Global Adjustment Lawsuit

Current Status

Leave to Appeal to the Supreme Court of Canada

- On June 20, 2016, OEFC submitted an application for leave to appeal to the Supreme Court of Canada the April 19, 2016, decision by the Ontario Court of Appeal that dismissed OEFC's appeal of the March 12, 2015, lower court decision.
  - OEFC's position has consistently been that it has administered these power purchase agreements in a manner that it believes has been correct.

- A decision on the leave to appeal application is expected this fall

Motion to Stay

- On August 5, 2016, a single judge of the Appeal Court for Ontario dismissed OEFC's motion for a stay of the court order that requires payment of retroactive amounts that result from the March 12, 2015, decision of the Ontario Superior Court of Justice. OEFC made an application for a review of the denial of the stay by a full panel of the Court of Appeal. At that review on September 13, 2016, the Ontario Court of Appeal denied OEFC's motion for a stay of the court order.
  - The March 12, 2015, decision determined that OEFC has incorrectly calculated payment provisions of 12 Power Purchase Agreements.
  - Under the Motion to Stay, OEFC would not have been required to make retroactive payments pending the decision of the Supreme Court of Canada on the Leave to Appeal.

- As a result of the dismissal on the stay, OEFC will be required to make payments of $182 million to the applicant NUGs for deliveries during the period from January 2011 to January 2015 that predates the Ontario Superior Court decision.
  - The $182 million amount is comprised of about $170 million in retroactive payments and about $12 million in interest.
  - For the period from February 2015 onwards, the applicants NUGs have been paid at rates determined in accordance with the Ontario Superior Court decision.

Timing of Payments

- OEFC will recover these payments from electricity consumers along with other NUG costs through the Global Adjustment mechanism, as provided for under statute. This recovery is done through the monthly settlement process of the Independent Electricity System Operator (IESO).

- Payments to the NUGs will be made on October 21, 2016, following receipt of funds from the IESO.
  - October 21, 2016, is the earliest OEFC could receive funds from IESO.
  - OEFC has informed the NUGs that payments will be made on October 21, 2016.

Ratepayer Impact

- For electricity users on the Regulated Price Plan (RPP) or some other contract, the impact of the retroactive payment on the Global Adjustment portion of the costs recovered through RPP prices would be smoothed. For residential and other consumers on the Regulated Price Plan, the impact may be smoothed over 12 months, as RPP prices are typically set to recover the estimated costs over a 12 month time frame, resulting in an increase of approximately $1.10 on the average monthly residential bill over the 12 month period, an increase of 0.7 per cent.
  - For RPP consumers, this increase would partially offset the recent rate mitigation initiative. The rate mitigation initiative is estimated to reduce the average residential electricity bill by approximately $11.
  - Increased RPP rates from recovery of the retroactive payments may be delayed until RPP prices are set in April 2017.
  - Note that this would be during the period when the proposed new rebate would be in place, so the net rate impact would in that case be mitigated by the rebate.

- The retroactive payments may result in an estimated increase in rates for large industrial consumers of over $10/MWh, a 12 per cent increase, in October.
  - For large, non-RPP, industrial consumers the impact would only occur for rates of the month that the retroactive amounts were recovered by OEFC through the Global Adjustment.
  - For large industrial consumers there would be no interaction with the recent rate mitigation initiatives.
    - They are not eligible for the rebate.
    - The impact, being in 2016, would also be prior to the implementation of and impact of the proposed expanded ICI eligibility or the GGRA mitigation.

- In the event that OEFC's leave to appeal to the Supreme Court is granted and that OEFC is ultimately successful, OEFC would seek recovery of the retroactive and additional payments made to NUGS in respect of the period since February 2015, inclusive. Recovered payments would be returned by OEFC to ratepayers through the Global Adjustment mechanism.
  - There could be a differential impact on different ratepayers, given the differential timing of the pass-through of the retroactive payments and a potential future return to ratepayers.

- OEFC included the ratepayer impact issue in its arguments for a Stay.

- In the event that OEFC's leave to appeal to the Supreme Court is denied, or the leave to appeal is granted and OEFC is not successful at the Supreme Court, retroactive payments would also need to be made to NUGs with standstill agreements with OEFC, resulting in a further ratepayer impact. Previous estimates of the retroactive payments to standstill NUGs have been over $65 million.
  - In addition to the Applicant NUGs, seven other PPAs with similar pricing provisions not in the lawsuit are now in "Standstill" agreements (preserving their rights, while not having to start lawsuits against OEFC).

Ongoing Litigation: Leave to Appeal to Supreme Court

Timeline for Leave to Appeal Application

	Date
Application for Leave to Appeal · Notice of Application · Documents relied upon (sample PPA & Term Sheet) · Affidavit (sworn June 15, 2016)	June 20, 2016
NUG Response	August 17, 2016
OEFC Reply	August 29, 2016
Decision on Leave to Appeal Application	Fall 2016 (expected)

Background

Global Adjustment and PPA Prices

- The rates under many OEFC PPAs are adjusted based on changes in an index called Total Market Cost (TMC). This index was calculated by OEFC as the sum of all the costs paid by a large industrial customer for delivered electricity. – Since its inception in 2005, the Global Adjustment (GA) has been included by OEFC in the calculation of TMC.
  - GA is a part of the commodity cost of electricity – the portion of generation costs not recovered through spot market prices – the difference between what generators are paid each month in the wholesale spot market and what they are owed based on their contracts or regulation.

- Since 2011, with a change in the GA regulation by the government, the calculation of TMC used to determine the escalation of rates paid to 24 NUGs has reflected the new GA for Class A consumers. – TMC is defined in NUG contracts to be the cost of electricity delivered on a 100 per cent load firm basis to a wholesale market participant load customer (which would be large customers).
  - TMC includes Hourly Ontario Energy Price (HOEP), Wholesale Market Service Charges, Transmission Service Charges, the Debt Retirement Charge and the Global Adjustment (GA).

- Prior to 2011, the GA was charged to all consumers based on their total consumption at a monthly rate in dollars per megawatt-hour ($/MWh). Effective January 1, 2011, the GA portion of generation costs is charged to large customers with a demand over 5 MW based on their share of electricity demand during the five system peak hours. – These large customers are classified as Class A customers.
  - Following the change in regulation, all remaining customers were classified as Class B customers and charged the GA as a rate based on total consumption as before.

- As a result of the change in the GA allocation, the TMC index is lower using the Class A GA, which reduced the contract price escalation for NUG power purchase agreements (PPAs) using this index.

Legal Action by Certain NUGs

- In January 2013, notices of application commencing legal proceedings were served on Ontario Electricity Financial Corporation (OEFC) in relation to 12 NUG power purchase agreements (PPAs) that have rate escalation based on change to the TMC index.

- The NUGs position was that OEFC breached the terms of the PPAs in employing a calculation of TMC, following the change in regulation, that does not reflect the
  - “underlying philosophy and definition of TMC”
  - “original economic effect of Total Market Cost”
  - “cost of uninterruptible power at 100 per cent load factor to wholesale market participant industrial customers at the relevant voltage”

- Subsequently, the NUGs also took the position that TMC was the cost of generating power for a large industrial customer and not the amount paid by such customers.
  - The NUGs argued that since the change in the calculation of the GA did not reflect a change in the cost of generating power the amount of GA included in calculating TMC should not be changed and requested that in calculating TMC the amount of GA should continue to be calculated based on the “methodology” used prior to 2011.

- OEFC’s position in the lawsuit was that it had properly calculated the price escalation indices, and that it had not changed the principles or methodology in the calculation of TMC. However, the actual value of the inputs had changed due to the new Class A Global Adjustment, where a 7x24 Class A customer was the appropriate match with a 100 per cent load market participant.

- The hearing of the applications occurred in May 2014.

- On March 12, 2015, a decision was issued which found that OEFC has not properly calculated the price paid for electricity under the 12 PPAs. The decision required OEFC to allocate the GA on a volumetric basis to calculate TMC as was the case before 2011.

- On April 10, 2015, based on the advice of its external legal counsel, OEFC filed a notice of appeal in response to the March 12, 2015, Ontario Superior Court of Justice ruling. On December 14 and 15, 2015, the appeal was heard by the Ontario Court of Appeal.

- On April 19, 2016, the Court of Appeal for Ontario released a decision dismissing the appeal filed by the OEFC.

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