



**Supplementary Information
on the Request for Ruling**

**Mémoire supplémentaire
au sujet de la demande de décision**

**Written submission from the
Pickering Harbour Company
Limited, Frenchman's Bay Harbour
& Marine Service Company Limited**

**Mémoire de Pickering Harbour
Company Limited, Frenchman's Bay
Harbour & Marine Service
Company Limited**

In the Matter of the

À l'égard d'

Ontario Power Generation Inc.

Ontario Power Generation Inc.

Application to extend the operation of
Pickering Nuclear Generating Station
Units 5 to 8 until December 31, 2026

Demande visant à prolonger l'exploitation
des tranches 5 à 8 de la centrale nucléaire de
Pickering jusqu'au 31 décembre 2026

Commission Public Hearing

Audience publique de la Commission

June 2024

Juin 2024

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June 10, 2024

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Canadian Nuclear Safety Commission
280 Slater Street,
P.O. Box 1046, Station B
Ottawa, Ontario
K1P 5S9

Attention: Ms. Candace Salmon, Registrar, Commission Registry

Dear Ms. Salmon:

Re: Pickering Harbour Company Limited ("**PHC**"), Frenchman's Bay Harbour & Marine Service Company Limited ("**FBHMSC**") and Ontario Power Generation ("**OPG**") application for licence renewal to the Canadian Nuclear Safety Commission ("**CNSC**") for the Pickering Nuclear Power Generating Station ("**PNPG**") for Reactors 5 to 8 ("**R5/8**")
Our File No: 31403

Further to our previous representations to CNSC in December 2023 and April 2024, this will confirm that we represent the Frenchman's Bay Harbour & Marine Service Company Limited and its subsidiary company, Pickering Harbour Company Limited. This letter is a response to the Response to the Request for Ruling by Ontario Power Generation ("**OPG**"), dated May 30, 2024 (the "**Response**").

Provision of the Requested Information

Firstly, our clients were asking for more than 2 rulings in its letters of April 26 and 29, 2024 (collectively, the "**Letter**"). There was an initial request for information that only OPG can provide with respect to the historical calculation of the exclusion zone and which information is critical to determining the current need and size of the zone in the context of the changes to the Pickering Nuclear Station and its continued operation as requested by the licence extension. This request was not addressed in the Response. This is relevant in that the initial calculations of the exclusion zone were premised, as far as our client is able to discern, on the then proposed eight reactors. Inasmuch as OPG is now reducing its nuclear footprint and de-commissioning the four reactors closest to our client's lands, the underlying facts, assumptions and premises that went into the calculation of the initial exclusion zone are very relevant. Simply put, after December 2024 there will be 4 reactors and they will be the four furthest from our client's lands. How does that affect the exclusion zone and when does this affect take place in the context and timelines of

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the decommissioning of Reactors 1 to 4? Our client feels that this can only be assessed when the initial calculation of the zone line is disclosed and reviewed relative to the continued operation of the Pickering Nuclear Station which our client has confirmed in principle it supports.

That information is relevant to our client's requests in the Letter, namely:

1. Does the Preliminary Decommissioning Plan being updated includes any re-calculations of the exclusionary zone dimensions given that reactors 1 through 4 will be taken offline, and if so, what milestones will be used for such re-calculation;
2. what is the relative timing for such milestones and how do these relate or tie into the 4 decommissioning "states" referred in OPG's supplementary report;
3. if any re-calculation of the exclusion zone is tied into any of the 4 stages or states referred to in the supplementary report, what are the time frames for these stages (a similar request to the milestones referred to in 1 above); and
4. is there a mandatory review of any exclusionary zone where nuclear facilities are taken off-line and permanently shut down or given OPG's response, if there is no mandatory review, is this review something that CNSC can mandate as part of any licencing review of the nuclear facilities at Pickering.

Clearly our client feels that these questions and considerations are inherently within the purview of the CNSC in its review of the revised footprint of the nuclear operations and future plans for the Pickering Nuclear Station, regardless of whether these matters were specifically included by OPG in its application for a licence renewal for reactors 5 through 8.

Historical Context of the PHC Lands and the Exclusion Zone

OPG's statement that PHC acquired title to the lands at 591 Liverpool Road (the "**591 Lands**") subject to the exclusion zone is correct. However, this fails to take note of the most important aspect of that land acquisition. Our client was a *bona fide purchaser for value without notice* of the exclusion zone and when it purchased the lands, its intention was at all times for future re-development of the lands, as it had just completed the successful re-zoning for development of its previous boatyard on the west side of Liverpool Road. The Response infers that since the exclusion zone has been in existence for decades, this is evidence that the exclusion zone affecting our client's lands is permitted. This is circular logic and is without evidence or foundation. You cannot complain about something if you are not aware it is affecting you.

There was no notice on title whatsoever that this exclusion zone affected or impacted the 591 Lands. There were no notices or agreements on title between OPG and any predecessor acquiescing to the imposition of the zone nor any other notice of any nature. Therefore, OPG's argument that the exclusion zone must be acceptable and/or compliant simply by the passage of time without complaint is flawed logic, very misleading and as a matter of law, incorrect. The passage of time does not make the initial imposition of the exclusion zone compliant absent the compliance with the terms of the OPG licence calling for control of the lands affected, which we will address later in this letter. There are examples in the Ontario land registration system when governmental and/or quasi governmental controls are imposed on lands and notice on title is provided to protect bona fide purchasers for value, such as airport regulations where there is clear notice on title where flight paths to an airport dictate permitted heights of structures on lands. We note that is notice derived from a federal overriding authority over land uses. In fact, my client did not learn of the exclusion zone until several years after it acquired the lands and then it tried to start a conversation with OPG through various channels, including the Chief Administrative Officer of the City of

Pickering and was candidly stonewalled. The fact remains that until the 1970s there was no exclusion zone affecting the 591 Lands and OPG has failed to produce any evidence that it has the approval of the owners of the 591 Lands from time to time to encumber such lands with restrictions on use. The imposition of such restrictions without consent or permission is a form of *de facto* expropriation of value. The fact that OPG may not have had this contested in the past is frankly irrelevant in that the expropriation of value continues today and OPG does not control the lands.

Compliance by OPG with its Licence

OPG has made the unequivocal statement that it is in compliance with the terms of its licence in that it “controls” the use of the lands through the zoning, as the current zoning does not permit residential uses on the 591 Lands. It is correct that the current zoning does not permit residential uses. It is incorrect to say that OPG controls this zoning.

The determination of zoning by the municipality is not subject to the control of OPG. OPG has no planning authority or the ability to control the official plan status or zoning bylaws affecting the 591 Lands whatsoever under the *Planning Act (Ontario)*, being the primary provincial legislation dealing with land use. Land use is controlled at first instance by the local municipality under delegated authority of the *Planning Act (Ontario)*. At best OPG, as a circulated commenting agency on applications, can request that the local municipality, as a host community of a nuclear facility, place use restrictions under the zoning bylaws on the lands within the exclusion zone but it cannot insist on it. It has no statutory powers to do so. If the City had refused to impose zoning restrictions on the 591 Lands and had permitted residential uses, then OPG would have had to enforce the operation of the exclusion zone based on the federal requirements under federal law with respect to the operation of a nuclear generating facility and that these requirements were paramount to the provincial powers over real property and its use as delegated to the local municipality. This is the operation of constitutional paramountcy and not the control of zoning.

The Response goes to great lengths to show that our client’s recent zoning application for a high-density mixed use residential and commercial development was refused and that this is evidence that OPG “controls” the zoning. However, this is clearly refutable. If OPG had the power to demand that Pickering refuse the zoning amendment that our client applied for, then Pickering could or would have:

- a) advised our client that it could not accept or circulate the re-zoning application in that OPG, with paramount control of the use of the lands in question, did not permit the change in use; or
- b) if could have advised our client that it would accept the application but that there would be a staff report to council without any circulation required on the application, recommending its refusal on the grounds that OPG, with paramount control of the use of the lands in question, did not permit the change in use.

The City of Pickering did neither of these things. It accepted the application after the usual protracted pre-consultation process and then circulated the application to all the applicable agencies. Staff did comment that the application may be pre-mature given the exclusion zone, but this was only one of many factors that were part of the final determination of the application by council. The primary reasons for the refusal of the application were planning considerations and concerns on the size and density of the proposed development and not its residential uses. The City commissioned an outside consultant to undertake a full zoning and application review and report at great expense to support its contention that the size and density of the development were inappropriate for the area. This would clearly not have been required if the application at first instance had to be refused at the request of OPG. The reasons given for refusing the application were based on planning considerations, the density and size of the mixed use commercial and residential development that our client was proposing and not due to any mandate from OPG that the

City of Pickering could not approve any of the residential uses proposed for the lands. The staff report and council decision in this regard and the reasons for the refusal of the zoning change request are a matter of public record.

That decision has been appealed by our client to the Ontario Land Appeals Tribunal (“**OLAT**”) and as part of that process our client revised the proposed development and has reduced the density and scale of the proposed development but not the fact that it is intended to contain future residential uses. This reduction in the density has led to discussions between the City and our client and on mutual consent by both parties, the hearing at OLAT has been postponed in order for the parties to fully review and consider their positions on the revised proposal. OPG has no standing at OLAT on this matter and this is one more fact demonstrating that OPG does not control the zoning in the exclusionary zone.

To reiterate, the City of Pickering could have granted the residential zoning for the lands with or without any holding designation pending the removal of the exclusion zone. If the City chose to not include any holding designation on the lands with a zoning change, then OPG’s only recourse then would have been to assert paramountcy of the federal legislation imposing the exclusion zone. That is not control of the lands through the zoning to permit the establishment and enforcement of the exclusion zone. That is a *post facto* enforcement of an exclusion zone imposed on lands that OPG clearly does not “control”. The approval of the zoning bylaws would in fact not be unconstitutional. The implementation and operation of that local zoning approval may be subject to the overriding provisions of federal law under the peace, order and good government provisions of the Canadian constitution. That does not make any zoning approvals, if granted for our client’s lands, unconstitutional but rather merely inoperative while the paramount federal legislation is in effect with respect to that matter and those lands. Even that paramountcy if in place, this does not address the questions, issues or requests that we have raised in the Letter, namely:

- a) What is the timing and the trigger for re-calculation for the possible removal of the restrictions on our client’s lands given the changes in the Pickering Nuclear Station since the original operation of the plant and what is the timing for this. In the Response OPG has stated that the future of reactors 1 to 4 is subject to change from the non-operational and surveillance mode. Is there a time frame on this based on how long this condition could last before a decision has to be made ?
- b) Since OPG does not control and has never controlled our client’s lands and therefore is not in compliance with its licence to operate the Pickering Nuclear Station, how does the CNSC intend to address this in the current application in respect of reactors 5 to 8 since, since OPG does not wish to alter the current exclusion zone based on its wait and see stance with respect to reactors 1 to 4.

Proposed Path Forward

OPG has made the offer on a without prejudice basis to meet and discuss this matter further. That is very encouraging to our client, and it is prepared to meet this week and thereafter in this regard to discuss this matter, but in our experience, it is highly unlikely that anything determinative will take place before the CNSC hearings. Our client’s past experience with OPG has given our client concern over this process. There have been past attempts to review this matter with OPG and notwithstanding some cursory communication when licence applications were pending, once the licences were extended, etc., from time to time no further communications were received. This includes any response to the letter of November 8, 2016 by Tony Prevedel, the then Chief Administrative Officer of the City of Pickering, the host community of the nuclear station. Candidly we feel that if these are voluntary discussions with no parameters imposed by CNSC that past experience has shown that these discussions will not move forward with any alacrity or resolution.

The issue of the control of the lands in the exclusion zone and how the affected landowners in this zone are dealt with by OPG is clearly within the mandate of the CNSC to review and impose conditions with respect to. Therefore while our client is happy to meet with OPG as soon as possible, we feel that in order for these discussions to be meaningful that there has to be mandatory conditions imposed by the CNSC with respect to this matter to deal with the exchange and provision of information by OPG as requested above so our client can clearly plan its path forward with respect to its lands and be able to deal with the issue of compensation if OPG needs to continue with the imposition of the current exclusion zone as part its operation of the Pickering Nuclear Station.

Yours truly,
SCHNEIDER RUGGIERO SPENCER MILBURN LLP

*David R. Spencer**

Per: David R. Spencer
Partner through David R. Spencer Professional Corporation

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c. Board of Directors — Pickering Harbour Company Limited