



**Ontario Power Generation Inc.**

**Application for payment amounts for the period from  
January 1, 2022 to December 31, 2026**

**DECISION ON CONFIDENTIALITY – PRE-FILED EVIDENCE  
April 13, 2021**

Ontario Power Generation Inc. (OPG) filed an application dated December 31, 2020, with the Ontario Energy Board (OEB) under section 78.1 of the *Ontario Energy Board Act, 1998* seeking approval for changes in payment amounts for the output of its nuclear generating facilities in each of the five years beginning January 1, 2022 and ending on December 31, 2026. OPG also requested approval to maintain, with no change, the base payment amount it charges for the output of its regulated hydroelectric generating facilities at the payment amount in effect December 31, 2021 for the period from January 1, 2022 to December 31, 2026.

As part of its pre-filed evidence, OPG requested confidential treatment of the following documents, or certain portions thereof, itemized as follows:

1. The Amended 2020-2026 Business Plan located at Exh. A2-2-1, Attachment 1 (Business Plan)
2. The Amended 2020-2026 Business Planning Instructions located at Exh. A2-2-1, Attachment 2 (Business Planning Instructions)
3. The revenue comparison tables located at Exh. G2-1-1, Table 1 and G2-1-2, Table 1 (Revenue Comparison Tables)
4. The engagement letters with third party advisors located at Exh. C1-1-1, Attachment 2, Exh. D2-2-11, Attachment 2, and Exh. D2-2-11, Attachment 4 (collectively, Expert Engagement Letters)
5. The nuclear business case summaries found at Exh. D2-1-3, Attachment 1 and Exh. F2-3-3, Attachment 1 (collectively, Nuclear BCSs)

6. The Darlington Water Treatment Plant business case justification memorandum located at Exh. D2-1-3, Attachment 2 (WTP Memorandum)
7. The Darlington Refurbishment Program attachments (collectively, DRP Attachments), comprised of:
  - a. Contract summaries at Exh. D2-2-4, Attachments 3, 14, 18, and 20 (Updated DRP Contract Summaries):
    - i. Summary of Retube and Feeder Replacement (RFR) Engineering, Procurement and Construction (EPC) Contract
    - ii. Summary of Turbine Generators (TG) EPC
    - iii. Summary of Steam Generators (SG) EPC
    - iv. Summary of Extended Service (ES) Master Services Agreement (MSA)
  - b. Major DRP contract amendments at Exh. D2-2-4, Attachments 4, 7, 8, 9, 13, 15, 16, 17, 19, and 21 (DRP Contract Amendments):
    - i. RFR EPC Amendment 7
    - ii. RFR EPC Amendment 10
    - iii. RFR EPC Amendment 11
    - iv. RFR EPC Amendment 12
    - v. TG Engineering Services, Equipment Supply and Field Services Agreement (ESESFSA) Amendment 5
    - vi. TG EPC Amendment 3
    - vii. TG EPC Amendment 4
    - viii. TG EPC Amendment 5
    - ix. SG Amendment 3
    - x. ES MSA, SNC-Lavalin Nuclear Inc. and Aecon Construction Group Inc. (SNC / Aecon JV), Amended and Restated
  - c. The Burns & McDonnell Canada and Modus Strategic Solutions Canada Company (McD / Modus) Report on Unit 3 Execution Estimate at Exh. D2-2-7, Attachment 3 (DRP Report)
  - d. The business case summary for the Heavy Water Storage and Drum Handling Facility at Exh. D2-2-10, Attachment 2(k) (D2O BCS)
  - e. The Black & McDonald Ltd. (B&M) Purchase Order located at Exh. D2-2-10, Attachment 2(f)

- f. The B&M ES MSA located at Exh. D2-2-10, Attachment 2(d)
  - g. The original ES MSA, SNC / Aecon JV and Amending Agreement #2 located at Exh. D2-2-10, Attachments 2(g)&(i) (Original JV ES MSA Documents)
8. OPG's 2019 income tax returns and tax information located at Exh. F4-2-1, Attachment 1 and Exh. F4-2-2-1, Table 4 (2019 Income Tax Returns and Tax Information)
9. The Planning Phase Clarington Corporate Campus business case summary located at Exh. D3-1-2, Attachment 2 (Planning Phase BCS) and certain related information contained in the following tables (collectively, Clarington Corporate Campus Information):
- a. Capital Projects – Support Services located at Exh. D3-1-2
  - b. Capital Projects Tables located at D3-1-1 Table 1, D3-1-1 Tables 2a and 2b, D3-1-2 Tables 1a and 1b, D3-1-2 Table 4, and D3-1-2 Tables 5a and 5b
10. The Willis Towers Watson Report located at Exh. F4-3-1, Attachment 3 (Willis Towers Watson Report)
11. The Report on the Estimated Accounting Cost for Post-Employment Benefit Plans for Fiscal Years 2021 to 2026 located at Exh. F4-3-2, Attachment 1 (Aon Report)

In Procedural Order No. 1, issued February 17, 2021, the OEB granted confidential treatment of redacted information in the 2019 Income Tax Returns and Tax Information (item #8). By letter dated February 26, 2021, OPG notified the OEB that confidential treatment of the Willis Towers Watson Report was no longer required (item #10).

Procedural Order No. 1 also made provision for intervenors and OEB staff to file submissions on OPG's confidentiality request, and for OPG to reply. OEB staff, the Power Workers' Union (PWU) and the School Energy Coalition (SEC) filed submissions. The only objections or concerns that were raised were specific to the Aon Report (item #11) and the Clarington Corporate Campus Information (item #9). OPG filed a reply submission.

**Confidential Treatment of the Aon Report (item #11)**

OPG stated that it sought confidential treatment of certain information in the Aon Report as it contains assumptions that underpin cost estimates that are labour-relations sensitive.<sup>1</sup> OPG argued that disclosure of the information could prejudice its position in upcoming rounds of collective bargaining with the PWU and Society of United Professionals (Society).

OEB staff noted that a report similar to the Aon Report was filed in OPG's previous payment amounts proceeding (2017-2021 Payment Amounts Proceeding),<sup>2</sup> however, confidential treatment of that report was neither requested nor granted. OEB staff submitted that it was unclear as to what had changed since the 2017-2021 Payment Amounts Proceeding that warranted information in the Aon Report being treated as confidential in this proceeding. Further, OEB staff highlighted that it was also unclear as to how such information being unredacted could impact collective bargaining with the PWU and Society.

On March 5, 2021, OPG filed a letter with the OEB elaborating on its request for confidential treatment of portions of the Aon Report. OPG explained that the report "includes cost estimates and underpinning assumptions that are labour-sensitive because they consider pension, other post-employment benefits and associated headcount projections related to certain Pickering downsizing processes expected to take place during the period. The assumptions and estimates depend on, and/or may influence, collective bargaining outcomes related to the anticipated Pickering downsizing exercise."<sup>3</sup>

OPG further requested that, in order to have access to the confidential portions of the Aon Report, representatives of the two union intervenors, the PWU and Society, be required to file an affidavit with the OEB. The affidavit would affirm that the representatives are external to, and at an arms-length from, the PWU and Society, and that they are not, and will not, be involved in any OPG collective bargaining-related activities on behalf of the PWU or Society. OPG argued that this measure was needed, in addition to the usual Declaration and Undertaking contemplated in the OEB Rules of Practice and Procedure, to avoid prejudice to its position in the collective bargaining process.

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<sup>1</sup> Exhibit F4 / Tab 3 / Schedule 2 / Attachment 1.

<sup>2</sup> EB-2016-0152.

<sup>3</sup> OPG Request to Limit Access to Labour-Sensitive Information / March 5, 2021 / p. 1.

The PWU filed a response to OPG's March 5, 2021 letter on March 10, 2021. The PWU argued that the Aon Report should not be granted confidential treatment as it is not apparent that it includes information that has not already been put on the public record of this proceeding. The PWU claimed that it would be inappropriate to require the PWU representatives to sign an affidavit in addition to the Declaration and Undertaking. The PWU asserted that singling out the PWU to sign an affidavit "is punitive to the PWU, undermines its right to the counsel of choice, and undermines the effectiveness of its representation in this matter."<sup>4</sup>

While acknowledging that the OEB had required union representatives to sign an affidavit in the 2017-2021 Payment Amounts Proceeding, the PWU argued that the OEB is not bound by that decision. It pointed to a more recent case where a similar issue had arisen: the Toronto Hydro-Electric System Limited (Toronto Hydro) rate proceeding.<sup>5</sup> In that case, the PWU argued that the execution of a Declaration and Undertaking should suffice as it is common for solicitors to be required to "compartmentalize" information. The PWU also noted that, in the case of lawyers, the breach of a Declaration and Undertaking is an act of professional misconduct. The OEB agreed with the PWU that its external counsel should have access to the information in question upon executing the Declaration and Undertaking, and that an additional affidavit was not necessary.

The PWU stated in its March 10, 2021 submission that its analysts from Econalysis were prepared to execute the affidavit, even though in the PWU's view it should not be required, but the PWU's counsel, Richard P. Stephenson, was not.

In its reply, OPG asserted that PWU was incorrect to suggest that the Aon Report included information that is already on the public record. OPG explained that "the Aon Report includes material assumptions and corresponding amounts of which may be recorded in the Pickering Closure Costs Deferral Account"<sup>6</sup> that does not appear elsewhere in the evidence.

OPG further maintained that the redacted information in the Aon Report could prejudice its position in upcoming rounds of collective bargaining with the PWU and Society, if such information were disclosed. OPG highlighted that the Aon Report includes assumptions that are labour-sensitive as they consider pension, other post-employment benefits and associated headcount projections related to certain Pickering Nuclear Generating Station downsizing processes.

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<sup>4</sup> PWU Submission / March 10, 2021 / p. 2.

<sup>5</sup> EB-2018-0165 / Decision on Confidentiality / December 14, 2018.

<sup>6</sup> OPG Reply Submission / March 15, 2021 / p. 2.

OPG relied on the OEB's decision in the 2017-2021 Payment Amounts Proceeding to require the PWU representatives to sign an affidavit in addition to the Declaration and Undertaking. In that case, according to OPG, "the arguments made by PWU ... were made and rejected by the OEB."<sup>7</sup> OPG quoted at length from that decision, where the OEB observed that "Labour negotiations between OPG and the PWU have historically been difficult and labour costs represent a significant portion of the costs the OEB is asked to approve in this application" before concluding that "While the OEB's Declaration and Undertaking does under normal circumstances offer the adequate protections you have noted, in this particular instance, the OEB believes the additional protection is warranted."

### ***Findings***

The OEB approves OPG's request for confidential treatment of certain information, redacted from the public record in the Aon Report (item #11). The OEB considered the submissions of OEB staff regarding the proposed redactions to the Aon Report. The OEB accepts the explanation provided by OPG in its reply submission. In particular, the redactions to the Aon Report include cost estimates and underpinning assumptions that are labour-sensitive as they relate to the Pickering downsizing processes expected to take place during the 2022-2026 period and that this information is not already on the public record.

The OEB has reviewed the letters filed by OPG and the PWU. OPG requested that the OEB limit access to the redacted Aon Report as it contains estimates for expenditures associated with post-employment benefit plans for the fiscal years 2020-2026. OPG proposed that access be provided to those intervenor representatives who have filed a Declaration and Undertaking. However, OPG submitted that the counsel and consultants representing the PWU and the Society also be required to file an affidavit with the OEB affirming that they are not and will not be involved in any collective bargaining-related activities on their behalf to gain such access. Mr. Stephenson, a legal counsel for PWU, objected to the requirement of the additional affidavit.

The OEB has reviewed its Rules of Practice and Procedure, Practice Direction on Confidential Filings and form of Declaration and Undertaking. The Declaration and Undertaking is signed by an individual with corresponding personal liability for its breach; it is not signed on behalf of the approved intervenor. The OEB finds the Declaration and Undertaking is sufficient for Mr. Stephenson and any other external counsel to the PWU or the Society, without an additional affidavit, as undertaking #1 states:

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<sup>7</sup> OPG Reply Submission / March 15, 2021 / p. 2.

1. I will use Confidential Information exclusively for duties performed in respect of this proceeding.

In so deciding, the OEB finds that the words “exclusively for duties performed in respect of this proceeding” are a sufficient protection against the disclosure or use of this information by the unions’ legal counsel in future labour negotiations. In particular, Mr. Stephenson will be giving his undertaking as a member of the Law Society of Ontario and may be subject to the discipline of that body for any breach of the same. Any subsequent legal assistance that he may render to PWU with respect to labour negotiations involving OPG or in this or any other proceeding will be governed by the terms of the undertaking.<sup>8</sup> The OEB relies on the provisions of the required undertaking, as well as the potential personal liability that might result from its breach to ensure compliance.

Consultants do not have the same professional obligations as lawyers. Therefore, the OEB finds it appropriate to require any external consultants to the PWU or the Society who wish to have access to the Aon Report for the purposes of this proceeding to sign the affidavit requested by OPG in addition to the Declaration and Undertaking. As noted above, the PWU has said its consultants are prepared to do so.

The OEB acknowledges, but is not persuaded, by the decision made by the panel in OPG’s 2017-2021 Payment Amounts Proceeding to require Mr. Stephenson to sign an affidavit, and by OPG’s submissions on that issue in this proceeding. The OEB agrees with the reasoning provided in the more recent Toronto Hydro case, which emphasized a lawyer’s professional obligations concerning undertakings which are in addition to the “sanctions that the OEB can take” for breach of the Declaration and Undertaking. The OEB is aware of the necessity to ensure confidentiality of information that, if disclosed, might place OPG at a disadvantage in subsequent labour negotiations.

In summary, OPG must provide access to the confidential version of the Aon Report to any external counsel for the PWU or the Society who signs the Declaration and Undertaking, but any external consultant for either union who wishes to view the confidential version must also sign an affidavit of the type requested by OPG in addition to the Declaration and Undertaking.

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<sup>8</sup> EB-2018-0165 / Decision on Confidentiality / December 14, 2018 / p. 3.

**Confidential Treatment of the Clarington Corporate Campus Information (item #9)**

In its confidentiality request, OPG noted that the Clarington Corporate Campus Information contained details relating to contingencies, as well as aggregate information, that would allow the determination of commercially sensitive information. As the tendering process for the Clarington Corporate Campus project has not commenced, OPG stated that disclosure of the redacted information could prejudice its competitive position and significantly interfere with its negotiations with prospective contractors / third parties.

SEC expressed concern with OPG's request for the confidential treatment of the forecast total cost for the Clarington Corporate Campus project<sup>9</sup> as it was unclear if the entire project, and thus total cost, would go out for a single tender or not. SEC submitted that if the project is to be tendered in portions, the forecast total cost could be made public, while the cost of each portion could be treated as confidential.

In response to the concern raised by SEC, OPG clarified that it expects the Clarington Corporate Campus project to go out as a single tender and, therefore, it is essential that the total project cost be treated as confidential.

***Findings***

The OEB approves OPG's request for confidential treatment of the proposed redactions within the Clarington Corporate Campus Information (item #9). The OEB considered SEC's question on the proposed redactions regarding the total project costs. The OEB accepts the explanation provided by OPG in reply submission. The redactions regarding the Clarington Corporate Campus project are necessary as OPG expects the project to go out for a single tender.

**Permanent Redactions to the Business Plan (item #1), the Business Planning Instructions (item #2) and the DRP Attachments (item #7)**

As part of its confidentiality request, OPG sought permanent redactions, without disclosure except to the OEB, of certain information in the Business Plan, Business Planning Instructions, and personal information under the *Freedom of Information and Protection of Privacy Act*.

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<sup>9</sup> Exhibit D3 / Tab 1 / Schedule 2 / p. 3, Exhibit D3 / Tab 1 / Schedule 2 / Attachment 2, and Exhibit D3 / Tab 1 / Schedule 2 / Table 1a.



OPG stated that redactions in the Business Plan and Business Planning Instructions related solely to OPG's unregulated business and information that, pursuant to applicable securities law, OPG is not permitted to disclose. The redactions of personal information included banking information, tax registration numbers, Workplace Safety and Insurance Board registration numbers, and names of individuals in the DRP Attachments.

### ***Findings***

The OEB is deferring its decision with respect to the permanent redactions in the Business Plan, the Business Planning Instructions and the DRP Attachments as proposed by OPG. The OEB will render a decision regarding the proposed permanent redactions request at a later date.

To clarify, the unredacted documents have been made available only to the panel in this proceeding and not "the OEB" in general as implied in correspondence from OPG.

### **Confidential Treatment of Items #1 to #7**

No one objected to OPG's request in respect for confidential treatment of items #1 to #7.

### ***Findings***

The OEB has reviewed the remaining documents for which OPG requests confidential treatment (item #1 to #7 inclusive). The OEB approves OPG's request for confidential treatment of these documents, or certain portions thereof, as they contain commercially-sensitive information, third-party information and information that public disclosure could reasonably be expected to prejudice the economic interest and competitive position of the third parties. While the OEB did not receive any objections from parties regarding these confidentiality requests, the OEB has assured itself that these documents have been appropriately redacted.

### **THE ONTARIO ENERGY BOARD ORDERS THAT:**

1. OPG's request for confidential treatment is granted in respect of the documents identified as items #1 to 7, 9 and 11 in the list above. OPG shall provide the non-redacted, confidential versions of those documents to the individuals that have signed and filed a Declaration and Undertaking (except in order to have access

to #11, individuals acting as external consultants to the PWU or the Society must also sign and file an affidavit of the type described above). For clarity, OPG is not required to provide anyone with those portions of items #1, 2 and 7 for which it has requested permanent redactions; that request will be dealt with in a separate decision.

**DATED** at Toronto, April 13, 2021

**ONTARIO ENERGY BOARD**

*Original Signed By*

Christine E. Long  
Registrar