

March 22, 2018

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street  
P.O. Box 2319  
Toronto, Ontario  
M4P 1E4

Dear Ms. Walli:

**Re: EB-2018-0085 – Ontario Power Generation Inc. – Motion to Review and Vary**

Please find, attached, the final Submissions of the Consumers Council of Canada in the above-referenced proceeding.

Please feel free to contact me if you have questions.

Yours truly,

*Julie E. Girvan*

Julie E. Girvan

CC: All Parties

**SUBMISSIONS OF THE CONSUMERS COUNCIL OF CANADA**

**RE: ONTARIO POWER GENERATION INC.**

**MOTION TO REVIEW AND VARY – EB-2016-0152**

**INTRODUCTION:**

On January 17, 2018, Ontario Power Generation Inc. (“OPG”) filed a Notice of Motion with the Ontario Energy Board (“OEB”) for:

1. a review and variance of the OEB’s Decision and Order dated December 28, 2017 in EB-2016-0152 (the “Decision”) at p. 157 where the OEB approves an effective date of June 1, 2017 for OPG’s payment amounts rather than the requested date of January 1, 2017;
2. an Order that OPG satisfies the “threshold test” referred to in Rule 43.01 of the OEB’s Rules of Practice and Procedure;
3. an Order for an oral hearing of the Motion on its merits;
4. an Order:
  - a) setting aside the OEB’s approval of June 1, 2017, as the effective date for OPG’s payment amounts in EB-2016-0152;
  - b) finding that the effective date for OPG’s payment amounts shall be January 1, 2017;
  - c) authorizing OPG to establish one or more variance accounts to record the revenue shortfalls that reflect all differences, including those arising in connection with the amounts captured in OPG’s deferral and variance accounts, between the amounts recovered through OPG’s nuclear and regulated hydroelectric payment amounts that the OEB declared interim effective January 1, 2017 and the amounts that OPG would have recovered if the effective date for OPG’s payment amounts in EB-2016-0152 had been set January 1, 2017.

On February 27, 2018 the OEB issued Procedural Order No. 1 setting out the following procedural steps:

- All intervenors in the EB-2016-0152 proceeding will be adopted as intervenors in this proceeding;
- The OEB will consider the threshold question for the motion at the same time it will hear submissions on the merits;
- Any party wishing to make submissions on the both the threshold issue and the ultimate merits of the motion will do so by March 22, 2018; and
- An oral hearing will be held on April 10, 2018, for the OEB to ask questions of the parties, if required, and to hear OPG’s reply submissions.

These are the submissions of the Consumers Council of Canada (“Council”) regarding the motion. As set out below the Council submits that the motion should be denied and that the original EB-2016-0152 Decision regarding the effective date should not be varied.

### **The OEB Decision:**

OPG had sought an approval date of January 1, 2017. On December 8, 2016, the OEB issued an order declaring the then current payment amounts interim effective January 1, 2017. In that order the OEB stated that the OEB is prepared to make OPG’s current payment amounts interim pending its final decision. The Board specifically said:

This determination is made without prejudice to the OEB’s ultimate decision on OPG’s application, and should not be construed as predictive, in any way whatsoever, of the OEB’s final determination with regards to the effective date for OPG’s payment amounts arising from this application.<sup>1</sup>

Several of the intervenors, including the Council, had argued that the effective date be the first day of the month following the issuance of the payment amounts order on the basis that OPG should have filed this complex application earlier in order for the OEB to approve a January 1, 2017 effective date. In the previous payment amounts decision the OEB did not approve the requested date of January 1, 2014, stating that it is its general practice for final rates to become effective at the conclusion of the proceeding and that this practice was predicated on a forecast test year.<sup>2</sup>

OPG had argued that the references to the EB-2013-0321 filing date are misplaced as the application started as an incomplete filing. An earlier filing would have required updates to the application. OPG noted that there is a tension between filing well in advance of a proposed effective date and providing parties with the best available information that is reasonably current upon which to make a decision. From OPG’s perspective the timing of its filing struck an appropriate balance in this regard.<sup>3</sup>

The OEB rejected OPG’s arguments. In its Decision the OEB made the following findings:

The OEB approves an effective date of June 1, 2017. OPG filed a substantial application on May 27, 2016 as well as impact statements, the last on March 8, 2017. It is unrealistic of OPG to expect that a final decision would be rendered and a

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<sup>1</sup> Interim Payment Amounts Order, December 8, 2016, p. 1

<sup>2</sup> Decision and Order, EB-2016-0152, p. 157

<sup>3</sup> Argument in Chief, pp. 284-285

payment amounts order processed in time for January 1, 2017 payment amounts. OPG filed a complicated application, which comprised of a Custom IR application for its nuclear facilities, an IRM application for its hydroelectric facilities, a review of DRP and consideration of PEO. 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<sup>4</sup>.

The OEB further noted that OPG filed significant updates after the initial filing, which runs counter to OPG's argument that it filed in May 2016 with a view to minimizing updates to the application. Although the OEB stated that it is common practice to establish new rates any payment amounts prospectively, it also noted that it has been a complicated case involving a lengthy submission and decision writing process. In arriving at the June 1, 2017, date the OEB indicated it had attempted to balance the revenue requirement needs of OPG and rate certainty expected by ratepayers<sup>5</sup>.

### **OPG's Position:**

It is OPG's position that there are material errors in the Decision and the OEB was unreasonable in the following ways:

- a) It established final payment amounts for January 1 to May 31, 2017 that are not just and reasonable;
- b) It considered the impact of the payment amounts on consumers, contrary to recent jurisprudence from the Supreme Court;
- c) It relied on the importance of ratepayer certainty in reaching its decision, even though ratepayers had no reasonable expectation of certainty in light of the OEB's Interim Payment Amounts Order declaring OPG's payment amounts;
- d) It considered OPG's alleged delay as a factor in determining the effective date.

### **Submissions:**

#### **Threshold Test**

As set out in the OEB's *Rules of Practice and Procedure*, when considering a motion the OEB may determine whether a threshold question of whether the matter should be reviewed before conducting a review of the motion on its merits. In this case the OEB, in its Procedural Order No. 1 determined that the two would be considered at the same time.

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<sup>4</sup> Decision, p. 158

<sup>5</sup> Decision, p. 159

The Council does not believe that OPG has met the threshold test. In previous decisions the OEB has determined that in order to meet the threshold test there must be an identifiable error in the subject decision. In addition, the OEB has determined that the review should not be an opportunity for a party to reargue the case.<sup>6</sup>

In its argument regarding the motion OPG is simply rearguing the points it made in the original case regarding the effective date. In addition, OPG is arguing the same points it made in the 2014-2015 (EB-2013-0321) payment amounts proceeding. In that case the OEB rejected OPG's arguments and OPG did not challenge that aspect of the Decision.

With respect to the other components of OPG's argument regarding its request to review and vary the Council sees no evidence that there was an identifiable error in the decision.

### **The Motion**

To the extent the OEB decides to consider the merits of the motion, the Council has the following submissions. We are in large measure supportive of the Submission of OEB Staff, which concludes that the decision should not be varied. There are two particular arguments that OPG relies on the Council finds troubling. If accepted by the OEB these arguments could represent a dangerous precedent for OEB cases going forward.

The OEB in setting interim rates expressly stated that it was doing so without prejudice as to what its ultimate decision might be regarding the effective date for OPG's payment amounts. It is OPG's position that once the OEB determined OPG's 2017 cost of service it must be able to fully recover those amounts, otherwise those rates are not just and reasonable.<sup>7</sup> In effect, from OPG's perspective, the OEB has no discretion in setting an effective date even if it had set those rates interim.

The OEB considered this argument in the last proceeding. The OEB explicitly stated that the obligation to ensure that rates are always just and reasonable does not mean that it must examine and adjust a utility's rates on a constant basis. Furthermore, the OEB determined that "just and reasonable rates can fall within a range, and there is no defined line past which rates immediately become unreasonable". The OEB disagreed 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 the interim rates were set.<sup>8</sup>

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<sup>6</sup> EB-2006-0322/0338/0340/ NGEIR Motion to Review, p. 18

<sup>7</sup> Argument in Chief, pp. 10-11

<sup>8</sup> Decision, EB-2013-0321, p. 134

If setting interim rates automatically requires the OEB to make the interim date the effective date, it is unlikely that the OEB will set interim rates going forward. Setting interim rates allows the OEB the flexibility to determine the appropriate effective date. This flexibility should be maintained.

OPG also argues that it was unreasonable for the OEB to consider rate certainty expected by ratepayers as a factor in selecting June 1, 2017, as the effective date. It is OPG's view that:

- Consumers were not paying rates based on final OPG payment amounts for 2017;
- They were paying rates based on interim payment amounts;
- Ratepayers received notice that those payment amounts were not final and were subject to change;
- Providing such notice to ratepayers is one of the fundamental purposes of making rates interim pending the final outcome of the proceeding; and
- In these circumstances, ratepayers had no reasonable expectation of certainty with regards to OPG's payment amounts.

Citing the fact that rates were made interim as one of the reasons why the Board should allow for an earlier effective date means that OPG is essentially arguing that there was an element of prejudice as a result of the interim order – customer expectations were changed relative to when they were not interim. The Council submits that the consideration by the OEB of customer impacts resulting from rate adjustments is always appropriate.

The OEB made its decision regarding the effective date taking into consideration a number of factors. OPG was required to take some responsibility for ensuring that its application was filed in a timely manner. The Council agrees with this. The OEB recognized that OPG was not entirely responsible for the timing of the decision and order. The OEB used its discretion in balancing the interests of OPG and its ratepayers. From the Council's perspective this was not an error and the OEB's original decision should not be varied.

All of which is respectively submitted on March 22, 2018.