

**Ontario Energy
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BY E-MAIL

December 9, 2016

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Ontario Power Generation Inc.
2017-2021 Payment Amounts
Ontario Energy Board File Number EB-2016-0152**

In accordance with Procedural Order No. 4, please find attached OEB staff's submission on motions filed regarding full and adequate responses. OPG and all intervenors have been copied on this filing.

Yours truly,

Original signed by

Violet Binette
Project Advisor, Applications

Attach

ONTARIO POWER GENERATION INC.
2017-2021 PAYMENT AMOUNTS
EB-2016-0152

Ontario Energy Board
Staff Submission on Motions

December 9, 2016

Introduction

Ontario Power Generation Inc. (OPG) filed an application with the Ontario Energy Board (OEB) on May 27, 2016, seeking approval for changes in payment amounts for the output of its nuclear generating facilities and the regulated hydroelectric generating facilities for the period January 1, 2017 to December 31, 2021.

In Procedural Order No. 4, issued on November 4, 2016, the OEB made provision for the filing of motions, including for full and adequate responses, on December 2, 2016, and for the filing of submissions supporting and opposing the motions. Motions were filed by the School Energy Coalition (SEC), Green Energy Coalition (GEC) and Environmental Defence (ED).

School Energy Coalition

SEC has filed a Notice of Motion seeking an order requiring OPG to make a full and adequate response to SEC interrogatory L-11.1-SEC-95. The interrogatory sought information relating to the hydroelectric projects and amounts that are expected to be recorded in the hydroelectric sub-account of the Capacity Refurbishment Variance Account (CRVA) from 2017-2021. The interrogatory also requested OPG's forecast total in-service hydroelectric additions for the same time period.

OPG refused to provide a response to the interrogatory. OPG stated that the requested information was not relevant because incentive regulation (IR) de-couples revenues from costs, and that OPG is required by O. Reg. 53/05 to use the CRVA and that forecasts of these amounts are not relevant. The CRVA was originally approved in EB-2007-0905 and was established pursuant to section 6(2)4 of O. Reg. 53/05 to record variances between the actual capital and non-capital costs and firm financial commitments incurred to increase the output of, refurbish or add operating capacity to a regulated generation facility. OPG proposes that entries into the account will record variances as follows:

- Until the effective date of the payment amounts order in this proceeding for the regulated hydroelectric facilities: the variance between actual capital and non-capital costs and firm financial commitments and those capital and non-capital forecast costs and firm financial commitments underpinning the revenue requirement approved by the OEB in EB-2013-0321
- As of the effective date of the payment amounts order in this proceeding, for the regulated hydroelectric facilities: OPG proposes the variance between actual capital

and non-capital costs and firm financial commitments and the 2014-2015 average forecast capital and non-capital costs and firm financial commitments underpinning the hydroelectric revenue requirement approved by the OEB in EB-2013-0321

OEB staff supports SEC's motion, largely for the reasons provided by SEC in its Notice of Motion and as further described below.

The information requested by SEC is relevant to this proceeding. The hydroelectric IRM plan proposed by OPG is an I minus X formula: rates adjusted by an inflation measure less an expected productivity factor. This formula is designed to allow OPG to recover sufficient revenues to cover its ongoing costs (assuming a more or less "steady-state"), and to encourage productivity improvements in its operations.

The CRVA, however, carves out a material amount of OPG's capital costs, and allows OPG to recover the revenue requirement associated with these costs in addition to the price-cap adjusted revenues it will realize from the IRM formula. While deferral and variance accounts are common in IRM plans, they are often established to capture pass through items or matters that are outside the utility's control or ability to anticipate (z-factor and incremental capital modules are other examples of this). The scope of the CRVA, however, is potentially much broader: it appears to capture much of OPG's routine capital spending. Routine capital spending (as opposed to capital spending that would trigger an incremental capital module of the type that exists for electricity distributors) is ordinarily meant to be covered by the IRM formula. If it is also recovered through the CRVA, this raises the potential for double recovery to some degree. As OPG pointed out in its response, IR is meant to de-couple, in the sense of loosening the relationship between revenues and costs relative to the more exacting one of traditional cost of service rate-setting. The CRVA potentially provides OPG with recovery of many of its costs for capital projects.

Although it is true that the CRVA is mandated through O. Reg 53/05, that does not mean it has no relevance for the IR regime that will be approved by the OEB. As Pacific Economics Group pointed out in its report, the existence of the CRVA might require an off-setting increase to the X factor.¹

Additional information is therefore required about OPG's proposed use of the CRVA.

¹ Exhibit M2, pp. 64-65

Green Energy Coalition

GEC filed a Notice of Motion seeking full and adequate response to three interrogatories filed on October 1, 2016.

Exh L-3.1-GEC-1

GEC referred to the Concentric Energy Advisors (Concentric) Report, *Common Equity Ratio: For OPG's Regulated Generation*, filed at Exh C1-1-1 Attachment 1, which recommended an equity thickness of 49%. Part (b) of the interrogatory sought the individual impacts of the Darlington Refurbishment Program (DRP) and Pickering Extended Operations on the equity ratio. Parts (c) through (f) sought net present value impacts of the life of the Darlington and Pickering facilities for the proposed change in cost of capital.

In response to part (b), Concentric stated DRP and Pickering life extension “are key elements of Concentric’s risk assessment, but it is not possible to isolate the effects of these projects, together or individually, from the overall risk assessment of OPG. While one could calculate the increase in capital expenditures for the projects, the capital mix is just one aspect of Concentric’s overall risk assessment.” In response to parts (c) through (f), OPG stated that “it is not possible to isolate the effects of these projects from the overall risk assessment of OPG.” In its Notice of Motion, GEC stated that Concentric’s response to part (b) is evasive and inaccurate and that OPG declined to answer parts (c) through (f) on the basis of the response to part (b). GEC submitted that cost and rate impact of the projects is fundamental to prudence determination.

OEB staff is of the view that the Concentric study involves a degree of subjectivity (i.e., qualitative judgement)² and, therefore, the value of a scenario analysis may not be as easy to perform or as useful as one which was more quantifiable. The Concentric study is not a purely quantifiable approach where one variable can be substituted for another in order to assess the impact on the overall result. OEB staff also notes that Concentric and OPG have expressed concern about isolating the effects.

Nevertheless, OEB staff submits that the matter expressed by GEC in its interrogatories is relevant to this proceeding and the manner in which Concentric approached its analysis should not influence the degree to which the evidence supporting the company’s proposal is tested. OEB staff submits that the scenario analysis requested

² OEB staff’s expert, Dr. Villadsen from The Brattle Group, comments on qualitative aspects of Concentric’s evidence; see Exhibit M3, pp. 7 and 9, for example.

by GEC may have a net benefit to the OEB's review of this matter and any concerns and the context for the overall risk assessment can be provided with the calculations.

Exh L-4.3-GEC-2

GEC sought illustrative information regarding avoidable costs if the DRP was cancelled "today". OPG replied that it had no plans to cancel the DRP, but did provide spending to August 2016 and accruals to September 2016. The matter was further discussed at the technical conference on November 14, 2016. It is GEC's view that the OEB should understand the avoidable costs if an off-ramp is exercised.

OEB staff notes that, during the technical conference, the OPG witness offered to explain the kinds of costs that OPG would incur if there was a cancellation. While OEB staff is of the view that the impacts of any off-ramps, and the cost implications of triggering those off ramps in the test period are within scope of this proceeding, the scope of GEC's request is not entirely clear. GEC could provide clarification at the motion hearing on December 16, 2016.

Exh L-1.3-GEC-64

GEC also sought the impact on payment amounts, with and without smoothing, in the event the Government required an off-ramp at the completion of Unit 2 refurbishment. OPG was unable to provide a response, stating that the costs would depend on timing of the decision and specific direction from the Government. GEC submitted that the Government required OPG to include off-ramps in its contracting approach and that testing with respect to off-ramps is required to evaluate the rate smoothing proposal.

As above, the scope of GEC's request is not clear. OEB staff submits that an off-ramp scenario needs to be specifically defined if OPG is to provide a helpful scenario outcome. And should OPG choose to provide a response, or if it is directed to do so, it could also provide any assumptions and probabilities.

Environmental Defence

ED has filed a motion with the OEB seeking full and adequate responses to six interrogatories and two undertakings. These interrogatories and undertakings all relate to issue 6.5: Are the test period expenditures related to extended operations for Pickering appropriate?

The disputed interrogatories and undertakings all relate to the cost effectiveness of OPG's proposal to continue operating Pickering past 2018.³ OPG refuses to respond to these enquiries because it believes the decision on whether Pickering should continue operating is not within the OEB's power to make, and is outside the scope of this proceeding. OEB staff agrees that whether the operations of Pickering are extended is not within the OEB's authority, but the OEB does have oversight of the payment amounts to fund the operation of Pickering.

As per OPG's proposal, the costs of continuing to operate Pickering past 2020 are significant. Approximately \$307 million in incremental O&M is required in the test years to enable Pickering to operate past 2020. There are also billions of dollars required to actually operate Pickering past 2020 (or even 2018). In this proceeding the OEB will review all expenditures for the 2017 to 2021 test period.

In its Notice of Motion, ED has tried to make clear that it will not be asking the OEB to decide whether Pickering should continue operating or not. ED wishes to assess the costs of Pickering against other generation options in order to assess the reasonableness of the costs sought by OPG. In ED's view, this assessment cannot be performed without responses to the disputed interrogatories and undertakings. Depending on the results of the assessment, ED may ultimately argue that OPG's cost recovery for Pickering should be capped at the level of the least cost alternative.⁴ And in ED's view, that analysis should be based on a 2018 reference, when the Clarington Transformer Station is forecast to be in service.

OEB staff observes that a decision to "cap" recovery of Pickering costs, and/or deny the \$307 million in incremental O&M, could have the effect of cancelling OPG's plans to continue operating Pickering past 2020. Although the OEB only has authority to set the payment amounts recovered by OPG, these payment amounts can have the effect of forcing OPG's hand. If a cap were imposed that was materially lower than the actual costs to operate Pickering, OPG might well be forced to cease operating the facility. As described in further detail below, in OEB staff's view this is not a reason for the OEB to foreclose this line of enquiry. The OEB should be aware, however, that despite ED's assertion that it is not seeking a go/no go decision from the OEB, this is what a decision to cap recovery could amount to.

³ ED Notice of Motion para. 4 refers to the forecast completion of the Clarington Transformer Station in 2018, adding options to meet demand. OPG's application is based on a proposal to operate Pickering beyond 2020.

⁴ ED Notice of Motion, paras. 5, 35.

OEB staff supports ED's motion. OPG is seeking significant money from ratepayers to operate Pickering. The OEB's mandate is to ensure that payment amounts are just and reasonable, which should include an assessment of the ongoing operating costs of Pickering.

What is the scope of the OEB's review of Pickering continued operations?

The OEB is empowered by section 78.1 of the OEB Act to set "just and reasonable" payment amounts for OPG's prescribed generation facilities, including Pickering. Section 78.1(6) further provides that the burden of proof rests with the applicant. The OEB's objectives with respect to electricity include: "[protecting] the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service."

The OEB's powers to set just and reasonable payment amounts are very broad. Many court decisions confirm this view; for example in *Toronto Hydro-Electric System Ltd. v. Ontario Energy Board*, the Divisional Court stated: "The OEB has broad powers to set rates. [...] Rate-setting, and the determination of what is just and reasonable as between the utilities and the ratepayers, is at the heart of the OEB's jurisdiction." ⁵

The onus rests with OPG to show that the costs it seeks to recover through OEB approved payment amounts are reasonable. The OEB's enquiry into the reasonableness of the proposed payment amounts could extend to asking whether a particular project is necessary at all. If the OEB determines that a proposed project provides poor value for ratepayers, then it should not approve the costs associated with that project.

OEB staff recognizes that the OEB is not the system planner. Typically that role is performed by the IESO based on the government's Long-Term Energy Plan (LTEP). In its decision on OPG's application for 2014-2015 payment amounts, the OEB indicated that it would place significant reliance on the LTEP.⁶ However, extending Pickering operations beyond 2020 is not in the current LTEP.

The government also has the power to direct the OEB to not consider need for specific projects. It exercised this power recently through amendments to O. Reg. 53/05, where

⁵ 2009 CanLII 30148, para. 23. Upheld by the Ontario Court of Appeal: *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284

⁶ EB-2013-0321, Decision with Reasons, p. 51. See also Achieving Balance, Ontario's Long-Term Energy Plan, December 2013

it directed the OEB to not consider need in assessing the prudence of costs related to the Darlington Refurbishment Program.

The government did not carve out any other projects (such as Pickering) for similar treatment. Under the doctrine of “implied exclusion” one can infer that had the government wanted to shield Pickering from a “need” analysis it would have specified this through the regulation. The doctrine of implied exclusion is a principle of statutory interpretation; it is described in *Sullivan on the Construction of Statutes* as follows:

An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature’s failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.⁷

Absent an explicit fettering of the OEB’s jurisdiction through a regulation (or, potentially, the LTEP), the OEB’s ordinary and broad just and reasonable powers continue to apply, and this can include an assessment of need.

The only indication that the OEB has of the government’s support for Pickering’s continued operations beyond 2020 comes from a press release that was issued on January 11, 2016. The press release states:

The Province has also approved OPG’s plan to pursue continued operation of the Pickering Generating Station beyond 2020 up to 2024, which would protect 4,500 jobs across the Durham region, avoid 8 million tonnes of greenhouse gas emissions, and save Ontario electricity consumers up to \$600 million. OPG will engage with the Canadian Nuclear Safety Commission and the Ontario Energy Board to seek approvals required for the continued operation of Pickering Generating Station.

Although the press release appears to show government support for the project, it cannot be considered a directive to the OEB to not assess need. Nor does it have the

⁷ Ruth Sullivan, *Sullivan on the Construction of Statutes*, Sixth Edition, 2014, p. 248.

weight of the LTEP, which is prepared after extensive review of the province's supply and demand forecast. In fact the press release specifically references the need for OEB approval, which suggests that the government does not intend to shield any part of the project from review.

The OEB should certainly consider the press release, but it should not be considered binding. The Minister, for example, approves OPG's Business Plan, which is the foundation upon which the entire payments application is based. If the OEB were bound by the Minister's assessment of the Business Plan then it would have little ability to disallow any of the matters addressed in the Business Plan. The OEB has in fact over the years made a number of disallowances for matters that were supported by the Business Plan. Obviously if the OEB is not bound by the Business Plan it is also not bound by a press release.

OEB staff submits, therefore, that the OEB has the jurisdiction to explore the cost effectiveness of ongoing operating costs of Pickering. The results of this enquiry could ultimately be a decision by the OEB to disallow some (or even all) costs related to operating Pickering beyond 2018 or beyond 2020. To be clear, OEB staff is not commenting at this stage on whether or not the proposed costs are reasonable. However, the assessment of the cost effectiveness of continuing to operate Pickering is within the OEB's jurisdiction to consider.

All of which is respectfully submitted