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Our File # 339583-000238

By electronic filing

March 22, 2018

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street, 27<sup>th</sup> floor  
Toronto, ON M4P 1E4

Dear Ms. Walli

**Re: Ontario Power Generation Inc. ("OPG")  
Motion to Review and Vary Decision EB-2016-0152  
Board File #: EB-2018-0085**

Please find enclosed the Submissions of Canadian Manufacturers & Exporters ("CME") submitted in the above-noted proceeding.

Yours very truly

Borden Ladner Gervais LLP



Scott Pollock

enclosure

- c. Barbara Reuber and Carlton Mathias(OPG)  
Charles Keizer (Torys)  
EB-2016-0152, EB-2018-0085 Intervenors

OTT01: 8856407: v1

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**RECEIVED**  
MAR 29 2018

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** a motion by Ontario Power  
Generation Inc. pursuant to Rule 40 of the Ontario Energy  
Board's Rules of Practice and Procedure for an order or  
orders to vary the Decision and Order EB-2016-0152.

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**SUBMISSIONS OF  
CANADIAN MANUFACTURERS & EXPORTERS ("CME")**

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**March 22, 2018**

Emma Blanchard  
Scott Pollock  
**Borden Ladner Gervais LLP**  
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100 Queen Street, Suite 1300  
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Counsel for CME

## 1. INTRODUCTION

1. On May 27, 2016, Ontario Power Generation Inc. ("**OPG**") filed a custom incentive rate application pursuant to section 78.1 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 Schedule B (the "**Act**"), seeking orders determining payment amounts for its generating facilities for the period from January 1, 2017 to December 31, 2021.

2. On December 8, 2016, the Ontario Energy Board (the "**Board**") declared that existing payment amounts would be interim as of January 1, 2017, pending the Board's ultimate decision in the application.

3. The Board issued its Decision and Order with respect to OPG's application on December 28, 2017 (the "**Decision**"). In the Decision, the Board determined that the effective date for the new (higher) payment amounts would be June 1, 2017, rather than January 1, 2017, the date OPG requested as the effective date. As a result of the Decision, OPG was only permitted to collect the existing (lower) payment amounts between January 1, 2017 and June 1, 2017.

4. On January 17, 2018, OPG filed its motion for an Order to review and vary the Decision in relation to the Board's determination that the effective date for OPG's final payment amounts was June 1, 2017 rather than OPG's requested date of January 1, 2017 (the "**Motion**").

## 2. THRESHOLD TEST

5. CME agrees with and adopts Board Staff's submissions regarding the threshold test.

## 3. JUST AND REASONABLE PAYMENT AMOUNTS

6. OPG contends that the Board is obligated to ensure that payment amounts are "just and reasonable" at all times. In OPG's view, this imposes an obligation on the Board to ensure that the effective date is set to the date that rates were declared interim.



7. CME disagrees with this proposition for three reasons:

- (a) The Board has been granted broad and flexible authority to set “just and reasonable” payment amounts, and a permissive power to set interim payment amounts. A requirement to match the interim and effective dates is incompatible with the Board’s authority;
- (b) Just and reasonable payment amounts exist as a range of values; and
- (c) Obligating the Board to match the interim and effective dates could offend the “right to be heard” principle of natural justice.

**3.1 A Requirement to Match Interim and Effective Dates is Incompatible with the Board’s Authority**

8. Section 78.1(5) of the *Ontario Energy Board Act* (the “Act”) provides that the Board may fix just and reasonable payment amounts for prescribed generators:

*“The Board may fix such other payment amounts as it finds to be just and reasonable,*

*(a) on an application for an order under this section, if the Board is not satisfied that the amount applied for is just and reasonable; or*

*(b) at any other time, if the Board is not satisfied that the current payment amount is just and reasonable.<sup>1</sup>*

9. In their decision in EB-2013-0321, the Board held that the power to set a just and reasonable payment amount is “very broad and allows significant flexibility”.<sup>2</sup>

10. Similarly, O. Reg. 53/05 regarding payments made under section 78.1 of the *Act* establishes that the “Board may establish the form, methodology, assumptions and

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<sup>1</sup> *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 Sched. B (the “Act”), s. 78.1(5).

<sup>2</sup> EB-2013-0321, In the Matter of an Application by Ontario Power Generation Inc. Payment Amounts for Prescribed Facilities for 2014 and 2015, Decision with Reasons, November 20, 2014 (the “**EB-2013-0321 Decision**”), p. 134.

calculations” used in determining what constitutes “just and reasonable” payment amounts under Section 78.1 of the *Act*.<sup>3</sup>

11. The *Act* also provides that the Board may make interim orders pending their final disposition on matter.<sup>4</sup>

12. CME submits that OPG’s contention that the Board must match interim and effective dates is incompatible with the Board’s broad, flexible, and permissive powers regarding just and reasonable payment amounts and interim orders.

13. As the Board pointed out in the EB-2013-0321 Decision, whether or not the Board issues an interim order is discretionary.<sup>5</sup> It was open to the Board not to issue an interim order at all in EB-2016-0152, thus preserving the lower existing payment amounts up until the date of the decision on December 28, 2017.

14. The Board also determined that:

*“As the decision to issue an interim order is discretionary, it follows that any decision to draw the effective date of the final payments order back to the date of the interim order is also discretionary.”<sup>6</sup>*

15. There is nothing in the legislation to suggest that once the Board has elected to make an interim order, they are required to match the effective date to the date interim payment amounts were declared.

16. Additionally, as stated in the Regulation, the form, methodology and calculation that the Board uses to set just and reasonable payment amounts is within the Board’s discretion. If the Board were required to match the effective date and date interim rates were set, this would be contrary to the latitude granted in the Regulation.

17. In other words, if OPG was correct, the Board would cease to be able to determine the form and methodology used to set payment amounts, and instead would be required

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<sup>3</sup> O. Reg. 53/05, *Payments Under Section 78.1 of the Act*, S.O. 1998, c. 15, Sched. B, s. 6(1).

<sup>4</sup> The *Act*, s. 21(7).

<sup>5</sup> The EB-2013-0321 Decision, p. 132.

<sup>6</sup> The EB-2013-0321 Decision, p. 132.



to mechanistically apply the payment amounts uniformly back to the date of the interim order.

18. CME therefore submits that a requirement to match the effective date to the interim date is incongruous and incompatible with the Board's voluntary ability to grant interim payment amounts and determine "just and reasonable" payment amounts.

### **3.2 Just and Reasonable Payment Amounts Exist as a Range of Values**

19. OPG's argument also implies that there is only one possible amount that is "just and reasonable" for the application.

20. In EB-2013-0321, the Board determined that "just and reasonable" payment amounts exists as a range of possible outcomes.<sup>7</sup> While the *Bell Canada* case discussed that payment amounts must be "just and reasonable" at all times, it does not support the proposition that there is only a single uniform "just and reasonable" payment amount.

21. Additionally, CME submits that "just and reasonable" payment amounts must exist as part of a range of values for practical reasons. The Board sets payment amounts on a prospective basis. Necessarily, some of the forecasts used to set those payment amounts will be incorrect. If "just and reasonable" payment amounts were not a range of values, payment amounts would need to be reset constantly to account for the differences between forecast values and actuals.<sup>8</sup>

22. Accordingly, the notion that there is only one "just and reasonable" rate is not borne out. Given the fact that the Board has been granted flexible and permissive authority regarding payment amounts and interim orders, and that "just and reasonable" payment amounts exist as a range of possible amounts, CME submits that the Board is not obligated to mechanically match the interim date to the effective date.

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<sup>7</sup> The EB-2013-0321 Decision, p. 134.

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

### **3.3 Obligating the Board to Match the Interim Date with the Effective Date Could Offend the “right to be heard” Principle of Natural Justice**

23. As the Board pointed out in the EB-2013-0321 Decision, the interim payment amounts order was made at OPG’s request without any opportunities for other parties to make submissions. The reason that other parties are not canvassed for submissions, is because “parties will be given the opportunity to ask questions and make submissions about the effective date of the final order throughout the hearing process.”<sup>9</sup>

24. If the Board was required to match the effective and interim dates, then ratepayers would be required to pay amounts in the order of hundreds of millions of dollars without the opportunity to make submissions. CME agrees with the Board’s concern articulated in the EB-2013-0321 Decision that this could be a violation of the “right to be heard” principle.<sup>10</sup>

## **4. OPG’S LEGITIMATE EXPECTATIONS**

25. OPG argues that the Board acted inconsistently with its duty of fairness by breaching OPG’s legitimate expectations regarding the procedure that the Board would apply to determining the effective date.

26. OPG states that the Board’s standard performance metric for the time between filing an application and the Board’s final decision is 235 days. Due to this document, OPG contends that it had a legitimate expectation that its application, filed May 27, 2016 would have a decision in January 2017 with an effective date of January 1, 2017.<sup>11</sup>

27. CME disagrees that OPG had any legitimate expectation of having a final ruling by the Board by January of 2017, and as a result, the Board did not act inconsistently with any duty of fairness it may have owed to OPG.

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<sup>9</sup> The EB-2013-0321 Decision, p. 133.

<sup>10</sup> The EB-2013-0321 Decision, pp. 133-134.

<sup>11</sup> EB-2018-0085, Submissions of Ontario Power Generation Inc. on Motion to Review and Vary, March 6, 2018 at para 44.



28. The Supreme Court of Canada, in *C.U.P.E. v. Ontario (Minister of Labour)* explained that the doctrine of legitimate expectation is engaged when a public authority, through clear, unambiguous and unqualified representations, conduct, or established practices, induces a “reasonable expectation” in the complainants.<sup>12</sup>

29. In this instance, the performance standards contain several qualification which should dispel any reasonable expectation of being followed in OPG’s case. For example, the performance standards state that they describe “typical” application types, including a 235 day timeline for typical “distribution rates” applications. The Board also states that the timelines are based upon “the full scope of procedural events associated with each application type taking place in a predictable manner.”<sup>13</sup>

30. The performance standards make reference to “typical” “distribution rates” applications where procedural events happen in a predictable manner. CME submits that OPG could not have been induced to form a reasonable expectation regarding the performance metrics since it is not a distributor, it is unique among entities that the Board regulates, and even within the normal scope of OPG’s application, EB-2016-0152 was an atypical application for a number of reasons.

31. In their Argument-in-Chief for EB-2016-0152, OPG stated:

*“OPG is unique among Ontario regulated companies, electric or natural gas, in terms of scope, scale and complexity.”<sup>14</sup>*

32. CME agrees. As OPG states, it is the only generator regulated by the Board, it operates two nuclear facilities, it has extensive hydroelectric facilities, and due to the number of facilities and diversity of technology, it is a complicated entity to regulate.<sup>15</sup>

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<sup>12</sup> *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, at para 131.

<sup>13</sup> <https://www.oeb.ca/industry/applications-oeb/performance-standards-processing-applications>

<sup>14</sup> Ontario Power Generation, EB-2016-0152, OEB Application for Payment Amounts for OPG’s Prescribed Facilities, Argument-in-Chief, May 3, 2017 at p. 1.

<sup>15</sup> Ontario Power Generation, EB-2016-0152, OEB Application for Payment Amounts for OPG’s Prescribed Facilities, Argument-in-Chief, May 3, 2017 at p. 1.



Accordingly, CME submits that it is to be expected that OPG's application would take longer than a typical distribution rates application.

33. The previous record of OPG's applications bear out that conclusion. OPG's most recent experiences with payment amount applications were:

- (a) EB-2007-0905, where it took 339 days between filing the application and the Board's decision;<sup>16</sup>
- (b) EB-2010-0008, where it took 288 days between filing the application and the Board's decision;<sup>17</sup> and
- (c) EB-2013-0321, where it took 419 days between filing the application and the Board's decision.<sup>18</sup>

34. All of OPG's three previous payment amounts applications have exceeded the amount of time in the Board's performance metrics, and the average time between filing the application and the Board's decision is 348 days. This is nearly half again as long as what the performance metrics state a typical distribution application should take.

35. In addition to the complexity and scope inherent with any rate application filed by OPG, OPG's application in EB-2016-0152 was especially large and complex. As a result, OPG had even less of a reasonable expectation that the Board would be able to render a decision within the time set out by the performance metric than it normally would.

36. OPG's application in EB-2016-0152 contained a number of unique features that ought to have produced a reasonable expectation that this application would take longer than the average OPG payment amounts application to fully review. EB-2016-0152 contained a review of the Darlington Refurbishment Project, which OPG described as

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<sup>16</sup> Determined by calculating the days between November 30, 2007 as the date of filing and November 3, 2008 as the date of the decision.

<sup>17</sup> Determined by calculating the days between Mar 26, 2010 as the date of filing and March 10, 2011 as the date of the decision.

<sup>18</sup> Determined by calculating the days between September 27, 2013 as the date of filing and November 20, 2014 as the date of the decision.

“the single largest capital project ever to come before the OEB”.<sup>19</sup> It also contained a request for funding to extend Pickering’s operation, introduced new ratemaking methodologies for both nuclear and hydroelectric payment amounts, and covered five years instead of OPG’s usual two year application.<sup>20</sup>

37. The fact that this application would be particularly complex and time consuming came as no surprise to OPG. In their argument in support of this motion to vary, OPG states that the complexity in the application was “largely inherent”, and required a substantial increase in the volume of information, since “every table containing forecast data included two and a half times as much information as in prior application”.<sup>21</sup>

38. Accordingly, CME submits that OPG could not possibly have a reasonable expectation that the Board would be in a position to render a decision in January of 2017 with an effective date of January 1, 2017.

#### **4.1 OPG Could Have Anticipated the Impact the Proceeding Length Would Have on the Effective Date**

39. OPG also argues that they could not reasonably have anticipated the Board’s determination that the effective date should be delayed due to the length of the proceeding. CME submits that OPG could have easily anticipated such a determination by the Board. In EB-2013-0321, the Board stated:

*“The Board must control its regulatory process. The Board hears a large number of cases throughout the year and must plan its resources accordingly to ensure cases are completed and decisions are rendered. In cases where utilities have not filed their applications in time to have rates in place prior to the effective date, 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.”<sup>22</sup>*

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<sup>19</sup> Ontario Power Generation, EB-2016-0152, OEB Application for Payment Amounts for OPG’s Prescribed Facilities, Argument-in-Chief, May 3, 2017 at p. 1.

<sup>20</sup> Ontario Power Generation, EB-2016-0152, OEB Application for Payment Amounts for OPG’s Prescribed Facilities, Argument-in-Chief, May 3, 2017 at p. 1.

<sup>21</sup> EB-2018-0085, Submissions of Ontario Power Generation Inc. on Motion to Review and Vary, March 6, 2018 at para 49.

<sup>22</sup> The EB-2013-0321 Decision, p. 135.



#### **4.2 The Procedural Requirements were Possible for OPG to Meet**

40. OPG argues that the Board's requirement that they file the application sooner was "impossible to meet". OPG states that their audited financial statements were not available until early March, and the earliest that an application could be brought would be in April of the bridge year.<sup>23</sup> As Board Staff points out however, OPG's filing guidelines state that OPG could file the audited financial statements by way of update.

41. CME submits therefore the Board did not impose an "impossible" procedural standard. OPG was, at all times, in control of the timing of their application, and had the ability to file their application with sufficient time for a determination to be made regarding payment amounts prior to the effective date.

#### **5. CONCLUSION**

42. For all of the foregoing reasons, CME submits that OPG's Motion to Vary should be denied for the reasons stated above.

#### **6. COSTS**

43. We request that CME be awarded 100% of its reasonably incurred costs in connection with this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of March, 2018.



Emma Blanchard  
Scott Pollock  
Counsel for CME

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<sup>23</sup> EB-2018-0085, Submissions of Ontario Power Generation Inc. on Motion to Review and Vary, March 6, 2018, p. 17.