

ONTARIO ENERGY BOARD

**Ontario Power Generation Inc. (OPG)
Motion to Review and Vary
2017-2021 Payments Decision and Order
(EB-2016-0152)**

**SUBMISSIONS
OF
ASSOCIATION OF MAJOR POWER
CONSUMERS OF ONTARIO (AMPCO)**

1. Rule 43 of the Board's *Rules of Practice and Procedure* provides that, in respect of this motion, the Board may determine a threshold question of whether the matter should be reviewed before conducting any review on the merits.
2. AMPCO submits that the Board should determine that this matter should not be reviewed.
3. The Board has considered all of OPG's arguments on this motion before, and has rejected them. It rejected them in 2014 in respect of OPG's last payments proceeding. It rejected them at the end of 2017 in respect of this payments proceeding. It should reject them again now.
4. There is nothing new in OPG's argument, and thus no basis upon which the Board should entertain a review of the clear and considered determination which it made in its EB-2016-0152 Decision (Decision) regarding the effective date for OPG's 2017 payment amounts.
5. If the Board does proceed to consider OPG's motion on its merits, it should find that there is no merit to the motion and that it should be dismissed.

Salient Facts

6. OPG filed its 2017-2021 Payments Application (Application) on May 28, 2016.

7. In its Application OPG requested an effective date of January 1, 2017; 7 months from the filing date.
8. OPG's own final argument in the 2017-2021 Payments proceeding (Proceeding) started from the premise that:

By any measure, this is a significant Application. It includes review of the Darlington Refurbishment Program ("DRP" or the "Program"), the single largest capital project ever to come before the OEB, and requests approval of some \$5,177.4 M of DRP-related in-service additions. It requests funding to extend Pickering's operation. It introduces new ratemaking methodologies for both the nuclear and hydroelectric payment amounts. It covers five years.

9. SEC, in addressing the effective date topic in its Final Argument in the Proceeding, put it well¹ (and AMPCO adopted this characterization in AMPCO's own Final Argument in the Proceeding²):

This Application is the biggest and most complex rate application for any utility in Canadian history. Not only does it involve more than \$27 billion of proposed revenue requirement, but it also contemplates the review of a large and risky nuclear capital plan. It is a five-year Custom IR application for nuclear, the first time that has ever happened in Canada, and a five year Price Cap IRM application for hydroelectric, also the first time that has ever happened. In addition to the obvious, there are many other twists and turns that the Board must address.

10. It is in this context that OPG filed its Application 7 months prior to its requested effective date. In its Decision the Board said³:

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.

11. The argument phase of the Proceeding concluded with the filing of OPG's Reply Argument on June 19th, 2017; just over 12 months from the Application filing date.
12. The Board issued its Decision about 6 months later, on December 28, 2017. In that decision the Board expressly and purposefully departed from its general rule that new rates (in this instance payment amounts) be established prospectively. The Board

¹ SEC EB-2016-0152 Final Argument, paragraph 11.1.2.

² AMPCO EB-2016-0152 Final Argument, paragraph 293.

³ Decision, page 157.

exercised its discretion and granted OPG a retrospective effective date of June 1, 2017. This date precedes by a few weeks the closing of the record in the proceeding with the filing of OPG's Reply Argument.

13. In directing a retrospective effective date of June 1, 2017 the Board expressly recognized the revenue requirement needs of OPG, and balanced these needs against the reasonable rate certainty that it considered to be expected by ratepayers. This was a classic exercise by the OEB of its expertise and associated discretion in setting rates, an expertise and associated discretion that has been repeatedly recognized by, and deferred to by, our courts.
14. In considering the appropriate balancing of interests, the Board considered, and took comfort from, the fact that the smoothing of payment amounts, as required by regulation, will help lessen some of the impact on ratepayers of having consumed power in 2017 and for a period in 2018 at OPG's previous payment amount levels, and who will now, after the fact, have to pay a new rate for those periods.⁴ However, the Board also concluded that this mitigating factor only partially alleviated the negative ratepayer impact of retrospective application of the Decision. (As the representative of Ontario's largest electricity consumers, AMPCO wholeheartedly agrees with this latter conclusion.)
15. The Board was not prepared, in the circumstances of this case, to relieve OPG entirely from its responsibility to manage its own regulatory program. The Board implicitly determined that OPG mismanaged that regulatory program in some respects. (AMPCO also wholeheartedly agrees with this implicit determination, as more particularly discussed later in this submission.)

Issues

16. As noted above, in determining the appropriate effective date for OPG's 2017 payment amounts, the Board expressly considered 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.

⁴ Decision page 159, 2nd paragraph.

17. Interestingly, OPG does not appear to be taking the position that it didn't know that. Rather it is essentially asserting that:
- (a) the timing of the Application was beyond OPG's ability to control; and
 - (b) once the Board determined OPG's 2017 cost of service (including a "fair return" on its rate base) OPG must, as a matter of law, be entitled to recover the entirety of that cost of service.

Threshold Determination: No Basis for Review

18. The Board has held⁵ that for a request for review to qualify for review, the grounds for the request must:
- (a) "raise a question as to the correctness of the order or decision"; and
 - (b) demonstrate that "there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended".
19. The Board has made clear that "a review is not an opportunity for a party to reargue the case".
20. On July 28, 2014 OPG filed its EB-2013-0321 2014/15 Payments Amounts Application Argument-in-Chief (AIC). Starting at page 145 of that AIC OPG addressed its request for an effective date of January 1, 2014, and argued as follows:

The analysis of the proper effective date(s) is governed by (1) the legal requirement that payment amounts ordered by the Board must at all times be just and reasonable and (2) the fact that the OEB issued an Interim Payment Amounts Order declaring the currently approved payment amounts....interim...

In OPG's submission, having declared current payment amounts interim as of the dates set out above, the OEB is obliged to make the payment amounts it determines to be just and reasonable after review of the application effective from those dates. The time taken to process and review OPG's Application is legally irrelevant.

⁵ NGEIR Decision; EB-2006-0322/EB-2006-0338/EB-2006-0340, Decision with Reasons, May 22, 2007, p.18.

21. OPG proceeded in that AIC to cite the Supreme Court of Canada's (SCC) decision in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, and then to assert as follows:

If the Board were to establish effective dates that were later than the dates that the payment amounts were deemed interim, OPG would recover less than its full cost of service over the test period. This under-recovery would breach the just and reasonable rate standard. The costs underlying the Application are OPG's costs for the 2014 and 2015 period, which costs OPG needs to recover in order to operate its business in a safe and reliable manner.

22. On September 10, 2014 OPG filed its EB-2013-0321 2014/15 Payments Amounts Application Reply Argument (Reply). Starting at page 234 of that Reply OPG addressed the arguments of other parties filed in that case and advocating for a later effective date than OPG had requested. In doing so, OPG reiterated that such alternative dates "*would, if ordered, result in payment amounts which are unjust and unreasonable*".
23. In that Reply Argument OPG went on to argue that the Federal Court of Appeal has held that is unlawful to cut payment amounts based on the magnitude of rate increases, that parties were put on notice of OPG's requested rate increases and its requested effective date for those rate increases, and, again, to argue in detail that the "just and reasonable" standard of ratemaking and the SCC's decision in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)* required that the Board set the effective date for the new 2014/15 payment amounts coincident with the date effective which OPG's then current payment amounts were made interim.
24. OPG's EB-2013-0321 effective date arguments were rejected by the Board in its EB-2013-0321 Payments Decision with Reasons, as extensively cited in OEB Staff's submissions herein.
25. In support of this motion to vary, OPG has made the same legal arguments, asserting that:
- (a) Rates must always be "just and reasonable"⁶;
 - (b) The *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)* requires that rates be "just and reasonable" at all times⁷; and

⁶ OPG Motion Submissions, paragraph 21.

⁷ OPG Motion Submissions, paragraph 22.

- (c) the effective date directed by the Board “deprived OPG of the opportunity to recover its prudently incurred costs and a fair return for 2017”⁸.
26. There is nothing new in OPG’s legal arguments in support of this motion to review. They have already been extensively considered by a previous panel of this Board, and rejected.
27. While the current panel is not, as a matter of law, bound by the determinations made by a previous panel, there should be good reason in the specific circumstances of this proceeding for this panel to come to a different conclusion on the precise legal arguments previously rejected by the Board. OPG’s arguments in support of its variance request have not identified any such reason.
28. In its June 19, 2017 Reply Argument in the Proceeding from which the instant motion arises, OPG argued that in order to file its 2017-2021 Application earlier than the end of May, 2016, it would have had to “prepare and compile” that application without the benefit of financial results for 2015, the 2016-2018 Business Plan which underpins the application, the OPG approved and provincially endorsed RQE for the DRP and the Business Case for the PEO, the amended Bruce Lease and refurbishment agreement, and the amended O.Reg. 53/05.
29. OPG went on to assert in that June, 2017 Reply Argument that⁹:
- There is a tension between filing well in advance of a proposed effective date and providing the OEB and parties with the best available information that is reasonably current, upon which to make a decision. OPG respectfully submits that it has struck an appropriate balance in this case, while being mindful and respectful of the OEB’s process. An effective date of January 1, 2017 should be approved.*
30. The Board considered OPG’s arguments and disagreed, electing instead a different balance.
31. In support of this motion to vary, OPG has again argued that key materials were not available to it earlier.¹⁰
32. Given the purposeful balance on effective date struck by the Board in the Decision, such that OPG has already been given the benefit of 7 months of retrospectivity in departure

⁸ OPG Motion Submissions, paragraphs 27-32.

⁹ OPG EB-2016-0152 Final Argument, page 285.

¹⁰ OPG Motion Submissions, paragraph 53.

from the Board's standard approach, there is no indication that consideration of these same arguments on availability of materials again *"could result in the Board deciding that the decision should be varied, cancelled or suspended"*.

33. OPG makes additional arguments in support of its motion to vary, none of which legitimately *"raise a question as to the correctness of the order or decision"* or have *"enough substance ... that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended"*. In particular:

- (a) In respect of OPG's reliance on the OEB's filing guidelines and standard application processing performance metrics¹¹, this is a complete red herring. OPG's application was unprecedented in its value, scope and complexity. No reasonable person, let alone an extremely experienced regulated utility, would assume an "average" application processing time for an application of such scale and scope.
- (b) In its submissions OPG essentially complains that the complexity of its application is not its fault, and it should not be penalized for it. This is true. However, what is OPG's "fault" is that it filed only 7 months prior to the effective date that it required, knowing full well how complex and novel its application was. AMPCO agrees with OEB Staff's motion submission that¹²:

Applicants must bear some responsibility for ensuring that their applications are filed in a manner that allows for a final decision prior to the commencement of their proposed rate adjustment.

- (c) Further, the fact that OPG met the Board's deadlines in this matter has no relevance at all to;
 - (i) OPG's choice of filing date;
 - (ii) The Board's balancing of interests between OPG and ratepayers in fixing an effective date halfway between what would normally be the effective date and what OPG requested for an effective date.
- (d) In respect of OPG's argument that the Board *"unreasonably considered impact on customers"* in disallowing recovery of prudently incurred costs¹³, this argument mischaracterizes the Board's decision. The OEB effectively decided that OPG's conduct of its regulatory program was imprudent, and that ratepayers should not bear the brunt of that imprudence through rate increases above those determined to be appropriate. Such a determination is squarely within this Board's purview. While the law cited by OPG does indicate that impact of increased rates on consumers cannot be used as the basis to trump (and disallow) *"reasonably and*

¹¹ OPG Motion Submission, paragraphs 40-49.

¹² Staff Motion Submission, page 7, second full paragraph.

¹³ OPG Motion Submission, paragraphs 33-34.

prudently incurred costs",¹⁴, it does not speak to the implications of improper carriage by a regulated utility of its regulatory program or a regulator's ability to effectively control its own regulatory process, which are the issues in the circumstances giving rise to this motion.

- (e) In respect of OPG's argument that the Board erred in considering ratepayer certainty as a factor for a later effective date than requested¹⁵, OPG is essentially arguing that since rates were interim and thus should have been expected to change, the more extreme change resulting from OPG's own questionable management of its regulatory program should not be a basis for concern. The interim nature of rates does not justify imprudent utility conduct which leads to higher rate volatility than would otherwise be the case.

34. In summary:

- (a) There is nothing new in the legal arguments or the factual "availability of materials" arguments made by OPG in support of its motion to vary. These arguments have been made, and determined, in the past.
- (b) The other arguments raised by OPG in support of its request to vary do not legitimately "raise a question as to the correctness of the order or decision" or have "enough substance ... that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended".

The Board should dismiss the motion pursuant to Rule 43.

Merits: Application Timing within OPG's Control

35. In the event that the Board determines that it should, again, consider OPG's arguments, it should nonetheless, again, reject them.

36. In respect of OPG's first argument - that OPG could not file earlier as there was information that was not available earlier:

- (a) OPG cites audited financial results for 2015 which were not available until March 2016, and which incorporated year end 2015 adjusted Nuclear Waste Liabilities based on an amended refurbishment agreement between Bruce Power and the IESO that was publically announced in December 2015.¹⁶

AMPCO notes that:

¹⁴ OPG Motion Submissions, paragraph 30, citing the Supreme Court of Canada decision in *ATCO Gas and Pipelines Ltd.*

¹⁵ OPG Motion Submission, paragraphs 35-39.

¹⁶ OPG Motion Submissions, paragraph 7.

- (i) The audited results were available more than 2 months prior to OPG's May 27th filing.
 - (ii) Nowhere does OPG indicate why unaudited results could not have been used in preparation of its application, pending availability of audited results, or even whether such unaudited results were materially different from the audited results.
 - (iii) Nowhere does OPG indicate the basis upon which awaiting audited results for one fiscal year required the suspension in preparation and finalization of an entire, prospective, 5 year rate plan filing. That is, there is no evidence, or even argument, explaining how "*fundamental updates*" would have been required had OPG proceeded in advance of the availability of the audited results for 2015.
 - (iv) Utility applicants regularly file bridge year data that combines actual and forecast quantities (and often update that data in response to interrogatories or otherwise during the course of a proceeding). OPG has nowhere indicated why this practice could not have been followed for the one year – 2015 – which it cites as having held up its entire application process. Indeed, as pointed out in Board Staff's submissions, the OPG filing guidelines expressly contemplate and endorse such an approach.
- (b) OPG also cites stakeholder consultation sessions held in February, March and May of 2016, and the fact that two of these were held following the release of the 2015 audited results "*so that OPG could elicit meaningful stakeholder feedback*". OPG has nowhere indicated why unaudited results would not have suited such consultations, and why such consultations could not have been held earlier.
 - (c) OPG further cites the alteration of its proposed going in hydroelectric payment amounts approach following the stakeholder consultations as underscoring the impact that these consultations had on the shape of its ultimately filed application. While AMPCO commends OPG for responding to stakeholder input and altering its application, this fact does not explain why these consultations could not have proceeded earlier. In any event, such alteration presumably rendered the hearing process shorter than it otherwise would have been.
37. In short on this line of argument, OPG has not justified its position that it could not have, somehow, managed its own regulatory program in a manner such that the filing of the salient portions of its 2017-2021 Payments Application evidence could not have been made earlier than 7 months prior to its requested effective date.

Merits: "Just and Reasonable Rates"

38. OPG's second argument is essentially to the effect that the Board has no discretion in respect of establishing an effective date for OPG's approved payment amounts other than

January 1, 2017. OPG asserts that once the Board determined OPG's 2017 cost of service (including a "fair return" on its rate base) OPG must, as a matter of law, be entitled to recover the entirety of that cost of service.

39. In this respect, OPG is improperly conflating the concepts of "revenue requirement" and "just and reasonable rates". One of the distinctions between these two concepts arises from a third key concept; "prudence". The concept of prudence in the factual context of this motion relates to OPG's actions in advancing its complex Application.
40. In the context of ratemaking, "just and reasonable" is a matter of some discretion. As OEB Staff has submitted in respect of this motion, it is not a singular point but rather a reasonable range.
41. The determination that OPG's updated payment amounts should be effective not on January 1, 2017 as OPG requested, nor on January 1, 2018 as would be the Board's normal practice, but rather about halfway in between these dates (and on a date just prior to the close of the record) is a prime example of the OEB's exercise of its legally recognized discretion.
42. When rates are set on a prospective test year basis, the resulting revenue will never match the forecast revenue. Sometimes it will be higher. Sometimes it will be lower. Further, the resulting costs will never match the forecast costs. Sometimes they will be higher, sometimes they will be lower. In the result, earnings will never track precisely to forecast earnings, and return will never be realized, to the dollar, as predicted. None of this makes the rates in place at any given time "unjust" or "unreasonable".
43. The OEB so determined, in response to the same arguments now being advanced by OPG, in the Board's decision on effective dates for OPG's 2014 payment amounts (as cited in OEB Staff's submissions herein):

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 (sic) 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”.¹⁷

44. Indeed, this regulatory fact is part and parcel of the very incentive regulation approach adopted by OPG in respect of both its nuclear (through a “custom incentive regulation” proposal) and hydroelectric (through a rate cap “incentive regulation mechanism” proposal) rate proposals, now approved.
45. Further, it is eminently reasonable for an economic regulator to take into account, in setting rates, the “prudence” of the regulated utility’s actions, including the prudence of the discharge by that utility of its regulatory agenda. That is what the Board did in determining that the effective date for OPG’s 2017 payment amounts should not be 7 months after the filing of the most complex application in the history of utility regulation in Ontario, and in then further determining that OPG should bear only part of the responsibility for the issuance of a decision thereon more than a year and half after that filing.
46. As argued above, AMPCO does not believe that OPG, despite its protestations, was unable to file its application earlier than it did by managing it differently than it decided to. It simply did not allow enough time. Ratepayers should not bear the brunt through increased rate volatility of OPG’s own decisions on management of its regulatory program.
47. OPG’s argument that once the Board determined OPG’s 2017 cost of service (including a “fair return” on its rate base) OPG must, as a matter of law, be entitled to recover the entirety of that cost of service would mean that the OEB must always determine an effective date for new rates to coincide with the start of the test period in issue, regardless of the conduct of the rate applicant or the “catch up” impact on ratepayers. If OPG were correct, the Board would have no discretion in respect of setting an effective date regardless of the conduct of the applicant, and no means to control the timing of its own regulatory processes. AMPCO does not believe that the law requires this result.

Merits: Other OPG Arguments

48. We have addressed OPG’s additional arguments at paragraph 33, above, in the context of the threshold test for consideration of the merits of this request to vary. The responses

¹⁷ EB-2013-0321 Decision with Reasons, page 132.

provided above illustrate that these arguments are without merit, and do not raise any legitimate question as to the correctness of the Board's decision on effective date.

Conclusion

49. AMPCO agrees with OEB Staff that applicants must bear some responsibility for ensuring that their applications are filed in a manner that allows for a final decision prior to the commencement of their proposed rate adjustment.
50. In the Board's decision in OPG's EB-2013-0321 payments case, the Board expressly articulated its normal practice to not make rate orders retroactive, even where an interim order would allow it do so, where utilities have not filed their applications in time to have rates in place prior to the effective date. That OPG had direct notice of this admonishment is beyond plausible deniability.
51. AMPCO agrees with OEB Staff that this approach "*makes good sense*", and that "[w]here unreasonable delays in processing an application are caused by the applicant, it would be unfair to impose the consequences on ratepayers through large catch-up rate adjustments".
52. Prior to bringing the instant motion, OPG had already made its arguments about legal "*just and reasonable*" requirements, interim rates and availability of information, and the Board had considered and rejected those arguments.
53. On this motion, OPG is making those same arguments again, but has provided no basis upon which to conclude that the decision, this time around, should be any different. The Board should, again, reject those same arguments.
54. The Board has exercised its expert and legally endorsed discretion and has set the effective date for OPG's 2017 payments amounts retrospectively, allowing OPG an additional 7 months of revenue recovery relative to the Board's expressly stated normal practice. In so doing, the Board has recognized that while OPG should not bear the entire brunt of the timing of the Decision relative to the filing of the Application, OPG should have known that its singularly complex 2017-2021 payments application would take more than the standard 7 months to process. OPG has not asserted that it didn't know this, yet it has

not provided any compelling justification for not filing its 2017-2021 payments application earlier.

55. No basis has been presented to justify OPG's request that the Board alter its previous determination. This motion should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by:



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March 22, 2018

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