

ONTARIOPOWER GENERATION

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ONTARIO ENERGY BOARD

VIA EMAIL and COURIER

Mr. John Zych
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 26th Floor
Toronto, ON M4P 1E4

Dear Mr. Zych:

**Re: Proposed New Practice Direction on Confidential Filings and
Related Proposed Amendments to the Board's Rules of
Practice and Procedure
Board File No. EB-2006-0084**

Pursuant to the Board's web posting requesting feedback on the above draft documents, attached please find Ontario Power Generation Inc.'s comments. OPG appreciates the opportunity to provide comments on these documents.

Please direct any comments or questions in this matter to the undersigned.

Yours truly,



Andrew Barrett

cc: Ethan Kohn, OPG
Regulatory Affairs Records, OPG

Att.

**OPG Comments on Ontario Energy Board Practice Direction on
Confidential Filings and Related Proposed Amendments to the Board's
*Rules of Practice and Procedure***

This document summarizes the comments of Ontario Power Generation Inc. (OPG) in relation to the Ontario Energy Board's proposed new Practice Direction on Confidential Filings and Related Proposed Amendments to the Board's *Rules of Practice and Procedure*. Comments are arranged by section of each relevant document.

In general, OPG supports the Board's development of a streamlined process relating to confidential filings and feels that the draft documents are a significant step forward.

1. Rule 10

- Section 10.04 (d) indicates that the Board may make any other order that it finds to be in the public interest, including disclosure under suitable arrangements. OPG suggests that "arrangements as to confidentiality" (i.e. Section 10.04 (d) of Rule 10 and Section 6 in the Practice Directions) should be used sparingly, and as a last resort. OPG recommends that this provision only be used after the provisions specified in parts (a), (b) and (c) to this section have been employed and deemed to be inappropriate or ineffective. See comments on Section 6 of the Practice Direction for additional discussion.

2. Rule 29

- This rule should be made consistent with Section 5.3 of the Practice Direction. Section 29.02 has deleted the original part c), which indicated that a party may use confidentiality as a justification for not providing all

information requested in an interrogatory. Instead of deleting this subsection in its entirety, the subsection should be modified (consistent with section 5.3 of the Practice Direction) to indicate that the party may request confidentiality for all or a part of an interrogatory response.

3. Proposed Practice Direction on Confidential Filings

- Section 2 - For certainty, the second paragraph in Section 2 should clearly reference the *Nuclear Safety and Control Act*, and its associated Regulations. Certain information regarding OPG's nuclear facilities is "prescribed information" under Section 21 of the General Nuclear Safety Control Regulations (the *General Regulations*) made under the *Nuclear Safety and Control Act*. As operator of its nuclear facilities, OPG has knowledge of "prescribed information" and is therefore required by subsection 23(2) of the *General Regulations* to "take all necessary precautions" to prevent unauthorized transfer or disclosure of "prescribed information". In discharging its legal duty, OPG applies Personal Security Standard Ch. 2-4 published by the Treasury Board Secretariat (Can.). Section 2.2. of this Personal Security Standard entitles access to such information if 1) an individual has a "need to know" this information and 2) (at minimum), a security clearance has been completed in accordance with the Personal Security Standard. Given that OPG's nuclear facilities are prescribed generators under section 78.1 of the *Ontario Energy Board Act, 1998* and will be subject to Ontario Energy Board regulation, the Practice Direction and Rules should specifically address this restriction on information release.
- Section 4.2.1 indicates "...to the extent practicable any such information should be clearly marked "confidential"." It should be noted that this comment is in reference to specific Board templates which are often protected and cannot be so marked. OPG suggests that the Board modify the templates to clearly indicate that they are confidential.
- Section 5 indicates "...parties will make every effort to limit the scope of their requests for confidentiality to an extent commensurate with the **commercial**

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sensitivity of the information at issue...” [Emphasis added]. This comment is not sufficiently broad to cover all reasonable justifications for requesting confidentiality. It should reference all situations contemplated within Appendix B.

- Section 5.1.4 – In the case of nuclear prescribed information, a confidential, unredacted version of the document cannot be provided. See Section 2 comment above.
- Section 5.1.11 (d) – see comment provided on Section 10.04 (d) in Rule 10 above.
- Section 5.1.13 - see comment provided on Section 10.05 in Rule 10 above.
- Section 5.3.1 - see comment provided on Section 29.02 in Rule 29 above.
- Section 6.1 – This subsection indicates that the Board may use a Declaration and Undertaking approach to allow parties to view confidential information. In reviewing this section of the Practice Direction and Appendices D and E, no mention is made of any remedy available to a party whose confidentiality has been breached. Given that significant harm could result from a breach, consideration should be given to further safeguard information in this circumstance. The Board should include specific provisions within this section that indicate a remedy.
- Section 6.2.2 – See Section 2 comment above.
- Section 9 – It is unclear what process the Board intends to follow in the situation where a ruling of confidentiality is upheld during a proceeding and a subsequent request is made for release of the same information under FIPPA. See comments made on Appendix B, part (f).
- Section 11 – It is unclear when a “proceeding” will be judged to have ended if the Application in question is a regular occurrence (i.e. an annual rate application). Confidential information in a given “proceeding” could be equally applicable to the next proceeding in the series. OPG submits that there are types of information (documents relating to regulatory strategy, for example), that would be deemed sensitive within a given hearing and would continue to

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be sensitive after that proceeding due to their enduring nature and relevance to a subsequent proceeding. As such, they should remain confidential.

- Appendix B, part (a) – “usefulness” of the information is not a relevant determinant of whether the information should or should not be maintained in confidence. The fact that a document is deemed very useful should not increase the likelihood of its release, if it is truly confidential.
- Appendix B, part (f) – The Privacy Commissioner uses a different decision making process and a different basis for deciding than does the Board. For this reason, a prior decision of the Commission can be reviewed but should not unduly influence the Board's own decision with respect to confidentiality. The Board has an intimate understanding of the energy sector, and as such, it may not be appropriate for it to rely on decisions from the Privacy Commissioner.
- Appendix B, part (j) – Legislative restriction on release of information is not a consideration, but a prohibition. See Section 2 of the Practice Direction.
- Appendices D and E – see comments on Section 6.1 above.