

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 a motion by Ontario Power Generation Inc. pursuant to Rule 40 of the Ontario Energy Board's Rules of Practice and Procedure for an order or orders to vary the Decision and Order EB-2016-0152.

**SUBMISSIONS OF ONTARIO POWER GENERATION INC.
(on Motion to Review and Vary)**

March 6, 2018

PART I – OVERVIEW

1. These are the submissions of Ontario Power Generation Inc. ("OPG") in support of its motion to review and vary the Ontario Energy Board's ("OEB") Decision and Order dated December 28, 2017 in EB-2016-0152 establishing payment amounts for OPG's nuclear and prescribed hydroelectric facilities for the period 2017 to 2021 (the "Decision").
2. In its application, OPG requested an effective date of January 1, 2017 for payment amounts associated with the prescribed hydroelectric and nuclear facilities. The OEB made OPG's then current payment amounts interim as of January 1, 2017. In its Decision, the OEB approved an

effective date of June 1, 2017 for OPG's final payment amounts, rather than the January 1, 2017 effective date requested by OPG.¹

3. In reaching this determination, the OEB made material errors. It was required to, but did not, consider whether the payment amounts it established were just and reasonable for the portion of the interim period from January 1 to May 31, 2017. They were not. It unreasonably relied on the importance of payment amount certainty, despite that interim rates had been set, and as such, customers had no reasonable expectation of certainty with regards to payment amounts for the interim period. It unreasonably considered the impact of the payment amounts on consumers as a basis for determining the effective date. It unreasonably and by implication introduced a novel procedural requirement for OPG to file payment amount applications at a date that is both far earlier than published guidelines and impossible to meet. It also misapprehended key facts in finding that OPG could have, and failed to, expedite the progress of this proceeding. All of these errors were material and relevant to the outcome of the Decision.

4. OPG therefore seeks an order varying the Decision, setting aside the OEB's approval of June 1, 2017 as the effective date, and finding instead that the effective date for OPG's payment amounts shall be January 1, 2017.

5. In these submissions, OPG (i) briefly sets out the relevant factual background relating to the effective date, (ii) identifies the errors in the OEB's ultimate selection of a June 1, 2017 effective date, and (iii) applies the threshold test to the issues underlying the motion.

PART II – THE EFFECTIVE DATE

A. Facts

OPG's Application

6. In its application, filed May 27, 2016, OPG sought approval for (i) nuclear payment amounts to be effective January 1, 2017 (and for each following year through to December 31,

¹ Decision, pp. 157-160, Motion Record and Book of Authorities ("MRBA"), Tab 1.

2021), and (ii) 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

7. In light of the materials that needed to be incorporated into its application, OPG's application was filed as early as practically possible. These materials included audited financial results for 2015, which were not available until March 2016 and which contained a year-end 2015 adjustment to Nuclear Waste Liabilities based on the amended refurbishment agreement between Bruce Power and the IESO. That agreement was not announced or published by the Province until December 2015. Without these materials, any application filed by OPG would have been incomplete and required fundamental updates, thereby further complicating and delaying the proceeding.

8. The May 2016 application date was also influenced by the stakeholder consultation sessions that OPG held in February, March, and May 2016. Two of those three sessions were held following the release of the audited 2015 financial statements so that OPG could elicit meaningful stakeholder feedback on its actual proposed application, taking into account all relevant financial factors. Those consultations resulted in material changes to the application, including the decision not to rebase hydroelectric payment amounts using a 2017 forecast test year cost of service review, and instead to escalate the then-existing hydroelectric payment amounts, subject to a nuclear tax loss adjustment, by a price-cap index.³

9. OPG materially complied with the OEB's guidelines for filing a payment amounts application.⁴ According to its published standard performance metrics, applications involving oral

² Exhibit A1-2-2, MRBA, Tab 2.

³ Exhibit A1-7-1, p. 3, MRBA, Tab 3.

⁴ See, e.g., OEB, *Filing Guidelines for Ontario Power Generation Inc.* in EB-2011-0286, November 11, 2011, MRBA, Tab 4.

hearings require approximately 235 days from the application date to decision.⁵ In this case, OPG filed its application 220 days before the requested effective date of January 1, 2017.

10. 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.⁶ Although OPG did file three updates to its application, those updates were limited in scope and included only new information that constituted a material change to the existing record:

- (a) The first update set out five material changes to OPG's nuclear revenue requirements that OPG did not have access to when the application was initially filed (such as changes in Bruce Lease net revenues associated with the 2017 ONFA Reference Plan, which was approved by the Province on December 20, 2016 with an effective date of January 1, 2017).⁷
- (b) The second update removed the D2O project from the proceeding due to uncertainty about its final cost and schedule for completion, which rendered certain information in the application materially inaccurate. The net effect of this update was to expedite the application by removing a contentious issue from the oral hearing.⁸
- (c) The third update 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 update and supporting evidence six days after the regulation was amended, which allowed the issue to be addressed without changing the hearing schedule.⁹

⁵ OEB, *Performance Standards for Processing Applications*, <https://www.oeb.ca/industry/applications-oeb/performance-standards-processing-applications>, MRBA, Tab 5.

⁶ OEB, *Procedural Order No. 1* in EB-2016-0152, August 12, 2016, MRBA, Tab 6; Exhibit O1-1-1, MRBA, Tab 7.

⁷ Exhibit N1-1-1, MRBA, Tab 8.

⁸ Exhibit N2-1-1, MRBA, Tab 9.

⁹ Exhibit N3-1-1, MRBA, Tab 10.

Parties' Submissions on the Requested Effective Date of January 1, 2017

11. As part of its application, OPG asked for an effective date of January 1, 2017, in respect of the payment amounts associated with the prescribed hydroelectric and nuclear facilities. It also sought an order declaring its then current payment amounts 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, 2017.¹⁰ In its reply submission, OPG highlighted its material compliance with the OEB's filing guidelines, and material compliance with all of the deadlines set by the OEB in the proceeding. It also identified the essential materials required to file a complete application, including the 2015 audited financial results.

12. OEB staff, QMA and SEP supported OPG's request.¹¹ According to OEB staff:

... a January 1, 2017 effective date for payment amounts is reasonable. The application was filed shortly after audited results for 2015 were available. As OPG states in the AIC, OPG has met the deadlines established by the OEB in Procedural Order No. 1, issued on August 12, 2016.¹²

13. The remaining parties that took a position on the issue opposed OPG's request, relying on the OEB's decision in EB-2013-0321 to set a later effective date than the one requested by OPG. However, that proceeding is entirely distinguishable. That application began with an incomplete filing, thereby immediately stalling its progress. The issue was only rectified one month before the effective date requested by OPG. As a further complicating factor, that proceeding also required an update to the evidence that resulted in a 17 day break in the hearing. OPG did not seek a review of the effective date in EB-2013-0321 because it agreed that it bore some responsibility for the delay. In contrast, in the current proceeding, OPG has provided complete information to the OEB

¹⁰ Exhibit A1-2-2, page 5, lines 10-12, MRBA, Tab 2.

¹¹ OEB Staff Argument, p. 180, MRBA, Tab 11; QMA Argument, p. 11, MRBA, Tab 12; SEP Argument, p. 25, MRBA, Tab 13.

¹² OEB Staff Argument, p. 180, MRBA, Tab 11.

in compliance with the OEB's stipulated timelines and worked diligently to advance the application.¹³

Approval of Interim Rates

14. In its December 8, 2016 Interim Payment Amounts Order, the OEB stated 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, and "should not be construed as predictive, in any way whatsoever, of the OEB's final determination with regards to the effective date for OPG's payment amounts arising from this application."¹⁴

OEB's Decision on the Effective Date

15. Although it had the jurisdiction to approve an effective date of January 1, 2017, the OEB ultimately approved an effective date of June 1, 2017 for each of the nuclear and hydroelectric payment amounts.

16. In the Decision, the OEB stated that "[i]n arriving at the June 1, 2017 effective date, [it had] attempted to balance the revenue requirement needs of OPG and rate certainty expected by ratepayers."¹⁵ Although the OEB emphasized the importance of ratepayer certainty in its Decision, it also recognized that in its December 8, 2016 Interim Payment Amounts Order, it had declared the then-current nuclear and hydroelectric payment amounts interim effective January 1, 2017.

17. In selecting the June 1, 2017 effective date, the OEB determined that 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."¹⁶ It held that OPG should have known the application would require

¹³ OPG Reply Argument, p. 283, MRBA, Tab 14; OEB, *Decision With Reasons re OPG Payment Amounts for Prescribed Facilities for 2014 and 2015* in EB-2013-0321, November 20, 2014, ("Decision, EB-2013-0321"), MRBA, Tab 15.

¹⁴ OEB, *Interim Payment Amounts Order* in EB-2016-0152, December 8, 2016, p. 1, MRBA, Tab 16.

¹⁵ Decision, p. 159, MRBA, Tab 1.

¹⁶ Decision, p. 158, MRBA, Tab 1.

over seven months to process, and that OPG was at least partially responsible for the extended duration of the proceedings as it filed a complicated application with three updates. It also considered the adverse impact on customers of selecting OPG's proposed effective date of January 1, 2017:

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 ... at the existing rates and will now, after the fact, have to pay a new rate for those periods.¹⁷

18. In response to OPG's argument that it tried to strike a balance between filing current, complete information and taking into account the time required for the processing of an application, the OEB found that some of the items identified by OPG as outstanding before the May 2016 filing date were largely in OPG's control. The OEB stated that OPG could have taken steps to include those elements in the application by an earlier date, and that the "[f]act that OPG filed significant updates runs counter" to OPG's argument that it tried to file as complete an application as possible by May 2016.¹⁸

19. Finally, the OEB determined that O. Reg. 53/05 did not impose a required effective date of January 1, 2017.¹⁹

B. Material Errors in the OEB's Decision

20. In selecting an effective date of June 1, 2017, the OEB unreasonably:

- (a) established final payment amounts for January 1 to May 31, 2017 that are not just and reasonable;
- (b) considered the impact of the payment amounts on consumers, contrary to recent jurisprudence from the Supreme Court;
- (c) relied on the importance of ratepayer certainty in reaching its decision, even though ratepayers had no reasonable expectation of certainty in light of the OEB's Interim

¹⁷ Decision, p. 159, MRBA, Tab 1.

¹⁸ Decision, pp. 158-159, MRBA, Tab 1.

¹⁹ Decision, p. 159, MRBA, Tab 1.

Payment Amounts Order declaring OPG's payment amounts interim as of January 1, 2017; and,

- (d) considered OPG's alleged delay as a factor in determining the effective date, including:
 - (i) applying a novel procedure without notice, thereby frustrating OPG's legitimate expectations;
 - (ii) imposing a procedural standard that is impossible to meet; and,
 - (iii) misapprehending material facts in attributing delay to OPG.

Final Payment Amounts for January 1 to May 31, 2017 Are Not Just and Reasonable

21. **Rates must always be just and reasonable.** Under Section 78.1 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B ("*OEB Act*"), the OEB has an obligation to establish just and reasonable payment amounts.²⁰ Although the OEB has the latitude to develop its own form, methodology, assumptions and calculations in determining payment amounts, it is never permitted to depart from the "just and reasonable" standard. In its 2015 OPG decision, the Supreme Court articulated the importance and application of that standard:

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.²¹

22. As the Supreme Court confirmed in *Bell Canada*, 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.²² Where interim rates are not just and reasonable, a necessary component of the regulator's power to make

²⁰ *OEB Act*, s. 78.1, MRBA, Tab 17.

²¹ *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at para. 20 ("*OPG (2015)*"), MRBA, Tab 18.

²² *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, pp. 1740-1741 ("*Bell Canada (1989)*"), MRBA, Tab 19.

interim orders will include the power to make a final order remedying the interim rates that did not meet the just and reasonable standard.²³

23. **OEB failed to consider whether payment amounts were just and reasonable for entire interim period.** As established by statute and jurisprudence, the OEB's obligation to establish just and reasonable payment amounts applies at all times.²⁴ It 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 portion of the period for which payment amounts had been declared interim.

24. Contrary to this requirement, the OEB failed to consider whether the payment amounts it made final for the period January 1 to May 31, 2017 were just and reasonable.

25. Prior to establishing the effective date of June 1, 2017, the OEB declared OPG's payment amounts to be interim as of January 1, 2017. Those interim payment amounts were based on 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"). Upon making the Interim Payment Amounts Order, OPG's payment amounts became subject to change based on the final decision of the OEB in the proceeding.

26. However, in approving the June 1, 2017 effective date for the new payment amounts, the OEB also made final the interim payment amounts for January 1 to May 31, 2017, which were set at the level of the Existing Payment Amounts. These payment amounts were not equal to those that the OEB determined to be "just and reasonable" in its decision. Although required to do so, the OEB did not consider whether applying the Existing Payment Amounts to the first five months of the application period would result in just and reasonable payment amounts for that period.

²³ *Bell Canada* (1989), pp. 1756-1757, MRBA, Tab 19.

²⁴ *Bell Canada* (1989), pp. 1740-1741, MRBA, Tab 19.

27. **OEB failed to consider material facts in establishing final payment amounts.** In making the Existing Payment Amounts for the January 1 to May 31, 2017 period final, the OEB did not consider material facts that demonstrate that the Existing Payment Amounts do not meet the just and reasonable standard during this interim period.

28. The Existing Payment Amounts made final for OPG's nuclear generation facilities do not meet the just and reasonable standard for January 1 to May 31, 2017. These Existing Payment Amounts were established in EB-2013-0321 by dividing the then-approved revenue requirement by a production forecast that included 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.²⁵ The Existing Payment Amounts for the nuclear facilities are too low to meet the just and reasonable standard because they were based on an outdated production forecast that was significantly higher than the feasible nuclear production level for the January 1 to May 31, 2017 period.

29. The Existing Payment Amounts established in EB-2013-0321 also did not include the anticipated reduction in production from the Pickering Nuclear Generating Station due to the requirements of Pickering Extended Operations. The 2017 production forecast approved by the OEB in this proceeding included 140 additional outage days for Pickering Extended Operations compared to the 2016 budgeted production amount.²⁶

30. Additionally, the OEB's decision with regards to the new approved payment amounts includes a determination of the elements to be included in OPG's nuclear revenue requirement for 2017. The nuclear revenue requirement, as determined for 2017, reflects the forecast capital and operating costs that the OEB found to be prudent to incur in respect of 2017. Having found those costs to be prudent, the OEB is required to ensure that OPG has an opportunity to recover those

²⁵ Exhibit D2-2-1, p. 2, MRBA, Tab 20.

²⁶ Exhibit E2-1-2, pp. 1-2, MRBA, Tab 21.

costs, which include a fair return on capital, through final payment amounts. As the Supreme Court of Canada established in *ATCO Gas and Pipelines Ltd.*:

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.**²⁷ (emphasis added)

31. Similarly, the Existing Payment Amounts made final for hydroelectric do not meet the just and reasonable standard for January 1 to May 31, 2017. For the hydroelectric payment amounts that the OEB made effective June 1, 2017, 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 to produce just and reasonable hydroelectric payment amounts for the latter half of 2017. However, by failing to apply this inflation factor to the final hydroelectric payment amounts for the January 1 to May 31, 2017 period, or to even consider whether the inflation factor should be applied during that period, the OEB established hydroelectric payment amounts that are too low to meet the just and reasonable standard from January 1, 2017 to May 31, 2017.

32. By selecting an effective date of June 1, 2017, the OEB deprived OPG of the opportunity to recover its prudently incurred costs and a fair return for 2017 through the final payment amounts for the entirety of the year. This approach is inconsistent with the Supreme Court's decision in *ATCO Gas and Pipelines Ltd.*

²⁷ *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45 at para. 61 (citing *OPG* (2015)), MRBA, Tab 22.

OEB Unreasonably Considered Impact on Customers

33. In its Decision, the OEB expressed concern about the impact on customers of imposing new payment amounts for the entire 2017 period, and that concern provided at least a partial basis for its ultimate decision to select June 1, 2017 as the effective date.²⁸

34. That concern is misplaced. As established by the Supreme Court in *ATCO Gas and Pipelines Ltd.*, concern about customer impact is not a relevant factor in this context. In light of that decision, 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. In these proceedings, the OEB unreasonably considered the impact of the payment amounts as a basis for determining the effective date and, in so doing, set final payment amounts for the January 1 to May 31, 2017 period that do not meet the just and reasonable standard.

OEB Erred in Considering Ratepayer Certainty in the Context of Interim Payment Amounts

35. It was unreasonable for the OEB to consider the “rate certainty expected by ratepayers” as a factor in its selection of the June 1, 2017 effective date.

36. OPG agrees that concerns about predictability and fairness to consumers are important. However, the OEB’s assessment of these concerns in this proceeding omits a critical fact: consumers were not paying rates based on final OPG payment amounts for 2017. They were paying rates based on interim OPG payment amounts. Ratepayers received notice that those payment amounts were not final and were subject to change. Providing such notice to ratepayers is one of the fundamental purposes of making rates interim pending the final outcome of the proceeding. In these circumstances, ratepayers had no reasonable expectation of certainty with regards to OPG’s payment amounts.

37. As reiterated by the Alberta Court of Appeal, when a rate is applied retroactively, the key question is: **“were the affected parties aware that the rates were subject to change?”** If so, the

²⁸ Decision, p. 159, MRBA, Tab 1.

concerns about predictability and unfairness that underlie the prohibitions against retroactive and retrospective ratemaking become less significant” (emphasis in original).²⁹ Courts have recognized the use of interim orders and deferral accounts as exceptions to the principle against retroactive ratemaking. 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.³⁰

38. As OPG’s payment amounts were declared interim from January 1, 2017, ratepayers were alerted to the fact that OPG’s payment amounts for the interim period were subject to change. They did not have a reasonable expectation that those payment amounts were final. Indeed, in its publicly available Interim Payment Amounts Order, the OEB explicitly stipulated that the interim payment amounts were without prejudice to and not predictive of the final rates. Consequently, the OEB’s concern with the “rate certainty expected by ratepayers” was not reasonable.

39. The OEB’s focus on ensuring “rate certainty expected by ratepayers” also cannot be reconciled with the fact that the majority of electricity consumers in Ontario are covered by the OEB’s Regulated Price Plan (RPP). Rates for customers under the RPP are based on OEB forecasts of future costs and 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 OEB’s decision. Beyond the RPP, some uncertainty exists for all customers based on the after-the-fact nature of the Global Adjustment calculation.³¹

²⁹ *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2014 ABCA 28 at para. 56 (“ATCO (2014)”), MRBA, Tab 23; *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 132 at para. 57, MRBA, Tab 24.

³⁰ See *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40 at paras. 59-61, MRBA, Tab 25.

³¹ OEB, *Regulated Price Plan – Price Report, May 1, 2017 to April 30, 2018*, April 20, 2017, MRBA, Tab 26.

Unreasonable to Consider Application Duration and OPG's Alleged Delay as a Factor in Determining Effective Date

40. In arriving at the June 1, 2017 effective date, the OEB erred by finding, after the fact, that a novel procedural requirement applies to OPG's payment amount applications, and that OPG failed to meet that requirement. Specifically, the OEB determined that OPG should have known that it would take the OEB more than seven months to hear and consider the application, render a decision, and finalize a payment amounts order, and that a delayed effective date was appropriate as OPG bore responsibility for the duration of the application.

41. The procedural requirement for OPG to file applications well in advance of the published guidelines has never been articulated in any previous decision or policy document. It is contrary to published guidelines and previous practice and it is impossible to meet. As a factual matter, in reaching its conclusion, the OEB also misapprehended and / or failed to consider key facts material to its determination.

Unreasonable for OEB to Apply a Novel Procedural Requirement without Notice

42. **The OEB's procedure must be consistent with legitimate expectations.** Although the OEB has significant control over its own procedures, it is required to ensure that those procedures are fair. As recently reaffirmed by the Ontario Superior Court, the OEB must ensure that its procedures provide "the highest degree of procedural fairness."³²

43. The OEB's duty of procedural fairness requires it to act consistently with the legitimate expectations of parties in OEB proceedings. In *Baker*, the Supreme Court reiterated the importance of "legitimate expectations" in determining the scope of the duty of procedural fairness. Parties are entitled to "take into account the promises or regular practices of administrative decision-makers," such that "it will generally be unfair for [decision-makers] to act in contravention of representations as to procedure."³³ The Federal Court of Appeal has confirmed that "published

³² *Rogers Communication Partnership v. Ontario (Energy Board)*, 2016 ONSC 7810 at para. 16, MRBA, Tab 27.

³³ *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 at para. 26, MRBA, Tab 28.

guidelines” can give rise to legitimate expectations about the “procedural norms” to be applied by decision-makers.³⁴ Breach of these legitimate expectations, especially without notice, is inconsistent with the OEB’s duty of fairness.

44. **OPG had legitimate expectations about the application timeline.** The OEB has an approved and published standard performance metric of approximately 235 days from application to decision for applications with oral hearings.³⁵ 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.

45. OPG acknowledges that its prior payment amounts proceedings have each taken 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 above). For example:

- (a) 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, 2008.³⁶
- (b) 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 10, 2011, approving the requested effective date of March 1, 2011.³⁷

Based on its three prior payment amounts applications, OPG experienced proceedings that took an average of 245 days from the filing of a complete application until the filing of reply argument, and an average of 80 days from the date of reply argument for the OEB to issue its decision. Even

³⁴ *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264 at para. 123, MRBA, Tab 29.

³⁵ OEB, *Performance Standards for Processing Applications*, <https://www.oeb.ca/industry/applications-oeb/performance-standards-processing-applications>, MRBA, Tab 5.

³⁶ OEB, *Decision With Reasons re OPG Payment Amounts for Prescribed Facilities* in EB-2007-0905, November 3, 2008, MRBA, Tab 30.

³⁷ OEB, *Decision With Reasons re OPG Payment Amounts for Prescribed Facilities for 2011 and 2012* in EB-2010-0008, March 10, 2011, MRBA, Tab 31.

where an application required more than 235 days, where OPG complied with all OEB guidelines and deadlines, the application duration did not prevent the OEB from approving the requested effective date.

46. **The OEB acted inconsistently with OPG's legitimate expectations.** Despite this previous practice and the OEB's published guidelines, in this application, the OEB determined that the effective date should be delayed due to the length of the proceeding. OPG could not reasonably have anticipated this approach based on its prior experience before the OEB or from any filing guidelines or directions given to it by the OEB. It was unreasonable for the OEB to apply a standard which OPG was not previously advised of and could not reasonably have anticipated.

47. In EB-2016-0152, the duration of the proceeding was materially longer than in previous applications, 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 did not control the length of these proceedings.

48. 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 materially 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.

49. Pursuant to the OEB's direction, OPG filed an IR framework for the hydroelectric payment amounts and a custom IR framework for the nuclear payment amounts.³⁸ 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

³⁸ As stated on p. 120 of the Decision, "[t]he OEB advised of its expectations of an IR framework for the regulated hydroelectric business and a custom IR framework for the nuclear business": MRBA, Tab 1.

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. However, OPG endeavored 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 unavoidable number of novel and complex issues in its application is unreasonable. It is not appropriate for OPG to bear the risk of having filed a “complicated application” where new requirements outside of OPG’s control significantly contribute to the length of the proceeding.

Procedural Requirement Applied to OPG’s Application is Impossible to Meet

50. OPG could not reasonably have filed its application substantially any earlier than it did. It uses a January 1st to December 31st 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 amount applications include audited financial statements, and information from these statements is used throughout the application and pre-filed evidence. Moreover, audited balances are a prerequisite for seeking to clear deferral and variance accounts, which the OEB requires OPG to undertake as part of its payment amounts applications, rather than through separate deferral and variance clearance applications.³⁹ 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 factor referenced by OEB staff in their support of OPG’s proposed effective date of January 1, 2017. As noted on page

³⁹ Decision, EB-2013-0321, pp. 124-25, MRBA, Tab 15.

157 of the Decision, OEB staff commented that the application was filed shortly after the 2015 audited results became available.

51. 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. This result is inconsistent with the OEB's obligation to set just and reasonable payment amounts.

OEB Misapprehended Material Facts in Attributing Delay to OPG

52. In its Decision, the OEB implies that OPG bears responsibility for delays in the proceeding and that a later effective date than proposed was therefore appropriate. It found that (i) it was in OPG's control, to some extent, to collect the required materials that would have enabled it to file its application earlier, and (ii) 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. Those findings are based on a material misapprehension or omission of key facts.

53. **Key materials not available earlier.** In its Decision, the OEB observed that according to OPG, "if it had filed prior to May 27, 2016, it would not have been able to include the 2015 audited financial statements, the release quality estimate for DRP, the final business case for PEO, the amended Bruce Lease agreement or the amendment to O. Reg. 53/05."⁴⁰ In rejecting OPG's explanation for why the May 2016 application date was reasonable, the OEB noted that "the completion of some of these items was largely in the control of OPG" and OPG could have, but failed, to collect those materials earlier.⁴¹

54. That statement is inaccurate. Two of those items – the Release Quality Estimate for the DRP and the business case for PEO – were completed in November 2015 and did not drive any

⁴⁰ Decision, p. 158, MRBA, Tab 1.

⁴¹ Decision, p. 158, MRBA, Tab 1.

delay beyond January 1, 2016.⁴² None of the remaining materials cited by the OEB were within the exclusive control of OPG, and some were entirely outside of OPG's control:

- (a) As set out above, 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. Consistent with typical timing for financial statements, OPG's 2015 statements were not ready until March 2016.
- (b) OPG did not control the timing of the amendments to the Bruce Lease Agreement, which impacted both Bruce Lease Net Revenues and Nuclear Waste Liabilities.
- (c) The timing of the changes to O. Reg. 53/05, which first determined and then modified the requirements for rate smoothing, was controlled by the Province.

55. **Updates did not create delay and could not have been filed earlier.** OPG filed three updates in this proceeding, all of which reflected new information that emerged since the application was originally filed. Each update was required by Rule 11.02 of the *Rules of Practice and Procedure*, which provides that:

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.⁴³

56. All of the updates contained new information that constituted a material change to the existing record. In two of three updates, the new information was largely driven by events external to OPG. Only the second update, which removed D2O from the proceeding, addressed a matter completely within OPG's control. As noted above, the removal of D2O had the effect of streamlining the proceeding by removing from further consideration a contentious issue involving information that remained uncertain. None of the updates delayed the hearing process.

⁴² Exhibit D2-2-8, p. 1, MRBA, Tab 32; Exhibit F2-2-03, p. 1, MRBA, Tab 33.

⁴³ OEB, *Rules of Practice and Procedure*, Rule 11.02, MRBA, Tab 34.

PART III – THRESHOLD TEST

A. The Threshold Test

57. The threshold question was articulated in the OEB’s *Decision on a Motion to Review in the Natural Gas Electricity Interface Review Proceeding* (the “NGEIR Decision”). The OEB stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the decision, and whether there is enough substance to the issues raised such that a review based on those issues could result in the OEB varying, cancelling or suspending the decision.

58. In order to meet the threshold test, certain criteria must be met:

- (a) There must be an “identifiable error” in the decision for which review is sought.
- (b) In demonstrating an error, the moving party must show that the findings are contrary to the evidence, the panel failed to address a material issue, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.
- (c) The alleged error(s) must be material and relevant to the outcome of the decision, such that if the error is corrected, the reviewing panel would change the outcome of the decision.

59. If the moving party cannot satisfy these criteria, there is no purpose in proceeding with the motion to review.⁴⁴

B. OPG Has Met the Threshold Test

60. OPG has satisfied the threshold test. The OEB should proceed to hear this motion on its merits.

61. **OPG has raised identifiable errors.** The grounds for this motion raise a number of questions as to the reasonableness of the OEB’s decision to approve an effective date of June 1,

⁴⁴ OEB, *Decision with Reasons* in EB-2006-0322/-0338/-0340, May 22, 2007, p. 18, MRBA, Tab 35.

2017 for OPG's payment amounts, rather than the January 1, 2017 effective date requested in OPG's application. Those errors are set out in Part II above, and are briefly summarized in the following paragraph.

62. **OPG has identified materially erroneous findings of fact and law.** The OEB's findings, which underlie its determination of the effective date, contain multiple factual and legal errors:

- (a) The OEB's findings with respect to OPG's responsibility for the application's filing date and duration are unreasonable and contrary to the record before the OEB in this proceeding.
- (b) 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. This is a material issue that the OEB was required to consider. It also failed to consider a number of key facts and criteria, such as the anticipated reduction in the nuclear production forecast and the impact of the inflation rate on the hydroelectric payment amounts for January 1, 2017 to May 31, 2017.
- (c) The other errors identified above are errors of a "similar nature." The OEB erred in disallowing OPG an opportunity to recover its reasonably incurred costs for the January 1, 2017 to May 31, 2017 period. It erred in law by taking into account the principle of rate certainty for customers despite the payment amounts having been declared interim. It acted inconsistently with OPG's legitimate expectations by imposing – without notice – novel procedural requirements that were inconsistent with its published guidance and prior practice. It also erred by unreasonably imposing, after the fact, a procedural requirement for an early application filing date that would have been impossible to meet.

63. **The alleged errors are material and relevant to the outcome of the decision.** The OEB now has an opportunity to correct the errors identified above, to exclude the consideration of rate certainty and rate impact for customers and application duration from its analysis, and to focus on applying the just and reasonable standard to the entire period. 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 amounts provided for by the Decision. Although that amount is subject to approval through the Payment Amounts Order process, it is likely to be in the range of hundreds of millions of dollars.

PART IV – REMEDIES

64. For the reasons set out above, OPG seeks an Order:

- (a) declaring that OPG has met the threshold test referred to in Rule 43.01 of the OEB's *Rules of Practice and Procedure*;
- (b) varying the OEB's Decision and Order dated December 28, 2017 in EB-2016-0152 at page 157 where the OEB approves an effective date of June 1, 2017 for OPG's nuclear and hydroelectric payment amounts rather than the January 1, 2017 effective date requested in OPG's application;
- (c) setting aside the OEB's approval of June 1, 2017 as the effective date for OPG's payment amounts in EB-2016-0152;
- (d) finding that the effective date for OPG's payment amounts in EB-2016-0152 shall instead be January 1, 2017; and,
- (e) 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 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.

All of which is respectfully submitted this 6th day of March, 2018.

ONTARIO POWER GENERATION INC.

By its Counsel Torys LLP

A handwritten signature in blue ink, appearing to be 'C. Keizer', written over a horizontal line.

Charles Keizer / Crawford Smith