’s actual costs. The Board therefore does not agree with OPG’s argument that the requirement to ensure just and reasonable rates at all times leads to an automatic requirement to match the effective date with the date interim rates were set.

Effective date for the Nuclear and Previously Regulated Hydroelectric Payment Amounts

The Board has determined that the effective date for the payment amounts for the nuclear and previously regulated hydroelectric facilities will be November 1, 2014. The Board is not prepared to accept the January 1, 2014 effective date proposed by OPG as it is contrary to the Board’s long-standing practice of setting rates on a forecast (i.e. forward test year) basis.

The Board’s general practice with respect to the effective date of its orders is that the final rate becomes effective at the conclusion of the proceeding. This practice is predicated on a forecast test year which establishes rates going forward, not retrospectively. Going forward, the utility knows how much money it has available to spend and the ratepayer knows how much it is going to cost to use electricity in order to make consumption decisions. The forecast test year enables both the utility and the

APPENDIX B

to Energy Probe Submission (EB-2014-0101)

ratepayer to make informed decisions based on approved rates. The forecast test year is a pillar in rate setting and the Board's practice must be respected.

The Board must control its regulatory process. The Board hears a large number of cases throughout the year and must plan its resources accordingly to ensure cases are completed and decisions are rendered. In cases where utilities have not filed their applications in time to have rates in place prior to the effective date, the Board's practice has typically been to not allow the utility to retrospectively recover the amounts from the period where the interim order was in effect.¹²⁴ All applicants are aware of the Board's metrics. The process for an oral hearing is expected to take 235 days from the filing of the application to the issuance of the final decision, and 280 days until the issuance of the rate order.

OPG understood the timelines associated with filing a cost of service application and its witnesses confirmed that it was unlikely that the Board could have completed the process by January 1, 2014 given a September 27, 2013 filing date.¹²⁵ Even if a complete application had been filed in September, there was no scenario under which the proceeding could have been completed by January 1, 2014. OPG's proposal would result in the entire two-year increase for the previously regulated assets being recovered over a significantly shorter time period, resulting in a higher monthly bill impact increases exceeding the \$5.36 and \$5.94 identified in the two published Notices of Application. OPG estimated the impact of establishing effective dates of January 1, 2014 for the previously regulated assets and July 1, 2014 for the newly regulated assets was \$649M or 43% over current payment amounts,¹²⁶ assuming an implementation date of September 1, 2014. A September 1, 2014 implementation date was used to calculate the magnitude of the increase during the oral phase of the proceeding; a November implementation date, assuming OPG's proposed payment amounts, would result in a percentage increase higher than 43%.

Ratepayers who made consumption decisions from January 1, 2014 to November 1, 2014, who thought they had already paid their electricity bills may be surprised to learn they will be responsible for additional costs, recovered through higher rates to be included on future bills until December 31, 2015. In addition, a January 1, 2014

¹²⁴ EB-2012-0165 (Sioux Lookout); EB-2013-0139 (Hydro Hawkesbury); EB-2012-0113 Centre Wellington; EB-2013-0130 Fort Frances

¹²⁵ Tr Vol 2 page 171

¹²⁶ Undertaking J3.10

APPENDIX B
to Energy Probe Submission (EB-2014-0101)

effective date would result in some level of inter-generational inequity, to the extent customer profiles changed over that time.

The Board finds that the reasons this proceeding could not be completed by January 1, 2014 were almost entirely within OPG's control. OPG's witnesses indicated the earliest date the application would have been ready to file was August 2013. OPG's management made the decision to delay the filing further to include the newly prescribed hydroelectric assets. OPG indicated that it would not be practical or workable to file one application regarding the previously regulated assets first and then file a second application or update for the newly regulated assets at a later date. OPG's management had choices and made decisions regarding the timing, inclusion and exclusion of evidence. For example, OPG indicated its plans to file a separate application for disposition of deferral and variance account balances as of December 31, 2014;¹²⁷ an application the Board has yet to receive. In addition, OPG understands that options are available to separate issues in distinct applications for significant issues to expedite the hearing process. In fact, OPG asked the Board to consider a stand-alone Niagara Tunnel Project hearing. The Board responded to OPG's request in a letter dated April 13, 2012 and agreed that given the scale and complexity of the Niagara Tunnel Project, it was appropriate to consider a separate 2013-2014 payment amounts application. In the end, OPG decided not file a separate Niagara Tunnel application nor a payment amount application for 2013 rates.

When OPG filed its application on September 27, 2013, it was incomplete. A complete application was filed on December 5, 2013, less than one month before its proposed effective date.

The Board decided to issue a notice for the proceeding on October 25, 2013 based on the incomplete application in order to avoid further delay; however, the Board stated: "[t]he timing of any further procedural steps will be dependent on OPG's response to the items noted in this correspondence."

On December 6, 2013, one day after filing the complete application on December 5, 2013, OPG filed a major update to its application which required the issuance of a new notice, and essentially brought the proceeding back to step 1. New information continued to be filed, including updated evidence on the Darlington refurbishment

¹²⁷ Exh H1-1-1 page 1

APPENDIX B

to Energy Probe Submission (EB-2014-0101)

project filed on July 2, 2014 which necessitated a delay of the oral hearing by several weeks.

The Board's decision is based on a balancing of the interests of the applicant and of the ratepayer. The timing of the application is solely in OPG's control, and the Board's metrics and policies regarding effective dates are well known. For the reasons provided above, the Board approves an effective date of November 1, 2014 for the previously regulated assets.

Effective Date for Newly Regulated Hydroelectric Payment Amounts

The Board has determined that the effective date for the final payment amounts shall be November 1, 2014 for the newly regulated hydroelectric facilities. As mandated by O. Reg. 53/05, the Board's regulation of the payment amounts for the newly regulated hydroelectric facilities commenced on July 1, 2014. From July 1, 2014 through October 31, 2014 the Board has determined that the payment amounts for the newly regulated hydroelectric facilities will remain HOEP, which is the amount that OPG actually recovered over that time period pursuant to the Board's interim rate order.

The Board accepts the arguments of the parties that argued that the Board is not legally required to set July 1, 2014 as the effective date for the final payment amounts applicable to the newly hydroelectric regulated facilities. O. Reg. 53/05 requires the Board to commence its payment regulation of the newly regulated hydroelectric facilities as of July 1, 2014; it does not require the Board to set the payment amounts at any particular level. In fact the regulation appears to contemplate that the effective date of the final payment order may well come after July 1, 2014: "[t]he order shall provide for the payment of amounts with respect to output that is generated at a generation facility referred to in paragraph 6 of section 2 [i.e. the newly regulated facilities] **during the period from July 1, 2014 to the day before the effective date of the order.**"

The Board has determined that it is not legally required to set the effective date of the final order for the newly regulated hydroelectric facilities to July 1, 2014. The Board has decided that it would be inappropriate to do so. The Board orders that the effective date for the final payment order for the newly regulated hydroelectric facilities will be November 1, 2014.

APPENDIX B

to Energy Probe Submission (EB-2014-0101)

OPG takes the position that given the September 2013 notice of the proposed amendment to O. Reg. 53/05 to regulate the newly regulated hydroelectric facilities, OPG could not have filed the application for the associated payment amounts any earlier than it did. OPG argues that it was dependent upon the Ministry's release of the proposal to amend the regulation in order to proceed with the application.

The draft regulation was published for comment in July 2013. The notice of the proposed amended regulation was made public in September 2013 and the regulation was filed in November 2013. The Board considers that an application could have been filed shortly after the draft regulation was published for comment (i.e. after July 2013). Indeed OPG did not wait for the regulation to be finalized before filing its original application.

It appears to the Board that OPG had various options available to it as to when it could have filed its application. In fact, the inclusion in the application of the newly regulated hydroelectric facilities was an issue of little controversy in this proceeding. One of the options it could have considered was to file the newly regulated hydroelectric portion of the application as an update to the payment amounts case which could have been filed earlier. Instead, OPG waited for the regulation to be issued as a draft before filing the entire payments amounts application. Other options were available as well, all of which could have resulted in finalized payment amounts at an earlier point in time. The Board has based its decision on the regulatory principle that rates should be set on a forward test year basis. The Board reiterates its reasons outlined in respect of the effective date for the nuclear and previously regulated hydroelectric payment amounts. The Board's position is that rates should be based on a forecast test year which establishes rates on a go forward basis, not retrospectively. This allows ratepayers to make informed consumption choices and provides utilities with certainty regarding revenue on a go-forward basis. OPG's evidence regarding when it could have filed its application is not so compelling as to move the Board off its practice of making rates effective in the month following the Board's final decision.

In the previous cost of service proceeding, the decision was issued on March 10, 2011 and the effective date was March 1, 2011. The IESO was able to implement the effective date through its billing processes without the necessity for shortfall payment amount riders to cover the period between March 1, 2011 and the date of the final payment amounts order. The Board expects that the same process can be