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2 --- On resuming at 2:45 p.m.

3 MR. KAISER: Please be seated.

4 **DECISION:**

5 MR. KAISER: The Board heard submissions this morning from a number of
6 interested parties with respect to an application by Ontario Power Generation for interim
7 rates. This relates to the application OPG filed on November 30th under section 78.1 of
8 the Ontario Energy Board Act for approval of increases in payment amounts for the
9 output of certain next generation facilities effective April 1st, 2008.

10 In particular, OPG seeks two Interim Orders. The first Order would make its current
11 payment amounts interim, effective April 1st, 2008. Secondly, they seek an Interim
12 Order increasing OPG's payment amounts on an interim basis to \$35.35 per megawatt
13 hour for hydro-electric production, and \$53 per megawatt hour for nuclear production.

14 There are two questions before us. The first is, does the Board have jurisdiction in
15 this case to issue these types of orders? And the second is, if we do have the jurisdiction,
16 should we exercise that jurisdiction, and to what extent?

17 Dealing with the first question, first. Mr. Penny, on behalf of OPG, has referred the
18 Board to a number of cases with respect to the issuance of interim orders throughout the
19 country. It is useful in the context of this case to identify the essential characteristics of
20 an Interim Order. This is at paragraph 28 of his factum.

21 First, an Interim Order does not require any decision on the merits of an issue. That
22 will be settled in the final decision. The purpose of an Interim Order is to provide relief
23 for any deleterious affects caused by the length of the proceedings.

24 Secondly an Interim Order is temporary. It can be changed retrospectively once
25 the final determination is made.

1 Thirdly, an Interim Order assumes and requires that a final order will be made.
2 One initiates the process and the other ends it, a point that Mr. Penny made on a number
3 of occasions.

4 Mr. Penny has also referred us to the Supreme Court of Canada decision in the Bell
5 Canada case where the Court stated:

6 “Traditionally, such interim rate orders dealing in interlocutory manner
7 with issues which remain to be decided in a final decision are granted for
8 the purpose of relieving the applicant from the deleterious effects caused
9 by the length of the proceeding.

10 Such a decisions are made in an expeditious manner on the basis of
11 evidence that would often be insufficient for the purposes of a final
12 decision. The fact that an order does not make any decision on the merits
13 of an issue to be settled in the final decision and the fact that its purpose is
14 to provide temporary relief against deleterious effects caused by the
15 duration of the proceedings are essential characteristics of an interim
16 order.”

17 There is no question that section 21(7) of the OEB Act grants the Board clear
18 authority to issue interim orders. It has done so on a number of occasions. Mr. Penny
19 referred to a number of those decisions including decisions involving IESO, the OPA,
20 and various gas companies.

21 Of particular interest here is whether a reading of section 78.1 of the Act leads to
22 a conclusion that the Board cannot or should not issue an interim order in this case.

23 Section 78.1(2)(b) provides, in relevant part, that the payment amount shall be the
24 amount determined:

25 in accordance with the order of the Board then in effect to the extent the
26 payment relates to a period that is on or after the latter of,

- 1 (i) the date prescribed for the purpose of this subsection;
2 and
3 (ii) the effective date of the Board's first Order under this section in
4 respect to the generator.

5 O. Reg 53/05 specifies the amount, for the purposes of section 78.1(2) that the IESO is
6 required to pay OPG for the output from the prescribed facilities from April 1st, 2005 to:
7 the later of:

- 8 (i) March 31st, 2008; and
9 (ii) the day before the effective date of the Board's first Order in
10 respect of Ontario Power Generation Inc.
11

12 Now, much was made of the fact as to whether a first order in this section meant an
13 Interim Order or whether it meant a Final Order.

14 It was Mr. Penny's position that it meant a Final Order.

15 Mr. Faye, in his submissions on behalf of Energy Probe, argued that if we were to
16 look, for instance, at Regulation 62.5, that this Regulation required the Board to accept
17 certain amounts and take certain steps in a very distinct fashion. He argues that if a first
18 order was an Interim Order (which chronologically it might seem to be), some real
19 complications would result and leads to the conclusion that an interim order should not be
20 granted.

21 Having listened to the submissions of all of the parties, the Board is of the view that
22 there is nothing in the language of section 78.1 or section 4 of Ontario Regulation 53/05
23 that removes the power of the OEB to set interim payment amounts, nor can that
24 restriction be implied as necessary to the operation of the legislative scheme.

25 In fact, the language of these provisions recognizes that when an OEB order
26 concerning payment amounts is made, may well be different from the effective

1 date of that order. This supports the interpretation that the OEB's power to make interim
2 orders applies to payment amounts under section 78.1.

3 An Interim Order is not necessarily a first order within the meaning of the Act. A
4 reasonable interpretation of the words "first order" is that it is a Final Order which
5 determines what might be described as the first rates set definitively by the Board and not
6 prescribed by Regulation. An Interim Order can by its nature be time limited and subject
7 to whatever is determined in the Final Order. Section 78.1 does no more than establish
8 that the payment amounts are as prescribed by regulation until the latter of March 31st,
9 2008 and the effective date of the OEB's first order.

10 The language of section 78.1 does not suggest that the OEB's power under section
11 21.7 to issue interim orders is in any way limited or abrogated other than by the limitation
12 that any such order could not purport to have an effective date before April 1st, 2008.

13 The object of the Act and the intention of the legislature is clear. In our view, the
14 clear purpose of section 78.1 of the Act and section 4 of the Regulations is to fix the OPG
15 payments for three years until March 31st, 2008 and to leave to the OEB thereafter the
16 task of determining payment amounts that are just and reasonable in accordance with the
17 regulations.

18 In summary, the ability to fix just and reasonable payment amounts would be
19 compromised, in our view, if the Board can only take action after a full and final hearing.
20 The power to make interim orders is clearly confirmed by the Act and is necessary for the
21 protection of both customers and generators. This power can be abrogated only by the
22 clearest statutory language. There is nothing in section 78.1 that supports that
23 conclusion.

24 This, then, leads us to the second aspect of this motion. This is the Applicant's
25 request, in the first instance, that the existing or current payment amounts be declared
26 interim effective April 1st, 2008. And in the second case that a Interim Order be issued,
27 increasing those payment amounts, on an interim basis, to the amounts I described earlier,

1 namely \$35.35 per megawatt hour for hydroelectric production and \$53 per megawatt-
2 hour for nuclear production.

3 We will consider the first aspect first; whether the existing payment amounts
4 should be declared interim effective April 1st, 2008. The Board agrees that that should
5 be the case and an Order will issue to that effect.

6 We see no harm resulting to any party as a result of such an Order. It is not
7 unusual for such Orders to issue. It preserves the ability of the Board to set rates
8 effective April 1st, 2008. And the ability of the utility to recover any ultimately
9 determined revenue deficiency from that date.

10 That leads us to the second question; whether the payment amount should be
11 increased to the requested amount on an interim basis effective the same date, April 1st,
12 2008.

13 This application is denied. The requested amount, which I have described earlier,
14 is said by the Applicant to be 50 percent of the amount claimed in its Application. This
15 calculation is set out at paragraph 108 of the Applicant's Factum. It refers in part to the
16 cost of capital. Instead of claiming the whole amount they would receive if they receive
17 an ROE of 10.5 percent, they have reduced that to Hydro One's 8.34% ROE. They also
18 added two recovery amounts, 85.3 million for the nuclear liability deferral account, and
19 another 67.7 million for recovery of specified deferral and variance accounts balance.
20 The latter two accounts are accounts where recovery is required by the Regulation.

21 OPG has claimed a total revenue deficiency of some \$760 million accumulating,
22 they say, at the rate of about \$39 million a month.

23 The Board is concerned, at this point, with granting the requested payment
24 increase. The main argument was not financial harm, which we often hear in these cases
25 and is often the basis for interim rate increases. Rather, OPG seeks rate smoothing to
26 avoid rate shock to consumers.

27 Of course, any concern with rate shock assumes that there will be some rate

1 increase; Otherwise, smoothing is not necessary. Mr. Stephenson, on behalf of his client,
2 the Power Workers' Union, supported the applicant and said, “we know some increase is
3 coming, and we might as well start to absorb some of it sooner rather than later”.

4 I should add that the applicant was supported by three consumer groups in this
5 regard, the Consumers Council of Canada, VECC and Power Workers' Union, but was
6 opposed by three other consumer groups, the School Energy Coalition, AMPCO and
7 Energy Probe. So the consumer groups were divided on the issue.

8 In the end, the Board believes that if smoothing is the objective and if smoothing
9 is required, at it can be achieved prospectively. It is not necessary to do that by early rate
10 implementation.

11 We also note the concerns of AMPCO, that some of the increase sought relates to
12 increased cost of capital, particularly return on equity. They expect this will be a
13 contentious issue. AMPCO was concerned that the Board not be seen to prejudge that
14 issue at that point.

15 That completes the Board 's ruling in this matter. Any questions?

16 MR. PENNY: No, thank you.

17 MR. KAISER: Thank you. Thank you, gentlemen, ladies. Thank you.

18 --- Whereupon the hearing adjourned at 3:02 p.m.

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