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.

Retroactive Payments to Applicant NUGs

- On September 13, 2016, the Ontario Court of Appeal denied OEFC's motion for a stay of the court order that requires payment of retroactive amounts to Applicant NUGs in the GA lawsuit that result from the March 12, 2015, decision of the Ontario Superior Court of Justice.
  - 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, on October 21, 2016, OEFC made payments of $178 million to the applicant NUGs for deliveries during the period from January 2011 to January 2015 that predates the Ontario Superior Court decision.
  - 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).
  - In addition to the payments to the NUGs, Applicant NUGs with Generator Debt owed to OEFC are entitled to retroactive increased rates totalling approximately $3.5 million. This amount will be recovered by OEFC from IESO and applied to reduce Generator Debt. Therefore, OEFC will recover a total of approximately $182 million from the IESO.
  - For the period from February 2015 onwards, the applicants NUGs have been paid at rates determined in accordance with the Ontario Superior Court decision.

- The recovery of the retroactive payments from the IESO will occur over three months (October to December 2016).
  - The Deputy Minister of Energy sent a letter to the CEO of OEFC requesting that recovery of the retroactive payments occur over three months in order to ensure more consistent treatment across electricity consumer classes in relation to the impact of the recovery – that spreading the impact of costs over a three-month period for Class A and non-RPP Class B electricity consumers would ensure greater consistency with the smoothed cost recovery for RPP electricity consumers.
  - OEFC accounting has reported that IESO has confirmed that recovery of the retroactive amount can be done in three instalments.

- Note that the above retroactive payments are in respect of Applicant NUGs to the GA lawsuit. Should OEFC be ultimately unsuccessful at the Supreme Court, other, non-applicant NUGs with similar contract provisions that have entered into a standstill agreement with OEFC would then seek recovery of retroactive payments and adjustments to their contract prices going-forward.

<u>Ratepayer Impact</u>

- 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 pressure 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 pressure would partially offset the recent rate mitigation initiative. The rate mitigation initiative is estimated to reduce the average residential electricity bill by approximately $11.
  - Note as well that the actual overall OEB setting of RPP prices will depend on other, non-GA factors.

- On October 19, 2016, the Ontario Energy Board (OEB) released the RPP rates effective for the six month period from November 2016 to April 2017.
  - Overall, the rates were unchanged from the previous RPP rates effective from May 2016 to October 2016.
  - The RPP rates do take into account the retroactive payments to NUGs; however, the overall assessment of the OEB was that the previous RPP prices continue to be effective in recovering the overall forecast costs attributable to customers on the RPP. Accordingly, no adjustments were required at this time.
  - The RPP report does note that the forecast average supply cost for RPP consumers increased by $0.97/MWh, or 0.87 per cent, in the current forecast compared to the previous forecast. However, the net difference in the forecast average supply cost for RPP customers was determined to be sufficiently small that RPP prices developed for the prior forecast period remain effective at recovering the expected costs over the current forecast period. The RPP report published by the OEB notes two factors that account for the $0.97/MWh increase in the forecast average supply cost for RPP consumers:
    - Underlying cost factors - the load-weighted market price for RPP consumers plus the Global Adjustment - decrease the average supply cost by $0.32/MWh; and,
    - The change in the RPP variance account balance adds to the supply cost increase by $1.29/MWh. This change is attributed to costs and market activity from April 2016 through to September 2016, *and also reflects the retroactive payments to NUGs*.

- The recovery of the retroactive payments over three months (October to December 2016) may result in an estimated rate pressure increase in the average rate, from what it otherwise would be, for large industrial consumers of approximately $3.50/MWh, a 4 per cent increase, in those months.

- For large, non-RPP, industrial consumers the impact would only occur for rates of the three months that the retroactive amounts are to be 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 Industrial Conservation Initiative (ICI) eligibility or the Greenhouse Gas Reduction Account (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 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

<u>Timeline for Leave to Appeal Application</u>

	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

<u>Global Adjustment and PPA Prices</u>

- 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.
  - The definition of Class A was subsequently expanded to include consumers under certain industry classifications with peak demands greater than 3 MW and less than 5 MW. These consumers began being billed as Class A consumers in July 2015.
  - The government has proposed to reduce the threshold for classification as Class A to include consumers under any industry classification with monthly peak demands greater than 1 MW. The base setting period for the expanded program would begin in 2017, with the benefit seen by consumers starting in 2018.

- 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.

<u>Legal Action by Certain NUGs</u>

- 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 OEFC.

Strategic Project Finance Branch
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