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March 22, 2018
Our File: EB20180085

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2018-0085 – Ontario Power Generation Motion to Review – SEC Submissions

We are counsel to the School Energy Coalition ("SEC"). Pursuant to the Notice of Hearing and Procedural Order No.1, please find SEC's submissions on the motion to review and vary brought by Ontario Power Generation Inc.

Yours very truly,
Shepherd Rubenstein P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicant and Intervenors (by email)

EB-2018-0085

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act 1998*, Schedule B to the *Energy Competition Act*, 1998, S.O. 1998, c.15;

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 determine payment amount for the output of certain generation facilities for the period of January 1, 2017 to December 31, 2021;

AND IN THE MATTER OF a motion by Ontario Power Generation Inc. pursuant to Rule 32 of the Ontario Energy Board's *Rules of Practice and Procedure* for an order or orders to vary the Decision with Reasons in EB-2016-0152.

SUBMISSIONS OF THE SCHOOL ENERGY COALITION

A. Overview

1. Ontario Power Generation Inc. ("OPG") filed an application with the Ontario Energy Board (the "Board" or "OEB") pursuant to section 78.1 of the *Ontario Energy Board Act. 1998* (the "*OEB Act*"), seeking approval for payment amounts for its prescribed generation facilities (EB-2016-0152). After a lengthy hearing, and arguments from all parties, the Board issued its Decision with Reasons on December 28th, 2017 (the "Decision").

2. OPG filed a notice of motion to review and vary the Board's Decision with respect to its findings that the effective date of new payment amounts should be June 1, 2017.

3. The School Energy Coalition ("SEC") was an intervenor in EB-2016-0152, and filed submissions on the issue of the appropriate effective date.

4. Pursuant to the Notice of Hearing and Procedural Order No. 1, these are SEC's submissions on the threshold question and merits of the motion. SEC submits OPG's motion to review and vary should be dismissed.

B. Facts

5. OPG filed its application for payment amounts to be effective January 1, 2017 on May 27, 2016. This was OPG's first application under the principles of the RRFE, which required payment amounts to be set for 5 years, instead of its usual 2 year application.[1] OPG sought approval for over $16 billion in forecast nuclear revenue requirement, approval of incentive-rate making formula for hydro-electric, and disposition of various deferral and variance accounts.[2] As the Board noted, "[i]n terms of the dollar amounts at issue, and the amount of supporting evidence, this was the largest rate case the OEB has ever heard."[3]

6. OPG itself characterized the application as "present[ing] a number of issues not previously addressed in the context of an OPG proceeding".[4] These unique aspects included approval of "substantial capital funding" for Unit 2 as part of the $12.8 billion Darlington Refurbishment Project, extending Pickering operating life to 2022/24, 2 new and different ratemaking approaches for its nuclear and hydroelectric facilities, a 5 year instead of 2 year term, and a rate-smoothing proposal required pursuant to O.Reg 53/05.[5]

7. At the request of OPG in its application[6], the Board issued an interim order on December 8, 2016 (the "Interim Payment Amount Order"), providing that payment amounts as of January 1, 2017 would be made interim pending its final decision.[7] No submissions were sought from parties on OPG's request to make payment amounts interim. The Board made the interim order, specifically stating that it "should not be construed as predictive, in any way whatsoever, of the OEB's final determination regarding the effective date for OPG's payment amounts arising in this application".[8] OPG did not object to that proviso at the time of the order was made or in its final argument.

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[1] *Decision and Order* (EB-2013-0152 – Ontario Power Generation Inc.), December 28 2018 ["*Decision*"], p.6, Motion Record and Book of Authorities of Ontario Power Generation Inc. ["OPG MRBA"], Tab 1

[2] *Ibid*, p.1

[3] *Ibid*

[4] OPG Argument-in-Chief, March 3 2017, p.1-2, Compendium and Book of Authorities of the School Energy Coalition ["SEC CBA"], Tab 1

[5] *Ibid*

[6] Exhibit A1-2-1, p.2-3. SEC CBA, Tab 1

[7] *Interim Payments Amount Order* (EB-2013-0152 - Ontario Power Generation Inc.), December 8 2016 ["*Interim Payments Amount Order*"], p.1, OPG MRBA, Tab 16

[8] *Ibid*

8. As can be expected by a proceeding of this magnitude, it was lengthy, including a 23 day oral hearing. OPG filed a significant amount of confidential information, which required review and required submissions from parties. OPG also filed three updates to the evidence by way of impact statements on December 20th 2016, February 22nd 2017, and March 8th 2017.[9] Parties provided lengthy and detailed written final arguments.

9. In its Decision, the Board determined that the effective date of new payment amounts would be June 1, 2017. The Board found that "it is 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" and that "OPG should have known that it would take more than seven months for the OEB to consider the application, render a decision and finalize a payment amounts order."[10]

10. The Board rejected OPG's argument that it struck the right balance between filing current information and accounting the time required to process the application. It found that some of the information OPG said it could not have filed earlier (audited 2015 results, release quality estimate for the Darlington Refurbishment Project, final business case for Pickering Extended Operations, the amended Bruce Lease agreement, and amendments to O.Reg 53/05) was "largely in control of OPG".[11] The Board rightly found, "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."[12] The Board noted that filing the three significant updates after the application was filed[13], "runs counter to OPG's argument that it filed in May 2016 with a view to minimizing the updates to the application".[14]

11. The Board balanced its practice of establishing new rates and payment amounts prospectively, with the complicated nature of the case that involved a lengthy submission and

[9] Exhibit N1-1-1; Exhibit N2-1-1; Exhibit N3-1-1; OPG MRBA, Tabs 8-10

[10] *Decision*, p.158, OPG MRBA Tab 1

[11] *Ibid*

[12] *Ibid*

[13] In the *Decision* the Board finds that two of the three updates were under OPG's control. In fact, in SEC's submission all three were under OPG's control. SEC assumes the one the Board is referring to which it wrote was not in OPG's control was the amendment to O.Reg 53/05 regarding smoothing requirement. In fact, it was OPG who wrote to the Minister of Energy in the middle of the proceeding to request the change to O.Reg 53/05 and the Minister responded agreeing to the proposed changes (See Letter from OPG to Ms. Walli: dated February 22, 2017, Attachment A and B, SEC CBA, Tab 3).

[14] *Decision*, p.158, OPG MRBA, Tab 1

decision writing process.[15] In doing so, it rejected many of the intervenors' arguments that the effective date should be set after the release of the Board's decision.

C. <u>Threshold Test</u>

12. SEC submits that OPG has not met the threshold test. It is simply seeking to re-argue aspects of the Decision, and its previous payment amounts decision (the "EB-2013-0321 Decision").[16]

13. Pursuant to Rule 43.01 of the Board's Rules of Practice and Procedure, the Board conducts a threshold inquiry to determine whether the matter should be reviewed on the merits. The threshold test was articulated by the Board in the *Motion to Review Natural Gas Electricity Interface Review* ("NGEIR") Decision.[17] The Board stated that the purpose of the threshold test is to determine whether the grounds relied upon by the moving party raise a question as to the correctness of the decision, and whether there is enough substance to the issues raised that a review based on those issues could result in the Board varying, cancelling or suspending that decision. [18] While the grounds listed in Rule 42.01(a) are not exhaustive, in order for the threshold test to be met, there must be an "identifiable error"[19] and the "review is not an opportunity for a party to reargue the case". [20] The Divisional Court has confirmed the Board's principle that re-argument of issues is not an appropriate ground for review.[21]

14. Many of OPG's arguments on the motion are simply a repetition of what it said in its Reply Argument[22], in response to arguments from intervenors including SEC[23], regarding why the proposed

[15] *Ibid*, p.159

[16] *Decision with Reasons (*EB-2013-0321 - Ontario Power Generation Inc.), November 20 2014 ["*EB-2013-0321 Decision"*], OPG MRBA, Tab 15

[17] *Decision with Reasons (EB-2006-0322/338/340 - NGEIR Motion to Review),* May 22 2007 ["*NGEIR*"], OPG MRBA, Tab 35. Also see *Decision and Order on Motion to Review* (EB-2011-0053 - Grey Highlands), April 21, 2011, SEC CBA, Tab 4; *Decision and Order on Motion to Review* (EB-2013-0193 - Milton Hydro Motion to Review), July 4 2013, p.4, SEC CBA, Tab 5; *Decision on Motion to Review Decision and Order* (EB-2013-0331 - NAN), January 16 2014, p. 3, SEC CBA, Tab 6

[18] *NGEIR*, p.18, OPG MRBA, Tab 15

[19] *Ibid*, p.14,

[20] *Ibid*, p.18

[21] *Grey Highlands (Municipality) v. Plateau Wind Inc*., 2012 ONSC 1001, para. 7, SEC CBA, Tab 7

[22] OPG Reply Argument, June 19 2017, p.282-285, OPG MRBA, Tab 14

[23] Final Argument of the School Energy Coalition, p.144-148, SEC CBA, Tab 8

January 1 effective date should not be accepted, albeit in less detail.[24] A motion for review is not an opportunity to fix a weak or flawed argument.

15. Not only is it inappropriate to re-argue aspects of the decision that were unfavorable to it. It is also inappropriate to make new arguments which it had the opportunity to make in the original hearing, and chose not to. OPG's legal argument that the Board is required to set rates back to the date rates were declared interim was not made in either its Argument-in-Chief or Reply Argument.[25]

16. It is the same argument it made, and the Board rejected, it in the EB-2013-0321 Decision.[26] Notably, OPG brought a motion to review regarding two aspects of that EB-2013-0321 Decision, but not with respect to the effective date.[27] It is seeking to re-argue aspects of the EB-2013-0321 Decision in a motion to review, after not even raising the arguments in its underlying proceeding. OPG should not be granted a forum now to make an argument it clearly could have, but did not, make in the underlying proceeding. Moreover, it should not be allowed to re-argue aspects a previous payment amounts decision that it disagrees with.

17. What is most surprising about OPG's approach, is that in the EB-2013-0321 Decision, the Board specifically commented that it was surprised to hear this argument raised for the first time in its final argument:

> Although OPG questioned in final argument whether the Board even has the ability to set an effective date to some date other than the interim date, it made no comment on this point when it made its request for interim payment amounts, nor when the interim order was issued. Given that the sentence quoted above is commonly included in the Board's interim orders, the Board is surprised to hear for the first time in OPG's final argument that OPG feels the Board lacks this authority. [emphasis added][28]

18. Not only did OPG not raise the issue at the time of the interim order, as the Board had previously said it would expect it to do, this time it did not even raise it in its final argument. The

[24] See Final Argument of the Consumers Council of Canada, p.50-52, SEC CBA, Tab 9; Final Submissions of the Association of Major Power Consumers in Ontario, p.59, SEC CBA, Tab 9; Submissions of Canadian Manufactures and Exporters, p.85-87, SEC CBA, Tab 10; Final Submissions of London Property Management Association, p.55-60, SEC CBA, Tab 11

[25] OPG Argument-in-Chief, March 3 2017, CBA, Tab 1; OPG Reply Argument, June 19 2017, OPG MRBA, Tab 14

[26] *EB-2013-0321 Decision*, OPG MRBA, Tab 14

[27] *Decision and Order* (EB-2014-0369 – Ontario Power Generation Motion to Review), January 28 2016, p.1, SEC CBA, Tab 13

[28] *Ibid*, p.133

first time OPG makes this argument is by way of a motion to review. Such an approach is entirely inappropriate, and an abuse of the Board's process.

D. Standard of Review

19. A motion to review is not a hearing de novo.[29] The original hearing panel, which had the benefit of considering the evidence first hand, is entitled to deference by a reviewing panel. The Board has previously said that "[a] reviewing panel should not set aside a finding of fact by the original panel unless there is no evidence to support the decision and [it] is clearly wrong [emphasis added]."[30]

20. A reviewing panel is not tasked with re-considering afresh the evidence and arguments to determine what decision they would have reached. Rather, it is a tasked with reviewing the decision to determine if it was unreasonable. As the Board recently confirmed in its decision on a Motion to Review brought by Milton Hydro, the standard of review of a reviewing panel is that of reasonableness.[31] Giving deference to the findings and conclusions of the original hearing panel is especially important in the rate-setting context where there is rarely a clear 'right' or 'wrong' answer. Most decisions the Board makes are ones that require judgement and balancing of various considerations.

E. Effective Date

Interim Rates

21. OPG argues that in setting just and reasonable payment amounts, the Board must ensure that they are just and reasonable at all times.[32] In doing so, the Board must ensure rates are just and reasonable all the way back to the point in time it declared rates interim. SEC disagrees with OPG's characterization of the law.

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[29] *Decision with Reasons* (RP-2004-0167/EB-2005-0188 - Natural Resource Gas Ltd. Motion to Review), October 6 2005, p.7, SEC CBA, Tab 14

[30] *Decision and Order* (EB-2009-0063 - Brant County Power Inc. Motion to Review), August 10 2010, para. 38, SEC CBA, Tab 15

[31] *Decision and Order* (EB-2016-0225 - Milton Hydro Motion to Review), February 22 2018, p.10, SEC CBA, Tab 16

[32] Submissions of Ontario Power Generation Inc. ["OPG Submissions"], para. 22

22. As the Board correctly noted in its lengthy analysis in the EB-2013-0321 Decision, the Board is not required to set an effective date of its final orders back to the dates rates were declared interim. The Board's interim rate-setting authority is entirely discretionary.

23. Section 21(7) of the *OEB Act* provides that "[t]he Board may make interim orders pending the final disposition of a matter before it [emphasis added]".[33] This power is entirely discretionary and thus so is the Board's authority to set the effective date of final payment amounts back to the effective date of the interim order, or any other after.

24. The *OEB Act* and O.Reg 53/05 are generally quite clear when it limits the Board's normally broad discretion in rate-setting.[34] Neither requires rates to be effective the same date interim payment amounts were declared.

25. OPG's reliance on the Supreme Court of Canada's decision in *Bell Canada*[35] is misplaced. In *Bell Canada*, the Supreme Court determined that the CRTC had the authority to retrospectively alter rates back to the effective date of the interim order. The Supreme Court stated that "[it] is inherent in the nature of interim order and the final order may be reviewed and remedied by the final order [emphasis added]'".[36] The decision does not stand for the proposition that the effective date of final rates must be aligned with the effective date of the interim order. It is permissible, not mandatory. The Board has come to the same conclusion when faced with this argument on multiple occasions, including in the EB-2013-0321 Decision.[37]

26. It is also worth considering the unique factual situation in *Bell Canada*. There, CRTC had not just declared existing rates interim, but provided an interim rate increase, on the basis that Bell had

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[33] *Ontario Energy Board Act, 1998*, section 21(7):

> Interim orders
>
> (7) The Board may make interim orders pending the final disposition of a matter before it.

[34] For example, see the restrictions placed on the Board with respect to the determination of 'need' regarding the Darlington Refurbishment Station (See O.Reg 53/05, s. 12(v))

[35] *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission),* [1989] 1 SCR 1722 ["*Bell Canada*"], OPG MRBA, Tab 19

[36] *Ibid*, para. 44

[37] *Decision on Motion* (RP-2005-0020/EB-2005-0361/EB-2006-0197/EB-2007-0016 – Erie Thames Powerlines), June 8 2007, p.5-6, SEC CBA, Tab 17; *EB-2013-0321 Decision*, p.133, OPG MRBA, Tab 15

claimed that without the increase it would suffer serious financial deterioration.[38] It turned out that Bell's financial position improved and it never actually required such a large rate increase.[39] The dispute arose over the CRTC's jurisdiction to require Bell to repay a portion of the interim rate increase to ratepayers. In doing so, the Supreme Court found the CRTC did have the authority to do so, finding that "power to revisit the period of which interim rates were in force is a necessary collar of this power without which interim orders made in emergency situations may cause irreparable harm and subvert the fundamental purpose of ensuring that rates are just and reasonable".[40]

27. In *Bell Canada*, it was fair for the CRTC to go back to the date when rates were declared interim since it was a rate increase that was interim. If not, it would be unfair to ratepayers who had not had a chance to properly consider Bell's evidence.

28. Contrary to OPG's claim, the Board is not required to ensure that a utility's rates are just and reasonable "at all times".[41] The Board is not required, nor is it practical, to adjust a utility's rates constantly to ensure it is always just and reasonable. If that were the case, both OPG's requested and the Board's approved rate-setting framework would not meet that requirement. For example, the incentive regulation regime for its hydroelectric facilities by definition decouples revenues from costs. Furthermore, the framework for both nuclear and hydroelectric approval allows for a review of payment amounts if performance is outside the +/-300 basis point ROE dead band.[42] If rates were always required to be just and reasonable, the 300 basis point dead band should be eliminated. Moreover, what the Supreme Court said in *OPG*[43] should be emphasized. A utility must "over the long run, be given the opportunity to recover, through the rates it is permitted to charge, its operating and capital costs [emphasis added]".[44]

29. Determining an effective date for final rates that is after the effective date of interim rates is nothing new. It is a long standing practice of the Board[45], and is entirely consistent with the law.

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[38] *Ibid*, para. 4
[39] *Ibid*, para. 5-8
[40] *Ibid*, para. 57
[41] OPG Submissions, para. 22. 23
[42] *Decision*, p.133-134, OPG MRBA, Tab 1
[43] *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44, OPG MRBA, Tab 18
[44] *Ibid*, para 16
[45] For example, see: *Decision and Order* (EB-2016-0085 – InnPower), March 8 2018, p.32, 40, SEC CBA, Tab 18; *Revised Decision and Order* (EB-2015-0072 – Grimsby Power), September 22 2016, p.10-11 SEC CBA, Tab 19;

OPG's Position Leads to A Breach of Intervenors Procedural Fairness

30. If OPG is correct that the effective date must align with the interim order effective date, then the Board will have breached its duty of procedural fairness to ratepayer intervenors. As OPG itself points out, the "OEB must ensure that its procedures provide the 'highest degree of procedural fairness'".[46] As the Divisional Court has pointed out, in a case regarding the Ontario Energy Board itself, the right to be heard is a "fundamental tenet of procedural fairness."[47]

31. The Board did not seek submissions from intervenors in its decision to deem payment amounts interim as of January 1, 2017. It unilaterally made the decision after a request from OPG, and issued the interim rate order on December 8, 2016.[48] It would be a breach of procedural fairness if parties who would be directly affected by the interim payment amounts decision are not heard on this important component of setting final payment amounts. The Board in the EB-2013-0321 Decision recognized this exact problem:

> If the Board is legally required to match the effective date to the interim date, as OPG argues, then the issuance of the interim order without process arguably represents a breach of the "right to be heard" principle. In the current case, ratepayer groups would be responsible for hundreds of millions of dollars in costs relating to the "interim" period without being afforded any opportunity for comment at all.[49]

Practical Consequences

32. It is important to consider the practical consequences of OPG's position. Under the current practice, the Board regularly declares rates interim so as to allow it maximum flexibility to determine the appropriate effective date after considering all the evidence and arguments for when the appropriate date should be. If by declaring current rates interim, the Board is required to set an effective date of final rates to match, then it will almost certainly be much less likely, in fact it may stop altogether, issuing interim rate orders. At the very least, intervenors will strenuously oppose any such orders going forward. Since almost all rate applications lead to some type of rate increase, this will disproportionately reduce utility revenues.

Decision and Order (EB-2014-0073 – Festival), April 30 2015, p.18, SEC CBA, Tab 20; *Decision and Order* (EB-2013-0130 - Fort Francis Power), August 14 2014, p.2-3, SEC CBA, Tab 21

[46] OPG Submissions, para 21, citing *Rogers Communication Partnership v. Ontario Energy Board*, 2016 ONSC 7810, para. 16, OPG MRBA, Tab 27

[47] *Rogers Communication Partnership v. Ontario Energy Board*, 2016 ONSC 7810, para. 19, OPG MRBA, Tab 27

[48] *Interim Payments Amount Order*, p.1, OPG MRBA, Tab 16

[49] *EB-2013-0321 Decision*, p.133, OPG MRBA, Tab 15

33. If such an interpretation of the law has been in place before this application, the Board likely would not have made the interim payment amounts order. In that scenario the earliest OPG would have been able to have its payment amount change made effective is the same as the implementation date of March 1, 2018[50], a full 9 months after the Board's actual decision of a June 1, 2017 effective date. OPG would have been in a worse position.

The Board Can Consider the Impact on Electricity Consumers

34. OPG argues that the Board's concern for customer impact in its decision on the appropriate effective date is not permissible.[51] It cites the Supreme Court's decision in *ATCO Gas* to support its position that the Board may not disallow recovery of prudently incurred or a fair return on capital due to rate impact on consumers.

35. The Board did not disallow any prudently incurred costs or an opportunity to earn a fair return. What it did was determine what the appropriate date that it will allow rates to be adjusted. As discussed earlier, there is no requirement to set effective of the date of the interim order. The reference to the customer impacts in the Decision was regarding the retroactive or retrospective nature of the rate increases:

> 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 2017) at the existing rates and will now, after the fact, have to pay a new rate for those periods.[52]

36. Considering customer impacts on the retroactive nature of the effective date is exactly what the Board should do. The Board's rate-setting regime is a positive approval scheme and, unless there is an exception (i.e. by way of interim rate order), is done on a prospective basis only.[53] Since interim payment amounts were in place, it is not argued that the Board was prohibited from setting payment amounts retroactively back to January 1, 2017. But just because it could have, does not mean that the policy reasons behind why as a general rule it cannot do so, are not relevant. The same "principles of certainty and finality [that] are a necessary component of effective rate regulation" are an important

[50] *Decision and Draft Payment Amounts Order and Procedural Order No. 10*, March 12 2018, p.20, SEC CBA, Tab 22

[51] OPG Submissions, p.12

[52] *Decision*, p.159, OPG MRBA, Tab 1

[53] *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453, para. 82, SEC CBA, Tab 23

factor in the Board's decision on the appropriate effective date of rates.[54] As noted elsewhere in the Decision, many consumers are not on part of the Regulated Price Plan (RPP), nor benefit from the Fair Hydro Plan.[55] The Board rightly pointed out that consumers make consumption decisions based on the price of electricity at any given time.[56]

37. While OPG is correct that in the strict legal sense consumers had noticed that the payment amounts may change due to the interim order, in reality, unlike OPG, most customers do not fully understand what this means. Even if they do understand, any notice that rates may change will alleviate, but not eliminate, the concerns about predictability and unfairness that underlie the prohibitions against retroactive and retrospective ratemaking.[57]

38. The Board did not consider only the impact on customers in coming to the June 1, 2017 effective date. If it did then it would have set the effective date as the same as the implementation date. The Board wrote that in setting the June 1, 2017 effective date, "the OEB has attempted to balance the revenue needs of OPG and the rate certainty expected by ratepayers".[58] The impact on consumers of the retroactive effect was one factor the Board considered.

Procedural Requirement Where Known

39. OPG claims that the Board breached its legitimate expectations by creating a novel procedural requirement without notice. SEC submits the Board did no such thing.

40. The Board has consistently been clear to OPG that "the Board's practice has typically been to not allow the utility to retrospectively recover the amounts from the period where the interim order was in effect".[59] The Board's metrics are simply guidelines that are applicable to many different types of rate cases. OPG as a very sophisticated utility would understand that the expectations on the timeliness of a

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[54] *Decision and Rate Order* (EB-2013-0119 – Chapleau PUC) March 13 2014, p.8, SEC CBA, Tab 24*; Decision and Orde*r (EB-2013-0022 – Veridian), April 25, 2013, p.10, SEC CBA, Tab 25

[55] *Decision*, p.154-155, OPG MRBA, Tab 1

[56] *Ibid*, p.159

[57] *Calgary (City) v. Alberta (Energy and Utilities Board),* 2010 ABCA 132, para.57, OPG MRBA Tab 24:

> Both *Bell Canada 1989* and *Bell Aliant* (which concerned deferral accounts rather than interim rates) 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 <u>less significant.</u>

[58] *Decision*, p.159, OPG MRBA, Tab 1

[59] *EB-2013-0321 Decision*, p.135, OPG MRBA Tab 15; *Decision*, p. 159, OPG MRBA Tab 1

proceeding for a one year cost of service for a small utility will be dramatically different from a 5 year application which is the "largest rate case the OEB has ever heard."[60]

41. Further, the Board's reference to the Board's metrics in the EB-2013-0321 Decision should be considered in the context of the actual decision it made. In that proceeding, a two year cost of service application, the Board determined the effective date was to be 331 days after the revised application was determined to be complete.[61] In fact, every single OPG payment amounts application has taken longer than the Board's metric.[62]

42. The fact that this proceeding took materially longer than OPG's previous payment amounts applications should have been expected. All previous payment applications were for two year test periods, whereas the one at issue was a 5 year application, which included "a number of issues not previously addressed in the context of an OPG proceeding."[63]

43. The length of time it has taken the Board to render a decision from the filing of a completed application was not very far off from the effective date the Board ultimately chose in the Decision. Based on its own calculations, of "its three prior payment amounts applications, OPG experienced proceedings that took an average of 245 days from the filing of a completed application until the filing of reply argument, and an average of 80 days from the filing of reply argument for the OEB to issue its decision". [64] If those calculations are correct, then it has previously taken an average of 325 days from filing of a two year application until the release of the Board's decision. Considering the application was for 5 years instead of two, 370 days was very reasonable.

Procedural Requirements Were Fair

44. OPG further argues that the Board's procedural requirements applied to the application were impossible to meet. OPG's position appears to be that since the earliest it could reasonably file its application would be in April of the bridge year due to the availability of previous year-end audited

[60] *Decision*, p.1, OPG MRBA Tab 1

[61] *EB-2013-0321 Decision*, p.1, OPG MRBA Tab 15

[62] *Decision with Reasons* (EB-2010-0008 – Ontario Power Generation Inc.), March 10, 2011, p.1, OPG MRBA, Tab 31; *Decision with Reasons* (EB-2007-0905 - Ontario Power Generation Inc.), November 3 2007, p.4, SEC MRBA, Tab 26; *EB-2013-0321 Decision*, p.1, OPG MRBA Tab 1

[63] OPG Argument-in-Chief, March 3 2017, p.1-2, SEC CBA, Tab 1

[64] OPG Submissions, para. 45

financial information, there is no way it could file much earlier than it did.[65] SEC submits this is entirely inaccurate.

45. First, when OPG is able to file its application is a different question from that of when it is seeking an effective date for new payment amounts. Nothing requires OPG to seek an effective date for January 1st of the next year. While OPG's fiscal year may begin on January 1st of a year, that does not mean its rate year must as well. Utilities regularly seek, and the Board regularly approves, rates with an effective date that is different from a utility's fiscal year. A significant proportion of electricity distributors have their rates effective May 1st of a given year, even if their fiscal year matches the calendar year.[66]

46. OPG itself has sought approval of an effective date different than January 1st in the past. In its 2011-12 payment amounts application (EB-2010-0008), it filed its application on May 26, 2010, for rates effective March 1, 2011.[67] In deciding not to seek a January 1st payment amounts, OPG stated that it was "not requesting to make the new payment amounts effective until March 1, 2011 because of the timing of the application."[68] OPG's claim of unfairness rings hollow, when it previously recognized that filing a two year application on May 26th (one day earlier in the year than the EB-2016-0152 application) required an effective date later than January 1st.

47. Second, nothing requires OPG to have file audited financial information before filing its application. The Board's Filing Guidelines for OPG contemplate the filing of audited financials by way of update, "if the statements are not available at the time of filing".[69] The Filing Guidelines further provide guidance to OPG "[t]o address the concern of a potentially significant variance between the date of the audited financial statements and the date of filing."[70] Filing an update for audited financial

[65] OPG Submissions, para. 50

[66] Letter from Board Secretary, *Re: Applications for 2019 Electricity Rates*, dated December 7 2017, Attachment A, SEC CBA, Tab 27

[67] *Decision with Reasons* (EB-2010-0008 - Ontario Power Generation Inc.), March 10, 2011, p.1, OPG MRBA Tab 30

[68] EB-2010-0008, Exhibit A1-3-1, p.1, SEC CBA, Tab 28

[69] *Filing Guidelines for Ontario Power Generation Inc.: Setting Payment Amounts for Prescribed Generation Facilities* (EB-2011-0286), Revised November 11 2011, p.9, SEC CBA, Tab 29

[70] *Ibid*, p.10

information is not uncommon. For example, Hydro One Networks Inc. regularly updates its filings to include bridge year audited financial information.[71]

48. Third, OPG did not even meet the Board's general expectations on the appropriate filing date for January 1, 2017 effective date. The Board expects electricity distributors filing traditional one year cost of service application to file by the end of April 2016. [72] For a first-of-a-kind application such as OPG's, utilities have generally filed significantly earlier than even the Board's bare minimum. For example, when Hydro One Networks Inc. filed the first Custom IR application for rates effective January 1, 2015, it did so over a year early, in December 2013.[73]

No Material Errors in Factual Findings

49. SEC disagrees with OPG's view that the Board made factual errors in the Decision.

50. First, OPG argues that the Board erred in finding that certain information was largely in its control and so could have led to an earlier filing.[74] It should be noted that the Board's reference to specific documents in the Decision was made because OPG specifically noted them in its Reply Argument.[75] OPG stated that it would not have had them to prepare for the filing if it was required to file "461 days in advance of January 1, 2017", because that "would have meant a filing date of approximately mid-October 2015."[76] The Board never required OPG to file the application for a January 1st effective date, nor in its Decision did it require them to file 461 days before its proposed effective date. In the Decision, the Board gave OPG an effective date 370 days after the filing of its application.

51. OPG has taken the position that the Release Quality Estimate for the Darlington Refurbishment Project and business case for Pickering Extended Operations, both cited by the Board in its Decision,

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[71] See for example, EB-2017-0049, Letter from Hydro One to Board Secretary, Re: Blue Page Update to Hydro One Networks Inc.'s 2018-2022 Distribution Custom IR Application, dated June 17 2017, SEC CBA, Tab 30:

> The updates include a number of adjustments including:
>
> - replacing the 2016 forecasted results with 2016 audited financial results;
>
> ….

[72] Letter from Board Secretary, *Applications for 2017 and 2018 Electricity* Rates, dated December 29 2015, p.2, SEC CBA, Tab 31

[73] *Decision with Reasons* (EB-2013-0416/EB-2014-247 - Hydro One Dx), March 12 2015, Appendix 1, p.66, SEC CBA Tab 32

[74] OPG Submissions, para. 53-54

[75] OPG Reply Argument, June 19 2017, p.282-283, OPG MRBA, Tab 14

[76] *Ibid*, p.282

were completed in November 2015 and thus "did not drive any delay beyond January 1, 2016". [77] If that is the case, it strengths the argument that OPG should have filed earlier, considering of two of three remaining items that are referenced, were also completed around the same time frame.

52. With respect to those specific documents referenced in the Decision. They were not barriers to an earlier filing. As discussed earlier, the audited financial are not a requirement to file. Regardless, they were released on March 3rd 2016[78], almost three months before OPG did file its application. Similarly, the amended Bruce Lease agreement was executed on December 4, 2015,[79] almost half a year before the application was filed.

53. With respect to the original amendments to O.Reg 53/05 regarding smoothing and the Darlington Refurbishment Project, it was enacted on November 27, 2015.[80] If these amendments to O.Reg 53/05 were anything like the later amendments regarding the update smoothing requirements, where OPG wrote to the Minister requesting the specific changes that were made, it likely knew the contents of the regulation much earlier.[81] In fact, OPG was discussing a smoothing proposal at stakeholder sessions as early as January 2015.[82]

54. Second, OPG argues that the Board erred in finding that the evidence updates delayed the proceeding.[83] The problem with this argument is the Board never made such a finding. The reference in the Decision to updates was in regard to OPG's claim that it was reasonable to file as late as it did to minimize updates. The Board wrote that "[t]he fact that OPG filed significant updates runs counter to OPG's argument".[84]

55. Regardless of any supposed errors, they are not material, and would not have had an effect on the Board's decision to set the effective date of June 1, 2017.

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[77] OPG Submissions, para. 54

[78] Exhibit A2-1-1, Attachment 3, p.1, SEC CBA, Tab 33

[79] Exhibit G2-2-1, p.2, SEC CBA, Tab 34

[80] O.Reg 353/15 amending O.Reg 53/05, filed on November 27, 2015, SEC CBA, Tab 35

[81] See Letter from OPG to Ms. Walli: dated February 22, 2017, Attachment A and B, SEC CBA, Tab 3

[82] Exhibit A1-7-1, p.2, SEC CBA, Tab 36; Stakeholder Consultation Session Notes: Second Information Session on Upcoming Applications, January 22 2015, p.12-15, SEC CBA, Tab 37

[83] OPG Submissions, para. 55

[84] *Decision*, p.158, OPG MRBA, Tab 1

Decision Was Reasonable

56. The Board's decision on the effective date was reasonable. The Board balanced a number of competing issues and reasonably determined that the effective date should not be after the release of the decision as advocated by some parties, but also not January 1, 2017, as sought by OPG. The decision the Board made is the type that should attract deference by a reviewing panel.

F. Relief

57. SEC submits the Board should deny OPG's motion to review and vary.

58. In the alternative, if the motion is granted, the Board should allow an opportunity for SEC and other parties to provide submission on a new appropriate effective date, taking into consideration the principles set out in the reviewing panel's decision. Even if the Board grants the motion, it is not necessarily a given that the appropriate effective date should be any earlier than what was ordered in the Decision.

Respectfully submitted on behalf of the School Energy Coalition this 22nd day of March, 2018.

Original signed by

Mark Rubenstein
Counsel for the School Energy Coalition