

January 17, 2018

**RESS & COURIER**

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

Attention: Ms. K. Walli, Board Secretary

Dear Ms. Walli:

**Re: EB-2016-0152 - Ontario Power Generation Inc. - Notice of Motion to Review  
and Vary the Decision and Order**

We are counsel to Ontario Power Generation Inc. ("OPG") in the above-referenced proceeding.

Enclosed, please find OPG's Notice of Motion seeking to review and vary the Ontario Energy Board's Decision and Order of December 28, 2017 in EB-2016-0152.

Yours truly,



Charles Keizer

cc: OPG  
Intervenors

**ONTARIO ENERGY BOARD**

**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 for the period from January 1, 2017 to December 31, 2021;

**AND IN THE MATTER OF** Rule 40 of the *Rules of Practice and Procedure* of the Ontario Energy Board.

**NOTICE OF MOTION**

Ontario Power Generation Inc. (“OPG”) will make a motion to the Ontario Energy Board (the “OEB”) at its offices at 2300 Yonge Street, Toronto, on a date and time to be fixed by the OEB.

**The Motion is for:**

1. a review and variance of the OEB’s Decision and Order dated December 28, 2017 in EB-2016-0152 (the “Decision”) at page 157 where the OEB approves an effective date of June 1, 2017 for OPG’s payment amounts rather than the January 1, 2017 effective date requested in OPG’s application;
2. an Order that OPG satisfies the “threshold test” referred to in Rule 43.01 of the OEB’s *Rules of Practice and Procedure*;
3. an Order for an oral hearing of the Motion on the merits;
4. an Order:
  - (a) setting aside the OEB’s approval of June 1, 2017 as the effective date for OPG’s payment amounts in EB-2016-0152;

- (b) finding that the effective date for OPG's payment amounts in EB-2016-0152 shall instead be January 1, 2017; and
- (c) authorizing OPG to establish one or more variance accounts to record the revenue shortfalls that reflect all differences, including those arising in connection with amounts captured in OPG's approved deferral and variance accounts, between the amounts recovered through OPG's nuclear and regulated hydroelectric payment amounts that the OEB declared interim effective January 1, 2017, and the amounts OPG would have recovered if the effective date for OPG's payment amounts in EB-2016-0152 had been set at January 1, 2017.

**The Grounds for the Motion Are:**

OPG's Application and the OEB's Findings on the Effective Date for the Decision

1. In its application, filed May 27, 2016, OPG sought approval for nuclear payment amounts to be effective January 1, 2017 (and for each following year through to December 31, 2021), as well as for hydroelectric payment amounts to be effective January 1, 2017 to December 31, 2017 (and approval of the formula used to set the hydroelectric payment amounts for the period January 1, 2017 to December 31, 2021).
2. OPG in all material respects complied with all filing guidelines provided by the OEB. In addition, OPG met the deadlines established by the OEB in Procedural Order No. 1 and diligently worked with all parties and OEB staff to advance the application in an efficient manner, including by reaching settlement on a subset of issues (Ex. O1-1-1).
3. As part of its application, OPG sought an order declaring its then current payment amounts for the nuclear and regulated hydroelectric facilities to be interim effective January 1, 2017 if the order or orders approving final payment amounts in the proceeding could not be implemented by January 1, 2017.
4. In its December 8, 2016 Interim Payment Amounts Order, the OEB found that it would not be in a position to render a final decision in time to implement new final payment amounts on January 1, 2017. The OEB accepted OPG's request to make OPG's then

current payment amounts interim pending the OEB's final decision. The OEB noted that this determination was made without prejudice to the OEB's ultimate decision on the effective date for the new payment amounts arising from the application.

5. In the December 28, 2017 Decision, the OEB notes that OPG's proposed January 1, 2017 effective date for new payment amounts was supported by OEB staff, which submitted that the application was filed shortly after OPG's 2015 audited results became available and that OPG met the schedule set out by the OEB in Procedural Order No. 1. The OEB then summarizes the arguments made by certain intervenors who took issue with OPG's proposed effective date.
6. Ultimately, the OEB approved an effective date of June 1, 2017 for each of the nuclear and regulated hydroelectric payment amounts. It did so on the basis of its findings that:
  - (a) it was unrealistic of OPG to expect that a final decision would be rendered and a payment amounts order processed in time for January 1, 2017 payment amounts;<sup>1</sup>
  - (b) OPG filed a complicated application and should have known it would take more than seven months for the OEB to consider it, render a decision and finalize a payment amounts order;<sup>2</sup>
  - (c) the completion of some of the items that OPG said could not have been included in the application if filed before May 27, 2016, were largely in the control of OPG and OPG could have taken steps to ensure it was possible to include those elements in the application by an earlier date;<sup>3</sup>
  - (d) OPG's filing of three significant updates to the application suggests that OPG did not file in May 2016 with a view to minimizing the need for updates to the application;<sup>4</sup>

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<sup>1</sup> Decision, p. 158.

<sup>2</sup> Decision, pp. 158-159.

<sup>3</sup> Decision, p. 158.

<sup>4</sup> Decision, p. 158.

- (e) the smoothing of payment amounts, as required by regulation, will help lessen some of the impact of the payment amounts on ratepayers during the test period but will not totally alleviate the fact that ratepayers will have consumed power for the last seven months of 2017 and for a period of 2018 at the existing rates and will, after the fact, have to pay a new rate for those periods;<sup>5</sup>
- (f) it was appropriate for the OEB, in arriving at the June 1, 2017 effective date, to attempt to balance the revenue requirement needs of OPG and rate certainty expected by ratepayers;<sup>6</sup> and
- (g) had O. Reg. 53/05 intended to require an effective date of January 1, 2017, it would have simply said so.<sup>7</sup>

#### Material Errors in OEB's Findings on the Effective Date for the Decision

##### ***Final Payment Amounts for January 1 to May 31, 2017 are Not Just and Reasonable***

- 7. Prior to establishing the effective date of June 1, 2017, the OEB by order dated December 8, 2016 declared OPG's payment amounts to be interim as of January 1. The basis for those interim payment amounts was OPG's existing payment amounts as set out in the Payment Amounts Order dated December 18, 2014 in EB-2013-0321 (the "Existing Payment Amounts").
- 8. In approving OPG's final payment amounts effective as of June 1, 2017, not only did the OEB establish final payment amounts for the period June 1, 2017 to December 31, 2017, it also established the Existing Payment Amounts as the final payment amounts for the period January 1, 2017 to May 31, 2017.

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<sup>5</sup> Decision, p. 159.

<sup>6</sup> Decision, p. 159.

<sup>7</sup> Decision, p. 159.

9. Under Section 78.1 of the OEB Act, the OEB has an obligation to establish just and reasonable payment amounts. The Supreme Court of Canada has described the just and reasonable standard as follows:

In order to ensure that the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and utilities may be assured of an opportunity to earn a fair return for providing those services.<sup>8</sup>

10. The obligation to establish just and reasonable payment amounts extends not only to the final approved payment amounts from the June 1, 2017 effective date onward, but also to the final approved payment amounts for the January 1 to May 31, 2017 period. The OEB failed to make a determination that the payment amounts it made final for the period January 1, 2017 to May 31, 2017 were just and reasonable.
11. According to the Supreme Court of Canada in *Bell Canada (1989)*, where a regulator has an obligation to establish rates for a utility that are just and reasonable, as well as the power to make interim orders, the regulator is obligated to ensure that a utility's rates are just and reasonable at all times.<sup>9</sup> Where interim rates are not just and reasonable, a necessary component of the regulator's power to make interim orders will include the power to make a final order remedying the interim rates that are not just and reasonable.<sup>10</sup>
12. In making the Existing Payment Amounts for the January 1 to May 31, 2017 period final, the OEB failed to consider material facts, which demonstrate that the Existing Payment Amounts do not meet the just and reasonable standard during this interim period.
13. The Existing Payment Amounts for nuclear were established in EB-2013-0321 by dividing the approved revenue requirement by a production forecast that included

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<sup>8</sup> *Ontario (Energy Board) v. Ontario Power Generation Inc.*, [2015] 3 SCR 147, 2015 SCC 44 (CanLII) at para. 20 ("OPG (2015)").

<sup>9</sup> *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722, 1989 CanLII 67 at pp. 1740-1741 ("Bell Canada (1989)").

<sup>10</sup> *Bell Canada (1989)* at p. 1756.

production from four operating units at the Darlington Nuclear Generating Station. Since October 2016 however, Darlington's Unit 2 (878 MW) has been out of service as part of the Darlington Refurbishment Program ("DRP"), which OPG is undertaking in furtherance of Provincial energy policy. Because the Existing Payment Amounts for nuclear were established using an outdated production forecast that is significantly higher than the production level that would have been possible for the January 1, 2017 to May 31, 2017 period, the Existing Payment Amounts are too low to meet the just and reasonable standard for that period. The OEB did not consider this fact in approving the June 1, 2017 effective date.

14. For the hydroelectric payment amounts, the OEB approved a formulaic adjustment to OPG's hydroelectric Existing Payment Amounts. The formula adopted applies an annual inflation factor adjusted by the approved stretch and productivity factors (the "Adjusted Inflation Factor") to produce hydroelectric payment amounts for 2017. However, by failing to apply the Adjusted Inflation Factor to the Existing Payment Amounts during the January 1, 2017 to May 31, 2017 period, the OEB omitted the impact of inflation during this period. This omission renders the hydroelectric Existing Payment Amounts too low to meet the just and reasonable standard during the January 1, 2017 to May 31, 2017 period. The OEB did not consider this fact in approving the June 1, 2017 effective date.
15. The Decision includes a determination by the OEB of the elements to be included in OPG's nuclear revenue requirement for 2017. The nuclear revenue requirement, as determined for 2017, reflects the capital and operating costs that the OEB found to have been prudently incurred in respect of 2017. Having found those costs to have been prudently incurred, the OEB is required to ensure that OPG has an opportunity to recover those costs, which include a fair return on capital, through final payment amounts. The OEB may not disallow recovery of prudently incurred costs or a fair return on account of its concern for the resulting rate impact on consumers. However, by establishing the effective date for the nuclear new payment amounts at June 1, 2017 and making the Existing Payment Amounts final for the January 1 to May 31, 2017 period, the OEB has effectively deprived OPG of the opportunity to recover its prudently incurred costs and a

fair return for 2017 through the final payment amounts. As the Supreme Court of Canada stated:

Where costs are determined to be prudent, the regulator must allow the utility the opportunity to recover them through rates. The impact of increased rates on consumers cannot be used as a basis to disallow recovery of such costs. This is not to say that the Commission is not required to consider consumer interests. These interests are accounted for in rate regulation by limiting a utility's recovery to what it reasonably or prudently costs to efficiently provide the utility service. In other words, the regulatory body ensures that consumers only pay for what is reasonably necessary.<sup>11</sup>

16. That the OEB had in mind the impacts of the resulting rates on consumers when it established June 1, 2017 as the effective date is clearly demonstrated by the Decision where the OEB states:

The smoothing of payment amounts, as required by regulation, will help lessen some of the impact of the payment amounts on ratepayers during the test period. However, it will not totally alleviate the fact that ratepayers will have consumed power for the last seven months of 2017 (and for a period into 2018) at the existing rates and will now, after the fact, have to pay a new rate for those periods.<sup>12</sup>

Based on the foregoing, the OEB incorrectly considered the impact of the payment amounts as a basis for determining the effective date and, in so doing, erred by setting final payment amounts for the January 1, 2017 to May 31, 2017 period that do not meet the just and reasonable standard.

***Incorrect to Balance Revenue Requirement with Ratepayer Expectation of Rate Certainty***

17. A key aspect of the OEB's decision with respect to the effective date for new payment amounts was its concern about increasing rates for power previously consumed during the interim period. This concern culminated in the OEB stating:

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<sup>11</sup> *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, [2015] 3 SCR 219, 2015 SCC 45 (*CanLII*) at para 61 (citing *OPG (2015)*)

<sup>12</sup> Decision, p. 159.



In arriving at the June 1, 2017 effective date, the OEB has attempted to balance the revenue requirement needs of OPG and rate certainty expected by ratepayers.<sup>13</sup>

18. The OEB's decision to determine the effective date for OPG's new payment amounts based on the "rate certainty expected by ratepayers" was in error. Given that the OEB had, on December 8, 2016, issued a decision and order declaring OPG's Existing Payment Amounts to be interim effective from January 1, 2017, ratepayers did not have a reasonable expectation of rate certainty insofar as their rates are based on OPG's payment amounts. It was therefore improper for the OEB to use that concern as a basis for effectively reducing what the OEB otherwise found to be OPG's appropriate nuclear and hydroelectric payment amounts for 2017.
19. The jurisprudence relating to the issue of retroactive ratemaking is helpful in this regard. The courts have found that the critical factor for determining whether a regulator is engaging in retroactive ratemaking is the parties' knowledge.<sup>14</sup> As the Alberta Court of Appeal explains, "both *Bell Canada 1989* and *Bell Aliant* illustrate the same preoccupation: **were the affected parties aware that the rates were subject to change?** If so, the concerns about predictability and unfairness that underlie the prohibitions against retroactive and retrospective ratemaking become less significant (emphasis in original)."<sup>15</sup> The courts have recognized certain exceptions to the principle against retroactive ratemaking, most notably these include the use of interim orders and deferral accounts. This is because, by declaring rates to be interim or establishing a deferral account, both the utility and affected ratepayers are made aware that the amounts at issue are encumbered and therefore subject to change.<sup>16</sup> As OPG's payment amounts were declared interim from January 1, 2017, ratepayers were made aware that OPG's payment

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<sup>13</sup> Decision, p. 159.

<sup>14</sup> *Atco Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2014 ABCA 28 (CanLII) at para 56 ("*ATCO (2014)*").

<sup>15</sup> *ATCO (2014)* at para 56, citing *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 132 (CanLII).

<sup>16</sup> See *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 SCR 764, 2009 SCC 40 (CanLII) at paras 59-61.

amounts for the interim period were subject to change. Consequently, the OEB's concern with the "rate certainty expected by ratepayers" was incorrect.

20. The OEB's focus on ensuring "rate certainty expected by ratepayers" is also difficult to reconcile with the fact that the majority of electricity consumers in Ontario are covered by the OEB's Regulated Price Plan (RPP). This is because, in setting rates for customers under the RPP, the OEB makes forecasts of future costs that have routinely required true-up payments from those same customers in subsequent periods. Moreover, in setting RPP rates for the most recent period (May 1, 2017 through April 30, 2018), the OEB assumed that OPG's payment amounts would increase by half of OPG's request. As such, consumers subject to the RPP knew or ought to have known that at least some true-up would be required for a large majority of customers as a result of the Decision. Beyond the RPP, some uncertainty exists for all customers based on the after-the-fact nature of the Global Adjustment calculation.

***Procedural Standard Applied to OPG's Application Was Not Previously Articulated***

21. In arriving at the June 1, 2017 implementation date, the OEB applied a standard for reviewing and processing OPG payment amounts applications that has never been articulated in any previous decision or policy document. Specifically, the OEB determined that OPG should have known that it would take more than seven months to consider the application, render a decision and finalize a payment amounts order.
22. In the EB-2013-0321 decision, the OEB indicates that its standard performance metric of 235 days from application to decision for applications with oral hearings applies to OPG.<sup>17</sup> Given this standard and the May 27, 2016 application filing date, OPG could reasonably have expected a decision in January 2017 with an effective date of January 1, 2017.<sup>18</sup>

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<sup>17</sup> OEB, *Decision With Reasons re OPG Payment Amounts for Prescribed Facilities for 2014 and 2015* (EB-2013-0321), November 20, 2014 at p. 135.

<sup>18</sup> As detailed in the material that follows, in EB-2010-0008 the OEB issued its decision on March 11, 2011 with an effective date of March 1, 2011 and in EB-2013-0321 the effective date was 19 days prior to the date of the decision.

23. OPG acknowledges that its prior payment amounts proceedings have each taken substantially more than the standard 235 days to complete. Nevertheless, the OEB has not previously delayed the requested implementation date as a result (except in EB-2013-0321, which had unique circumstances as described below).
- In EB-2007-0905, OPG filed its application on November 30, 2007 seeking an effective date of April 1, 2008. The OEB issued its decision on November 3, 2008, which approved an effective date of April 1, 2008.
  - In EB-2010-0008, OPG filed its application on May 26, 2010 seeking an effective date of March 1, 2011. The OEB issued its decision on March 11, 2011, approving the requested effective date of March 1, 2011.
  - In EB-2013-0321, OPG filed its application on September 27, 2013 seeking an effective date of January 1, 2014 for the previously regulated facilities and a July 1, 2014 effective date for the hydroelectric facilities that became regulated as of that date. The OEB deemed the OPG's application to be incomplete and it was not until December 6, 2013 that a completed and updated application was filed and the OEB issued a new notice. This proceeding also required an update to the evidence that resulted in 17 day break in the hearing to give parties time to assess the new evidence and for a technical conference. The OEB issued its decision on November 20, 2014, which approved an effective date of November 1, 2014 for both the previously and newly regulated facilities.
24. Based on its three prior payment amounts applications, OPG experienced proceedings that took on average 245 days from the filing of a complete application until the filing of reply argument, and which required an average of 80 days from the date of reply argument for the OEB to issue its decision. In EB-2016-0152, the duration of the proceeding was materially longer, as was the time to a decision. In total, from filing of the complete application until issuance of the Decision, the EB-2016-0152 proceeding took 256 days longer than the average duration of OPG's prior payment amounts proceedings. OPG could not reasonably have anticipated this based on its prior experience before the OEB or from any filing guidelines or directions given to it by the

OEB. It was incorrect for the OEB to apply a standard which OPG was not previously advised of and could not reasonably have anticipated.

25. The OEB cites the complexity of the application filed as a factor supporting the delayed effective date, but this complexity was largely inherent. OPG neither introduced unnecessary complexity, nor declined opportunities to simplify the proceeding. To the contrary, OPG met all procedural deadlines, as noted above, and moved quickly to modify its rate smoothing proposal to reflect changes in O. Reg. 53/05 in order to avoid delaying the application schedule, as discussed below.
26. Pursuant to OEB direction, OPG filed an IR framework for the hydroelectric payment amounts and a custom IR framework for the nuclear payment amounts.<sup>19</sup> Both frameworks were new to OPG and each required substantial additional evidence, discovery and review. The OEB accepted OPG's proposed IR frameworks for each of the hydroelectric and nuclear payment amounts. Moreover, as required by the OEB, OPG filed its first five-year application, which substantially increased the volume of information in the proceeding: Every table containing forecast data included two and half times as much information as in prior applications. Review of DRP and Pickering Extended Operations ("PEO"), both of which were undertaken in furtherance of Provincial policy, also added to the time needed to conclude the proceeding, but OPG endeavoured to simplify this review by filing comprehensive evidence, including extensive supporting documentation, as part of its application. Both DRP and PEO were accepted by the OEB. In these circumstances, requiring OPG to forego recovery of a portion of its prudently incurred cost owing to the complexity of its application is unreasonable. It is not appropriate for OPG to bear the risk of having filed a "complicated application" where new requirements are a significant contributor to the complexity of the proceeding.

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<sup>19</sup> As stated on p. 120 of the Decision, "the OEB advised of its expectations of an IR framework for the regulated hydroelectric business and a custom IR framework for the nuclear business."

***Procedural Standard Applied to OPG's Application is Impossible to Meet***

27. OPG uses a January 1<sup>st</sup> to December 31<sup>st</sup> fiscal year. Consequently, OPG's audited financial statements for the most recent historical year are not available until early March of the year following. The OEB's filing guidelines require that OPG payment amounts applications include audited financial statements, and information from these statements is used throughout the application. Moreover, audited balances are a prerequisite for seeking to clear deferral and variance accounts, which are an integral part of the payment amounts application process. Given the scope of OPG's regulated business and the documentation that the OEB requires for an OPG application, the availability of financial information for the last historical year in early March means that the absolute earliest that OPG could file its application would be in April of the bridge year, which is about eight months before the beginning of the test period. This was a key aspect referenced by OEB staff in supporting OPG's proposed effective date of January 1, 2017. As noted on p. 157 of the Decision, OEB staff commented that the application was filed shortly after the 2015 audited results became available.
28. Under the 12 month review and processing period contemplated by the OEB's Decision (i.e. filing May 27, 2016 for payment amounts to take effect June 1, 2017), OPG would in the best case be required to forego 4 months of incremental revenue every time it applies for new payment amounts due to the impossibility of receiving incremental revenue for the first four months of the first test year in each new payment amounts period.<sup>20</sup> This result cannot be seen as being consistent with the OEB's obligation to set just and reasonable payment amounts.
29. In the Decision, the OEB notes OPG's submission that OPG sought to strike a balance between filing current information and taking into account the time required to process the application. The OEB then states:

Specifically OPG notes that if it had filed prior to May 27, 2016, it would not have been able to include audited 2015 results, the release quality estimate for DRP, the final business case for PEO,

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<sup>20</sup> In effect, this standard would make it impossible for OPG to receive incremental revenue during the first four months of the first test year included in each five-year application term.

the amended Bruce Lease agreement or the amendment to O. Reg. 53/05. The OEB notes that the completion of some of these items was largely in the control of OPG. Knowing that it was filing a major payment amounts application, OPG could have taken steps to ensure that the inclusion of these elements in the application was possible.<sup>21</sup>

30. In fact, the steps that the OEB suggests OPG could have taken to ensure inclusion of the referenced elements in the application were not available. Audited financial statements cannot be filed until the year they relate to has come to a close, the financial information for the year has been finalized and audited, and the auditors have prepared and submitted their audit opinion on OPG's financial statements. The timing for both the Release Quality Estimate (RQE) for the DRP and the business case for PEO were referenced in OPG's Reply Argument as reasons why OPG could not have filed prior to January 1, 2016.<sup>22</sup> They did not drive any delay in the application's timing beyond that date as both of these documents were completed in November 2015. Finally, OPG cannot control the timing of the amendments to the Bruce Lease Agreement, which impacted both Bruce Lease Net Revenues and Nuclear Waste Liabilities. The timing of the changes to O. Reg. 53/05, which first determined and then modified the requirements for rate smoothing, is controlled by the Province.

***Attribution of Fault to OPG for Procedural Delays is Contrary to Facts in the Proceeding***

31. In its decision approving an effective date of June 1, 2017, the OEB implies that OPG bears responsibility for delays in the proceeding and that a later effective date than proposed was therefore appropriate.
32. In part, the OEB selected the approved effective date based on the view that OPG was responsible for delaying the proceeding by filing updates and that two of the three updates filed were for matters within OPG's control. This view is factually incorrect. Only one of the updates, the second one, which removed D2O from the proceeding, addressed a matter completely within OPG's control and, rather than increasing the

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<sup>21</sup> Decision, p. 158.

<sup>22</sup> OPG Reply Argument, pp. 282-283.

duration of the proceeding, this update decreased it. Moreover, delaying the effective date because of the updates filed would penalize OPG for complying with the OEB's *Rules of Practice and Procedure*, which provides:

Where a party becomes aware of new information that constitutes a material change to evidence already before the Board before the decision or order is issued, the party shall serve and file appropriate amendments to the evidentiary record, or serve and file the new information.<sup>23</sup>

33. OPG filed three updates in this proceeding, all of which reflected new information that emerged since the application was originally filed. In two of three updates, the new information was largely driven by events external to OPG. Each update was required by the above-referenced rule.
34. OPG's first impact statement included five material changes to its nuclear revenue requirement.<sup>24</sup> OPG's second impact statement removed the D2O project from the proceeding because anticipated cost increases and delays rendered the information in the application materially inaccurate. Deferring this issue to a future proceeding did not delay consideration of the application but instead expedited it by removing a contentious issue. OPG's third impact statement reflected material changes made by the Province of Ontario to O. Reg. 53/05 on March 2, 2017 in respect of rate smoothing. OPG filed this impact statement and supporting evidence six days after the regulation was amended, which allowed the issue to be addressed without changing the established hearing schedule.
35. The OEB's Rules of Practice and Procedure.
36. Such further grounds as counsel may advise and the OEB may permit.

### **The Threshold Test is Satisfied:**

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<sup>23</sup> OEB *Rules of Practice and Procedure*, Rule 11.02.

<sup>24</sup> (1) changes in pension cost due to a new pension valuation and updated assumptions for pension costs; (2) anticipated impacts on nuclear liabilities from the 2017 ONFA Reference Plan that came into effect on Jan. 1, 2017; (3) changes in Bruce Lease net revenues associated with the 2017 ONFA Reference Plan and new information from Bruce Power on waste volumes; (4) ROE and tax related changes due to the OEB's updated 2017 ROE figure; and (5) increases in anticipated Nuclear OM&A costs due to the CNSC's proposed fitness for duty requirements.

37. Rule 43.01 of the OEB's *Rules of Practice and Procedure* provides that, in respect of a motion brought under Rule 40.01, the OEB may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits. The OEB applies the following tests (the "Threshold Tests"):<sup>25</sup>
- *the grounds must raise a question as to the correctness of the order or decision;*
  - *the issues raised that challenge the correctness of the order or decision must be such that a review based on those issues could result in the OEB deciding that the decision should be varied, cancelled or suspended;*
  - *the motion must show that there is an identifiable error in the decision, as a review is not an opportunity for a party to reargue the case;*
  - *in demonstrating that there is an error, the party bringing the motion must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature; it is not enough to argue that conflicting evidence should have been interpreted differently; and*
  - *the error must be material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.*
38. The grounds for this motion raise a number of material questions as to the correctness of the OEB's decision to approve an effective date of June 1, 2017 for OPG's payment amounts, rather than the January 1, 2017 effective date requested in OPG's application, and should therefore be corrected by granting the relief sought above. The OEB's findings, which underlie its determination of the effective date for the Decision, are in a number of respects, as set out above, contrary to the evidence that was before the panel. The OEB's findings also demonstrate that the OEB failed to address a material issue, namely whether the Existing Payment Amounts, which were made final for the January 1, 2017 to May 31, 2017 period, are in accordance with the just and reasonable standard. Once corrected, the amounts that OPG would have the opportunity to recover through final payment amounts in respect of 2017 would be materially different than the amount

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<sup>25</sup> *Decision with Reasons on Motions to Review the Natural Gas Electricity Interface Review Decision* in EB-2006-0322/-0338/-0340 at p. 18.



provided for by the Decision. As such, OPG has satisfied the Threshold Tests and the OEB should proceed to hear this motion on its merits.

**Documentary Evidence:**

39. The following documentary evidence will be used at the Motion:

- (a) materials from the record in EB-2016-0152;
- (b) the Decision;
- (c) OPG's submissions on this Motion to be delivered in accordance with the OEB's procedural order or orders; and
- (d) such further evidence as counsel may advise and the OEB may permit.

January 17, 2018

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**AND TO:** All Intervenors in EB-2016-0152