

OPG BRUCE POWER TRANSFER OF EFFECTIVE CONTROL

DECISION WITH REASONS [oeb:12MX1-0:1]

EXECUTIVE SUMMARY

RP-2002-0142

On August 19, 2002, Ontario Power Generation Inc. ("OPG" or "OPGI") filed an application (the "Application") with the Ontario Energy Board (the "Board") pursuant to Part 4, Section 4 of OPG's Transitional Generation Licence (EG-0333) issued by the Board. OPG has applied for an Order determining that the transaction with Bruce Power L.P. ("BP LP") to lease and operate the Bruce Nuclear Generating Stations (the "Bruce Transaction") represents the transfer of Effective Control over the output of the Bruce Nuclear Generating Station ("Bruce NGS").

Part 3 of OPG's licence establishes a price cap and rebate mechanism for a period of four years from the date the electricity market opens. The price cap and rebate mechanism sets an annual average price cap of \$38/MWh for a defined quantity of OPG's energy production referred to as the Contract Required Quantity or CRQ. OPG's revenues in excess of this limit on the CRQ amount are paid back in the form of a rebate. OPG can reduce the CRQ, and hence the quantum of the rebate derived from it, by satisfying the Board that it has transferred effective control over the output of a generation unit to another party. Effective control over output is defined in the licence to mean control over the timing, quantity and bidding of that output into the Ontario market.

Before the Board can grant the relief requested by OPG on this Application, the Board must be satisfied that:

1. OPG has transferred to BP LP control over the timing, quantity and bidding into the Ontario market of the output from the Bruce NGS;
2. There are no on-going arrangements which facilitate interdependent behavior between OPG or any OPG affiliate and BP LP; and
3. BP LP has not obtained effective control over approximately 25 percent or more of either total in-service Tier 2 capacity or total in-service Tier 1 and Tier 2 capacity.

Based on OPG's evidence that BP LP is the sole licensed operator of the Bruce NGS the Board is satisfied that OPG has transferred control over the timing, quantity, and bidding into the Ontario market of the output of the Bruce NGS.

The term interdependent behaviour is not defined in OPG's licence and therefore the definition of this

term was an issue in the hearing. The Board heard evidence from the federal Competition Bureau (the "Bureau") and OPG on the meaning of the term, and decided on a definition which encompasses the range of actions, agreements, or understandings that are encompassed in various definitions available in Bureau documents.

The various on-going arrangements between OPG and BP LP can be categorized into three groups:

- Group 1: Ancillary Service Arrangements;
- Group 2: Joint Committee Representation, Joint Cooperation and Other Joint Arrangements; and
- Group 3: Financial Arrangements.

In addition to these arrangements, OPG has instituted protective measures which are designed to prevent information about BP LP that flows into OPG as a result of the arrangements from influencing OPG's market conduct. The measures include the Competition Legislation Compliance Program, the Code of Business Conduct, the Guide for Exchange of Information between OPG and Bruce Power Staff, and OPG's Bruce Power Ring-Fence plan.

The Board heard evidence and argument on whether or not the arrangements facilitate interdependent behaviour and whether the protective measures are relevant to this determination. OPG submitted that although some of the arrangements in Groups 1 and 2 could be problematic, the effect of the protective measures was to eliminate any concern. While one of the intervenors argued that the protective measures were not relevant, the others accepted the view that they were.

The Board found that protective measures are relevant to the determination of whether or not the arrangements facilitate interdependent behaviour.

The Board also heard evidence on whether or not the protective measures were adequate to remove concerns about the arrangements. Most intervenors expressed concern that in the future the protective measures could lose their effectiveness. They therefore recommended that the measures - in particular the Ring-Fence plan - should be made mandatory conditions of licence, and that various on-going audit and reporting requirements should be imposed.

The Board is satisfied that the protective measures are adequate to address concerns over the arrangements, but agrees with various of the intervenors that additional controls must be put in place to ensure the on-going effectiveness of these measures. These include the mandatory maintenance of the Ring-Fence with annual internal audits of its effectiveness, and annual external audits of the internal audit process.

Regarding the Group 3 financial arrangements the Board finds that the Supplemental Rent Payments do not facilitate interdependent behaviour. While the Contract For Differences for Forced Outages ("CFD") raises concerns, the Board notes that it expires at the second anniversary of Market Opening. In addition

the Board orders that no further renewal or amendment of this agreement shall occur, and has taken the step of notifying the Independent Electricity Market Operator's Market Assessment Unit of the existence of this agreement. Under these conditions the Board is satisfied that the CFD does not facilitate interdependent behaviour.

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The Board finds that, taken as a whole, the arrangements existing between BP LP and OPG do not represent ongoing arrangements which facilitate interdependent behaviour.

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The Board heard evidence to the effect that after the conclusion of the Bruce Transaction BP LP attained a market share of about 9% of Ontario's electricity generating capacity. Therefore the Board finds that BP LP has not obtained a market share of 35% or greater as a result of the Bruce Transaction.

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The Board has examined CRQ and Q_h values supplied by OPG for the Bruce NGS and has compared them with the CRQ and Q_h values for Bruce NGS held by the staff of the Energy Licencing Group, Licencing and Applications Branch of the Ontario Energy Board. The Board confirms that these two sets of values for the Bruce NGS are in agreement and are the values to be used for computation of the Average Price and the Rebate amount as provided for in the OPG licence, Part 3, sections 1 and 2.