

Ontario Energy Board

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c. 15, Sch. B, as amended;

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

ENERGY PROBE RESEARCH FOUNDATION

("ENERGY PROBE")

Reply to OPG's Motion

Executive Summary

1. In its December 28, 2017 Decision establishing Ontario Power Generation's ("OPG") 2017-2021 nuclear and hydroelectric payments amounts, the Ontario Energy Board ("Board") approved an effective date of June 1, 2017. OPG applied for an effective date of January 1, 2017. Energy Probe Research Foundation ("Energy Probe") believes that ruling from the Board is too severe given the complexity of the application and that some portion of the delay was an inevitable and shouldn't be completely borne by the utility. That said, OPG failed to adequately plan for that complexity and allowed for too little time to complete the regulatory process, particularly when compared to the time estimates of other utilities in Ontario with large applications currently before the Board or recently completed.
2. OPG was 17 days late in its application by only allowing for 218 days to complete the regulatory process, when the Board estimates that time to be 235 days. The Board decided as a result that the effective date should be June 1st, 2017, a penalty of some 150 days. Energy Probe believes that a penalty of three days for each of the 17 days that OPG was late, or 51 days, would be adequate. This 3-to-1 rule would imply an effective date of February 21, 2017. If the effective date needs to be at the start of the month, then March 1, 2017 should be used.

Why the Board should reject OPG's Motion for an effective date of January 1, 2017

3. OPG should have filed material portions of the application earlier than May 27th, 2016. OPG argues that it filed the application "as early as practically possible", given that it needed audited financial results for 2015 and it changed portions of the application, particularly its decision not to rebase its hydroelectric assets, as a result of stakeholder consultations held in the winter and spring of 2016.¹ Nonetheless, the utility argues that even with those delays, it filed the application 218 days (OPG says 220 days) – not including the day of filing – before its proposed effective date, which is generally in-line with the Board's "Performance Standards for Processing Applications" that provide a regulatory timeline estimate of 235 days.
4. OPG's reliance on the Board's processing guidelines is, in the best-case scenario, naïve. The Board has established those guidelines for utility rate applications that range in complexity and volume. OPG's 2017-2021 payments application is, without question, the largest application this Board has ever seen in terms of dollars at stake – requesting the approval of more than \$23 billion in rates – and the complexity and range of issues.
5. OPG should have compared its application to other rate applications – and the time those utilities afforded themselves to complete the regulatory process – that have come before the Board. Hydro One currently has a five-year distribution application before the Board.² It submitted the application

¹ OPG Motion, page 3

² EB-2017-0049

on March 31, 2017 with an effective date of January 1, 2018, or 276 days. Toronto Hydro's last five-year application was submitted on July 31, 2014 with an effective date of May 1, 2015, or 274 days.³ Enbridge Gas Distribution and Union Gas filed their rate-setting application for the 2019-2029 period on November 23, 2017 with an effective date of January 1, 2019, or 403 days.⁴ All of these applications, while complex, pale in comparison to OPG's 2017-2021 payment amounts application, yet all of them allowed for more time to complete the regulatory process than OPG.

6. The Darlington Refurbishment Project (DRP) portion of the application alone would likely have been one of the most complex applications the OEB would have ever processed. The DRP evidence involved multiple expert witnesses. Two of those witnesses dealt specifically with the DRP – the Pegasus⁵ and Schiff Hardin evidence⁶ – while the equity thickness evidence from Concentric relied heavily on the DRP for its claims.⁷ Most rate applications before the OEB involve a fraction of that material. Furthermore, OPG had been planning for the DRP for nearly a decade and should have been well aware that the evidence related to that project alone – and the issues surrounding such a voluminous record – would be nearly equivalent, or more, than that of a rate application and oral hearing for a standard distributor.
7. OPG was also asking the Board to approve costs related to a significant change in the operation of the Pickering nuclear units, which it was proposing to operate until 2022 and 2024. Determining whether the extended operations of a nuclear plant that accounts around 14% of the province's electricity is in the best interest of ratepayers is a complex discussion, to say the least. Part of the determination required extensive cross examination of an expert from the province's planning agency (IESO), as well as OPG witnesses. OPG should have recognized that the decision to extend the operating life of the Pickering nuclear plant would add further complication to an already complex regulatory proceeding.
8. The 2017-2021 payment amounts proceeding was also the first time that OPG applied for a five-year term and used a Custom Incentive Rate-setting for its rates. Given the many years that OPG had to work on this rate application, it could have started stakeholder consultations on the details of its IRM for setting hydroelectric payment amounts earlier. Had the utility done so, it would have been able to incorporate concerns over rebasing its hydroelectric facilities and removed that from its application, as it eventually did, although much later in the process. OPG could have also released details of its nuclear Custom IR evidence earlier in order to receive feedback and potentially limit time spent in oral hearing.

³ Decision and Order, EB-2014-0116

⁴ EB-2017-0307

⁵ EB-2016-0152 Exhibit D2 Tab 2 Schedule 11, attachment 3

⁶ EB-2016-0152 Exhibit M1

⁷ EB-2016-0152, Exhibit C1-1-1, Attachment 1

9. OPG's application also carries a number of other complexities not seen in a standard rate application, including costs related to the Bruce Lease, long-term nuclear liabilities, more than a dozen deferral accounts and provincial legislation related to rate smoothing and other issues such as refurbishment and prudent costs. In short, OPG is a different beast to regulate when compared to other utilities in the province.
10. Given that magnitude of complexity, OPG should have been more aggressive with its timelines.
11. And OPG's previous rate application (EB-2013-0321) should have been all the warning OPG needed to understand the risk in delaying its filing. In its Decision, the Board rightfully pointed out that reasons that proceeding was not completed on time "were almost entirely within OPG's control."⁸ While Energy Probe fully understands that no two rate applications are exactly alike and some of the problems in the EB-2013-0321 proceeding were not present in the EB-2016-0152 proceeding, some portion of the delay in this proceeding can again be attributed to OPG. As highlighted above, those include OPG's refusal to accept the full complexity of this case and its decision to file the application 217 days before the proposed effective date when the Board has determined that applications with an oral hearing are expected to be completed in 235 days. Given the volume of information and the many various and complicated issues raised in the 2017-2021 payment amounts proceeding – as well as the behaviour of other utilities with their five-year applications – OPG should have known that the regulatory process would be lengthy and the Board would, as it did previously, hold OPG to account for those delays.
12. OPG also submits that it needed to wait for 2015 "actuals" to fully submit its application and avoid lengthy updates. This argument is less than inspiring. An application of this size, length and political implications – OPG remains solely owned by the province and significant portions of the rate application are directly linked with provincial legislation – was always going to have multiple updates. OPG should have known that. Energy Probe certainly planned for it. OPG could have submitted as much evidence as possible, as early as possible, and then provided a meaningful update when the information became available. It ended up submitting (three) updates regardless.
13. OPG cites two other factors that led to delays beyond its control – both of which were controlled by the province. One factor was an update to the Bruce Lease Agreement, while the other was a change to O. Reg. 53/05, which altered OPG's rate smoothing proposal.⁹ The province is OPG's shareholder and if its policies, decisions and regulations, in any way, lead to delays in the rate application of its utility, then the province should bear those costs. Even if Energy Probe fully accepted that these factors were completely out of OPG's control, they were done by the utility's shareholder. If the shareholder of a private utility caused a delay in its utility's largest ever rate

⁸ Decision with Reasons, EB-2013-0321, page 136

⁹ OPG Motion, page 19

application – and one that it had been in the planning stages for years in advance – we would hold that shareholder to account for those costs. OPG and its shareholder should be treated no differently.

14. And finally, although it's a small issue, OPG says its decision to remove the D20 project helped to "expedite the application by removing a contentious issue from the oral hearing."¹⁰ To Energy Probe, the removal of the D20 actually works against, rather than supports, OPG's argument for an earlier effective date. Many of the reports prepared by Burns and McDonnell and Modus Strategic Solutions (Modus) – that were repeatedly referenced throughout the hearing – documented, as far back as 2014, the many problems and delays with the D20 project (among others).¹¹ OPG was fully aware when it filed its application that this project would be contentious and, very likely, result in a significant number of hours in the oral hearing being devoted to it. If anything, the D20 project should have pushed OPG to file its application earlier than it did, knowing full well that it would likely drag down the regulatory process. In short, it was "lucky" to have the project removed and the delay in the application even less severe than it ultimately turned out to be.

Other points of disagreement with OPG's motion

15. OPG repeatedly relies on the "just and reasonable" rates argument in its motion. Energy Probe believes that argument was rebutted in the Board's decision in the EB-2013-0321 proceeding. In that Decision, the Board stated:¹²

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

¹⁰ OPG Motion, page 19

¹¹ See Energy Probe's final argument for the EB-2016-0152 proceeding for details

¹² Decision with Reasons, EB-2013-0321, page 134

16. Energy Probe will deal with the “rate certainty” argument of the Board, which we disagree with, in the following section, but will address OPG’s claim that ratepayers subject to the Regulated Price Plan (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.”¹³ This is a very misleading argument.
17. OPG makes the claim that because the RPP allowed for half of OPG’s requested rate increase to take effect on May 1, 2017, ratepayers knew they would be on the hook for the difference between approved rates and the previous four months of interim rates. How would they know that? Any ratepayers covered by the RPP would have been paying rates in January, February, March and April of 2017 based on the RPP released in October 2016. At that point, all the Board said in the RPP was that the EB-2016-0152 was in the “early stages” and that no “provisions” had been made to account for that application in rates going forward.¹⁴ Only later, in its May 2017 – April 2018 (released on April 20, 2017) did the Board then decide to blend in half of the application’s costs going forward, as it was clear the application was severely delayed and, when the decision is finally released, hundreds of millions of dollars of deferred costs were going to be collected ratepayers. But prior to that report, it wasn’t very clear to ratepayers a). How delayed the application truly was and b). What magnitude of costs was going to be approved given no evidence had been tested in any way.

Why the Board’s effective date decision was too harsh

18. The Board’s policy on the timelines associated with rate applications is unclear. The Board notes that it estimates rate applications with an oral hearing should be completed in 235 days, which is a little more than two weeks longer than OPG estimated in submitting the application on May 27, 2016.¹⁵ As Energy Probe noted in the introduction (and detailed below), OPG should have to eat some of costs related to that delay. But then the Board says that OPG “should have known” that it would take longer than seven months for the regulatory process to be completed, even though the OEB’s own guidelines state differently.¹⁶
19. In Energy Probe’s view, the Board is, in essence, changing the rules in the middle of the game. If seven months (give or take) is the Board’s policy for completing a rate application with an oral hearing, then OPG should be held to that standard. If, as Energy Probe believes, that figure is arbitrary and doesn’t account for the significant difference between OPG and other large utilities like Hydro One to the many smaller utilities in the province, then it’s too rigid of a policy and utilities shouldn’t bear the cost of that rigidity. If the Board’s performance standards for rate applications

¹³ OPG Motion, page 13

¹⁴ https://www.oeb.ca/oeb/Documents/EB-2004-0205/RPP_Price_Report_Nov2016.pdf, page 14

¹⁵ <https://www.oeb.ca/industry/applications-oeb/performance-standards-processing-applications>

¹⁶ Decision and Order, EB-2016-0152, page 158

don't apply to OPG – or are unreasonable given the scale of OPG's applications (as Energy Probe believes) – it should have made that known.

20. While OPG should be held to account for its decision to delay the filing of the application, it shouldn't be blamed for the lengthy discovery process, oral hearing and time for the decision to be rendered. As stated in its motion, OPG largely met the deadlines established via procedural orders, didn't delay the hearing when the province changed the regulation dealing with rate smoothing and, ultimately, had little control over the length of the oral hearing process. Energy Probe is concerned that pushing the utilities to, in essence, eat the cost of a lengthy and delayed proceeding such as EB-2016-0152 because many different parties addressed many different issues at length, may lead to utilities increasingly – and being encouraged by this ruling – to limit regulatory proceedings to the greatest extent possible. OPG also filed dozens of undertakings throughout the oral proceeding in a timely fashion.
21. OPG, along with intervenors, was also able to settle a number of issues in a settlement conference, which helped limit the already lengthy oral hearing schedule. Given the many contentious issues in this application – and the wide range of viewpoints on those issues – the utility should be given at least partial credit for streamlining the regulatory process.
22. And finally, the Board's argument for "rate certainty" is misguided in Energy Probe's view, particularly in the wider context of what has occurred recently in Ontario regarding electricity rates.
23. First, there's the simple fact that the rates approved on January 1, 2017 were interim. Any electricity consumer in Ontario interested in this proceeding – and its subsequent impact on rates – would have been aware that the rate being charged by OPG for output from its nuclear and hydroelectric facilities was, as stated, interim. Many ratepayers will face – and have faced – a similar situation with other utilities. In Hydro One's most recent transmission application, the decision came ten months after the rates were made effective.¹⁷ In Hydro One's distribution application before the Board, the oral hearing isn't expected to begin until June 2018, even though the effective date for the application is January 1, 2018. Distribution rates for Hydro One's customers are likely to be at least a year behind schedule. And in Toronto Hydro's 2015-2019 application, the decision was released eight months after the effective date.¹⁸ In all of those cases, ratepayers will, in the words of the Board "have consumed power" for a certain period of time at existing rates and "will now, after the fact, have to pay a new rate for those periods."¹⁹ Energy Probe fails to see why this concern is being applied to OPG when it wasn't applied to other utilities, which in some cases, would have a

¹⁷ Decision and Order, EB-2016-0160. The effective date was January 1, 2017, while the decision was released on November 1, 2017.

¹⁸ Decision and Order, EB-2014-0116. It was released on December 29, 2015 with a May 1, 2015 effective date.

¹⁹ Decision with Reasons, EB-2016-0152, page 159

larger impact on the monthly bills of customers. Toronto Hydro's delayed application, for example, caused a double-digit percentage bill increase for many customer classes.

24. Secondly, the province has, to a large extent, overruled the Board's rate-making authority – much to Energy Probe's dismay – with the Fair Hydro Act, which uses debt to artificially lower monthly bills for small-volume consumers. As many parties to this proceeding are aware, the Fair Hydro Act lowers the average residential customer's bills by, on average 25% beginning in 2017 and will hold any increases to monthly bills to that of inflation for the next four years.²⁰ The Board's concern about "rate certainty", while important, is largely unnecessary given the province has used the legislature to control electricity rates for many ratepayers in Ontario (and given them rate certainty in the process). Furthermore, prior to the Fair Hydro Plan, the province used the legislature to smooth OPG's nuclear rates, thereby providing them with even more rate certainty. The entire notion of ratepayers paying an electricity rate based on what it costs to generate and deliver that power has been negated in Ontario. Making OPG eat hundreds of millions of dollars in costs on that principle is misguided in Energy Probe's view.
25. Thirdly, the many sophisticated power consumers in Ontario that aren't covered by the RPP and the Fair Hydro Act are part of organizations that actively participated in this hearing. These consumers should have been more than aware that the current Global Adjustment costs driving their monthly bills were, at least in part, interim and the difference between interim and approved rates would be recovered in the future.
26. And finally, it's not as if ratepayers are suddenly going to get a bill in the mail for the past difference. That's a very simplistic view of ratemaking and one not borne out in the real world. While Energy Probe is a staunch critic of rate-smoothing and other cost deferral methods, we are also aware that the Board commonly relies on deferral accounts and other mechanisms to smooth rates. It could easily do so if the cause of a dramatic spike in rates is a justifiable delay in the regulatory process. OPG, in fact, already relies on more deferral accounts than any other utility in this province. As such, the current rate being charged to ratepayers is often "too low" (very rarely, if ever, has it been the other way around). OPG's last rate application resulted in deferral account charges of more than \$10 per MWh on a base rate of around \$59 per MWh. The difference between the initial "approved" rate and subsequent charges to consumers to make the utility whole was significant. In short, customers are often consuming power at one rate and then later paying a different rate to account for past discrepancies.

OPG should be liable for some delay, but not all

27. Energy Probe believes OPG should be held responsible for some of the delay in the 2017-2021 payment amounts application, but not all of it (for the reasons stated above). We are relying on the

²⁰ <https://www.ontario.ca/laws/statute/17o16>

Board's performance standards for processing rate applications to establish what effective date is appropriate.

28. The Board states that the processing time for a rate application with an oral hearing is 235 days.
 - (1) Difference between performance standard estimate (235) – days between when OPG filed the application and effective date (218) = 17 days.
 - (2) Penalty for OPG's failure to adequately account for complexity of application = 3:1
 - (3) Equation (1) X Equation (2) = 51 days.
29. In Energy Probe's view, a more appropriate effective date would be 51 days from the proposed effective date of January 1, 2017, which would be February 21, 2017. If, for accounting or ratemaking purposes, the effective date needs to be on the first of the month, Energy Probe recommends the Board make March 1, 2017 the effective date.