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VIA RESS FILING and COURIER

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

Dear Ms. Walli,

**Re: Ontario Power Generation - Notice of Motion to Review and Vary
EB-2016-0152 Decision and Order dated December 28, 2017**

Attached please find the Power Workers' Union's Submissions in connection with the above-noted proceedings. An electronic copy has been filed through the Board's RESS filing system, and two paper copies will follow by courier delivery.

Yours very truly,

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP


Richard P. Stephenson
RPS:pb

Encl.

Doc 2457704 v1

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Ontario Power Generation Inc. pursuant to section 78.1 of the *Ontario Energy Board Act, 1998* for an Order or Orders determining payment amounts for the output of certain of its generating facilities for the period from January 1, 2017 to December 31, 2021;

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

SUBMISSIONS OF POWER WORKERS' UNION

(OPG Motion to Review and Vary)

1. These are the submissions of the Power Workers' Union ("PWU") in respect of Ontario Power Generation's ("OPG") motion for review and variance of the Ontario Energy Board ("OEB" or "Board") panel's Decision and Order dated December 28, 2017 in EB-2016-0152 (the "EB-2016-0152 Decision").

2. Rule 45.1 of the OEB Rules of Practice and Procedure sets out that the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting a review on the merits of the motion. In Procedural Order No.1, dated February 27, 2018, the Board determined that parties should make written submissions on both the threshold for review and the ultimate merits of the Motion.

3. The PWU was an intervenor and active participant in EB-2016-0152. The PWU supported OPG's application, including its position with respect to the subject matter of this motion.

4. The PWU's submissions are in response to the Board's request to the parties to make submissions. These submissions do not specifically address all of the OEB's determinations in OPG's Motion. The PWU supports the Motion as filed, and supports and adopts the submissions of OPG in support of the Motion. Specifically, these submissions do not address the threshold question. On that, the PWU adopts the submissions of OPG.

5. The PWU submits that the Board committed a reviewable error in determining that the effective date for OPG's new payment amounts should be June 1, 2017, rather than January 1, 2017 as requested by OPG. The effect of the Board's decision is to prevent OPG from having the ability to recover the revenue requirement approved by the Board in the EB-2016-0152 decision. Even assuming that it could be appropriate, in a proper case, to deprive a utility of the opportunity to earn its approved revenue requirement, no circumstances are present here which could warrant that outcome.

6. Up to p. 142 of the EB-2016-0152 decision, the Board reviewed and approved (with modifications) OPG's revenue requirement for nuclear and OPG's IRM mechanism for its hydraulic stations. All that properly remained for the Board to do was to determine the *manner* in which those amounts were to be recovered.

7. Instead, by determining June 1, 2017 as the implementation date for the new rates, the Board deprived OPG of the opportunity to earn any incremental revenue requirement for the five month period between January 1 and June 1, 2017.

8. Significantly, the Board noted SEC's submission that:

...the Board could determine that the revenue requirement for the period January 1, 2017 to the effective date is equivalent to that resulting from the current payment amounts.¹

9. This submission reveals that the SEC was, quite properly, alive to the problem that would arise if the Board deprived OPG of its ability to earn its approved revenue requirement by virtue of setting a later implementation date. Had the Board accepted this submission (assuming that it was appropriate to do so in view of the prior findings of the Board), the Board may have avoided a reviewable error. However, the SEC's submission was not accepted.

10. In its submissions on this Motion, Board Staff relies on the reasons of the Board in EB-2013-0321 where the Board determined that it did not accept that there is a legal requirement that it set the effective date of its final orders to the date that rates were declared interim. An interim rate order permits but does not require the Board to make a retrospective rate order. Moreover, there is "wobble room" in just and reasonable rates such that rates can fall within a range within which they will be reasonable.²

11. The PWU disagrees with this analysis. First, it is important to note that the Board's decision in EB-2013-0321 was made in November 2014, significantly prior to the Supreme Court of Canada decisions in *ATCO* and *OPG*,³ which were released in September 2015. As noted by OPG, the Court in *ATCO* determined that:

[61] As discussed above, a key principle in Canadian regulatory law is that a regulated utility must have the opportunity to recover its operating and capital

¹ EB-2016-0152, p. 158

² Board Staff Submissions, p. 5-6

³ *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, [2015] 3 SCR 219, 2015 SCC 45 (CanLII); *Ontario (Energy Board) v. Ontario Power Generation Inc.*, [2015] 3 SCR 147, 2015 SCC 44 (CanLII)

costs through rates: *OEB*, at para. 16. This requirement is reflected in the *EUA* and *GUA*, as these statutes refer to a reasonable opportunity to recover costs and expenses so long as they are prudent. A regulator must determine whether a utility's costs warrant recovery on the basis of their reasonableness — or, under the *EUA* and *GUA*, their “prudence”. *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: *OEB*, at para. 20.⁴ (emphasis added).

12. By the time the Board came to consider the implementation date issue, it had determined OPG's revenue requirement. In doing so, it had deemed the costs comprising that revenue requirement to be prudent. As a consequence, the *OEB* “must allow the utility the opportunity to recover [those costs] through rates”. By failing to permit OPG the benefit of the new (higher) payment amounts for the first five months of the test period, the Board permanently deprived OPG of any opportunity to recover the full amount of the approved revenue requirement. This is an error in principle.

13. The *PWU* acknowledges that the Board has an element of judgment and discretion⁵ in determining the level of costs that it considers to be prudently incurred. To that extent, the Board has “wiggle room”. Moreover, the Board has discretion over how, and what period the revenue requirement will be recovered (e.g. rate design and smoothing mechanisms). However, the Board has no discretion to deny a utility the opportunity to recover its approved revenue requirement.

14. The *PWU* acknowledges the inherent uncertainty in setting rates on a forecast basis, where various assumptions inevitably do not materialize in fact. That is why a

⁴ *ATCO*, *supra*, para 61

⁵ Subject to the legal constraints recognized by the *SCC* in *OPG*

utility has no right to actually recover its revenue requirement, merely the “opportunity” to do so. The present case does not involve any issues of future uncertainty. To the contrary, the Board made a deliberate decision, looking backward, to deny OPG *any opportunity* to recover the full approved revenue requirement.

The Board’s Justification for the Selection of the Implementation Date

15. The Board rested its decision on the following two bases:

- (a) It was appropriate to deprive OPG of its approved revenue requirement because it had filed late and/or had not been diligent in prosecuting the application; and
- (b) An earlier implementation date would offend customers’ rate certainty expectations.⁶

16. It is submitted that neither of these considerations, if valid at all, warrant depriving OPG of its approved revenue requirement.

(a) Late Filing/Lack of Diligence

17. The PWU adopts the submissions of OPG with respect to the timeliness and diligence of its application. The PWU also notes the following. It is apparent that the vast majority of the time associated with the application derived either from the inherent requirements of the case, or matters under the Board’s control. In this regard, the PWU has prepared a chart of the major events in the case, which is attached as Appendix A.

⁶ EB-2016-0152, p. 158-9

18. As revealed by Appendix A, the case occupied a total of 581 days from application to decision. The Board ultimately determined that a total of 371 days from application to implementation was reasonable, disallowing 210 days. However, the PWU notes that the period of time from the conclusion of the oral hearing (April 13, 2017) until the decision was released exceeds this total, some 259 days. In addition, the period from the filing of the application (May 27, 2016) to the issuance of Procedural Order #1 was a further 78 days. These time periods were wholly within the Board's control.

19. Moreover, if the Board is correct that the reasonable amount of time for the processing of the application was 371 days, then in order for OPG to obtain a January 1, 2017 implementation date, OPG would have had to have filed the application no later than December 28, 2015.⁷ There can be no suggestion that this is a reasonable requirement to place on OPG or any other applicant.

20. Board Staff responds to OPG's submission that it had a "legitimate expectation" that the Board would process its application so as to permit a January 1, 2017 implementation by indicating that the Board's performance standards are not prescribed by any statute or Board rule. That is correct, however, it is no answer to OPG's position. There is no obligation that the expectation be based upon a legally binding instrument. Rather it may arise from "established practices, conduct or representations".⁸ That standard is clearly met here.

(b) Customer Expectations of Rate Certainty

⁷ Or even earlier, assuming that additional time were to be allotted for the purpose of issuing a rate order.

⁸ *CUPE v. Ontario (Minister of Labour)* [2003] 1 SCR 539 at para. 131

21. Rate stability is a well recognized objective of rate setting. However, it is not a basis to deprive a utility of the opportunity to earn its approved revenue requirement.

22. Moreover, the Board misstated the role and impact of customer expectations here. First, there is no customer expectation that rates will be determined solely on a prospective basis. Virtually all regulated utilities (including OPG) are subject to numerous deferral and variance accounts which result in future collection (or rebate) of prior period amounts. Customers understand this, or at least for legal purposes, are treated as if they understand this. In addition, the use of interim rate declarations is not uncommon. When, as here, such a declaration is made, customers are put on notice that the rates they are currently being charged are potentially subject to future adjustment, and future collection/rebate. That is the *raison d'être* of interim rates.

23. Indeed, the Board's decision in EB-2016-0152 achieves precisely this effect – allowing OPG to collect past rate revenue in a future period. To the extent “rate certainty” was the objective the Board was seeking to achieve, the Board's order does not achieve it. The issue in this case is not one of principle (i.e. “rate certainty”); it is one of amount (i.e. the magnitude of the rate impact).

24. Further, this is not a case where customers will be confronted with multiple and potentially conflicting movements in their rates or bills. In this case, customers will be largely, if not entirely insulated from fluctuating payment amounts through a variety of different mechanisms:

- (a) OPG's payment amounts are subject to a smoothing mechanism that was reviewed and approved by the Board in EB-2016-0152;

- (b) The majority of OPG customers are on the RPP which regulates and tempers the impact of any change to OPG payment amounts; and
- (c) The Board failed entirely to recognize the impact of the Fair Hydro Plan (“FHP”).

25. Under the FHP, any change made to OPG’s payment amounts as a result of the EB-2016-0152 decision (or this motion) will not flow through to the electricity bills paid by FHP eligible customers (these are a majority of OPG’s customers). The commodity cost for these customers is determined formulaically pursuant to the provisions of O. Reg. 195/17, and OPG payment amounts (or changes thereto) play no role in that formula.⁹

26. The failure to consider the effect of the FHP was a critical oversight by the Board, since the customers protected by the FHP (i.e residential and small commercial customers) are likely to be the least sophisticated, and otherwise most in need of rate certainty protections.

27. At page 8 of its submissions on the motion, Board Staff argues, *in terrorem*, that the Board must have the discretion to deny full retrospective implementation because it would improperly reward an applicant for delays caused by its own “incompetence or wrongdoing”. This is a legitimate concern. However, the solution does not lie in depriving utilities of their legal right to have an opportunity to earning their approved

⁹ O. Reg. 195/17. Amounts deferred by operation of the FHP will needed to be recovered at some point in time in the future. However, it is not apparent when, how or from whom that recover will occur. At present, the FHP expires in2020.

revenue requirements. Rather, the Board has at least two tools available to it to address this concern:

- (a) If the applicant's misbehaviour was apparent prior to an interim rate order being made, this would be a legitimate basis for refusing such an order; and
- (b) In determining the utility's approved revenue requirement, the Board could set the approved revenue requirement for the period prior to the implementation date of the new rates at a level lower (i.e. commensurate with the pre-existing rates) than the approved revenue requirement for the period after the implementation date.¹⁰

28. Finally, the deficiency of the Board's decision is revealed by the following counter example. Rate increases are not an inevitable result of rate applications. Rate reductions are not unknown. Consider how the Board would have dealt with an application identical in every respect to the OPG application, but where the result was a rate reduction.

29. Would the Board have allowed the utility to retain the income generated under its old, higher (interim) rates for any period after the asked for implementation date, regardless of the conduct of the applicant? Would the Board's concern for rate certainty for customers have resulted in a deferral of the benefit of the new, lower rates? Or would the Board have insisted that customers receive the full benefit of the lower rates

¹⁰ This is the solution, made by the SEC in its original submissions, and identified by the Board in the Decision with Reasons.

through a negative rate rider to recapture all excess amounts previously collected. The answer is clear. In the PWU's submission, OPG is entitled to the same treatment.

All of which is respectfully submitted.

APPENDIX A to PWU Submission re: OPG Motion to Review and Vary			
Schedule of Major Events EB-2016-0152			
Date	Event	Elapsed Days	Cumulative Elapsed Days
May 27/16	OPG Files Application	0	0
Aug 12/16	PO #1 Issued	78	78
Sept 23/16	Final unprioritized Issues List issued	42	120
Sept 26/16	Board Staff IRs filed	3	123
Oct 26/16	IR Responses filed	30	153
Nov 14-16/16	Technical Conference	19	172
Dec 20/16	OEB orders current rates interim, effective Jan 1/17	36	208
Jan 1/17	OPG proposed effective date	12	220
Jan 9-11/17	Settlement Conference	8	228
Jan 15/17	End of OEB Standard performance metric	7	235
Feb 14/17	Supplemental Evidence re: ONFA	29	264
Feb 22/17	Impact Statement #2 filed	8	272
Feb 27/17	Oral hearing commences	5	277
Mar 8/17	Impact Statement #3 filed	9	286
Apr 13/17	Oral hearing concludes	36	322
June 1/17	Effective date of rates	49	371
June 19/17	OPG files reply argument	18	389
Dec 28/17	OEB releases decision	192	581