EB-2023-XXXX

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S. O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF an application by Ontario Power Generation Inc. pursuant to section 78.1 of the *Ontario Energy Board Act, 1998 for* an Order or Orders determining payment amounts for the output of certain of its generating facilities.

APPLICATION FOR AN ACCOUNTING ORDER ESTABLISHING A VARIANCE ACCOUNT TO CAPTURE THE NUCLEAR REVENUE REQUIREMENT IMPACTS OF THE OVERTURNING OF BILL 124

1. The applicant, Ontario Power Generation Inc. ("OPG") is a corporation, incorporated under the Ontario Business Corporations Act, with its head office in the City of Toronto. The principal business of OPG is the generation and sale of electricity in Ontario.

2. In this application, OPG requests the approval to establish a variance account to record the nuclear revenue requirement impacts resulting from the Ontario Superior Court overturning the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* ("Bill 124"), which prescribed limits on compensation increases in the Ontario public sector, including OPG. More specifically, Bill 124 restricted both union and non-union provincial public sector wage increases and total compensation increases to 1% annually for a three-year moderation period.

3. The legislated limits on compensation set out in Bill 124 were the basis of the forecast compensation costs reflected in OPG's approved nuclear revenue requirements for the 2022-2026 period in the EB-2020-0290 proceeding.

4. Employees belonging to all of OPG's bargaining units were subject by Bill 124. OPG's major direct bargaining relationships are with the Power Workers' Union ("PWU") and the Society of United Professionals ("Society"). On November 29, 2022, the Ontario Superior Court of Justice ruled Bill 124 to be contrary to the *Canadian Charter of Rights and Freedoms* and of no force and effect. The unions have indicated that they will be seeking enhanced wages for the periods their members' compensation has or would have been restrained due to Bill 124. The Government of Ontario has filed an appeal of the Court's decision.

5. The overturning of Bill 124 is a change of law that OPG could not reasonably have anticipated during the 2022-2026 payment amounts application and is expected to materially increase OPG's compensation costs during the 2022-2026 period relative to the costs reflected in the forecast revenue requirement and the currently approved payment amounts. Such costs are necessary for the continued operation of the nuclear facilities.

6. Notwithstanding that the outcome of any labour relations process is inherently uncertain, OPG expects that the annual revenue requirement impact will be in excess of the company's $10M annual materiality threshold. This is illustrated by an analysis performed in response to an interrogatory during the EB-2020-0290 application which asked OPG to quantify the revenue requirement impact had wage escalation during the moderation period been set at inflation rather than 1%.[1]

7. The variance account is proposed to record impacts effective March 1, 2023 until the effective date of the Ontario Energy Board's ("OEB") next payment amounts order. OPG requests that the OEB issue an interim order effective March 1, 2023, approving the establishment of the requested variance account on an interim basis. This will permit OPG to record the nuclear revenue requirement impacts in the account pending the OEB's final order in respect of this Application.

[1] EB-2020-0290 Ex. L-F4-03-PWU-023

8. OPG expects that information supporting the balance in the proposed account, as well as the timing and manner of its disposition, would be reviewed in a future OPG application. Accordingly, there is no rate impact at this time from this Application.

9. OPG requests that this Application proceed by way of a written hearing.

10. The Application will be supported by written evidence, as required. The written evidence filed by OPG may be supplemented or amended from time to time by OPG prior to the OEB's final decision on the Application.

11. OPG further applies to the OEB pursuant to the provisions of the Act and the OEB Rules of Practice and Procedure for such orders and directions as may be necessary in relation to the Application and proper conduct of this proceeding.

12. The persons affected by this Application are all electricity consumers in Ontario. It is impractical to set out the names and addresses of the consumers because they are too numerous.

13. OPG requests that copies of all documents filed with the OEB by each party to this Application along with copies of all comments filed with the OEB in accordance with Rule 24 of the OEB Rules of Practice and Procedure be served on the applicant and the applicant's counsel as follows:

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Dated at Toronto, Ontario, this 1st day of March 2023.

Ontario Power Generation Inc.

[Original signed by]

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Saba Zadeh

Vice President, Regulatory Affairs

1.0 BACKGROUND

1.1 Bill 124

Bill 124, which came into force on November 8, 2019, set limits on compensation increases for unionized and non-unionized employees in the Ontario public sector and applied to OPG. Bill 124 limited the maximum annual increase in both wages and total compensation to 1% for a three-year period, referred to as the "moderation period", subject to certain exceptions. A broad range of unions and organizations challenged the constitutionality of Bill 124. In a decision dated November 29, 2022, Justice Koehnen of the of the Ontario Superior Court found that Bill 124 substantially interfered with the applicant unions' section 2(d) freedom of association rights under the *Canadian Charter of Rights and Freedoms* ("Bill 124 Decision"). After determining that the violation could not be saved under section 1 of the Charter, Justice Koehnen declared Bill 124 to be "void and of no effect." The government of Ontario filed an appeal of the decision with the Ontario Superior Court on December 29, 2022. The legislation is presently void and of no effect.

Bill 124 was applicable to OPG based on the Complementary Amendments of Bill 124. Section 41(1) amended the *Labour Relations Act*, *1995* to apply sections 1 to 16 and 24 to 38 of Bill 124 to OPG, its subsidiaries, trade unions and employees represented by those trade unions. Section 42(1) repealed and substituted a revised section 143(1) of the *Employment Standards Act*, *2000* to apply the provisions of Bill 124 to OPG, its subsidiaries and their employees.

OPG's major direct bargaining relationships are with the PWU and the Society.[2] Employees belonging to all of OPG's bargaining units are subject to Bill 124. The three-year moderation period began on April 1, 2021 for OPG's PWU bargaining unit and on January 1, 2022 for OPG's Society bargaining unit. As part of these periods, the PWU bargaining unit was covered by a collective agreement with a term of April 1, 2021 to March 31, 2022 and the Society bargaining unit is covered by a collective agreement with a term of January 1, 2022 to December 31, 2023. The process for a renewal collective agreement with the PWU effective

[2] Additionally, OPG has a direct bargaining relationship with the Canadian Union of Skilled Workers, which represents certain construction trades employees. Information related to this small number of employees has been historically aggregated as part of the "EPSCA" category of employees in OPG's evidence.

April 1, 2022 is ongoing. The process for a renewal collective agreement with the Society is expected to commence later in 2023.

Each bargaining unit will address the implications of the Bill 124 Decision on existing collective agreements covered by the moderation period according to the provisions of such agreements. If the collective agreement contained provisions that reopen compensation should the Bill 124 challenge be successful ("Reopener Provision"), the union has the ability to seek increased compensation for such period through two-party bargaining and interest arbitration. If the collective agreement contained no such language, the union may seek increased compensation through the Ontario Superior Court where the constitutionality issue was originally decided.[3]

PWU

The one-year collective agreement with the PWU that expired on March 31, 2022 did not contain a Reopener Provision. This agreement was achieved through two-party bargaining and ratified by the PWU membership in early 2021. In compliance with Bill 124, it reflected a 1% wage increase effective April 1, 2021. OPG and the PWU have been negotiating a renewal collective agreement since the spring of 2022, and discussions are presently ongoing.

The Society

The current two-year collective agreement with the Society expiring on December 31, 2023 contains a Reopener Provision. The agreement reflected a 1% wage increase effective each of January 1, 2022 and January 1, 2023, in compliance with Bill 124. While OPG and the Society were able to agree on a number of items through two-party bargaining, the agreement was finalized through an interest arbitration award issued in December 2021. The arbitrator's decision included the Reopener Provision.

Following the Bill 124 Decision, the Society is seeking increased compensation for the term of their collective agreement pursuant to the Reopener Provision. This matter is presently scheduled for interest arbitration on March 15, 2023.

[3] Alternatively, the union could pursue increased wages in the subsequent round of collective bargaining to make up for the wage restraint during the moderation period.

1.2 OPG Application for 2022-2026 Payment Amounts

On December 31, 2020, OPG filed an application (EB-2020-0290) under section 78.1 of the *Ontario Energy Board Act, 1998* seeking approval for payment amounts for generating facilities prescribed under *Ontario Regulation 53/05* ("O. Reg. 53/05"). The OEB issued its Decision and Order on the application on November 15, 2021. The EB-2020-0290 Payment Amounts Order was issued on January 27, 2022 and established, among other things, payment amounts effective January 1, 2022 that are expected to continue until OPG's next application for payment amounts to be effective January 1, 2027.

OPG's evidence in EB-2020-0290 explained that its compensation cost forecasts for the 2022-2026 period were premised on the known requirement of Bill 124. The following four examples demonstrate OPG's adherence to the restrictions of Bill 124 in its compensation cost forecast:

1) In discussing unionized salaries at Ex. F4-3-1, p. 11, OPG stated that it is "legally bound by its collective agreements, which establish salary rates and govern salary increases, any cost of living adjustments, and progressions through established salary ranges". OPG also notes that "[t]ypical union salary increases have tended to be between 2% and 3% per year" for OPG but, for future years, "OPG projections are based on known requirement per Bill 124".

2) At Ex. F4-3-1, p. 14, OPG stated:

> Bill 124 sets limits on compensation increases for unionized and non-unionized employees in the Ontario public sector, which includes OPG. Bill 124 limits the maximum annual increase in both wages and total compensation to 1% for a three year period, referred to as the "moderation period". The moderation period is tied to the expiration dates of the collective agreements and, accordingly, these wage restrictions will be in effect for any PWU collective agreement renewal period within April 1, 2021 to March 31, 2024. Similarly, the wage restrictions will apply to any Society collective agreement renewal period within January 1, 2022 and December 31, 2024.

3) At Ex. F4-3-1, p. 29, OPG stated: “During the IR term, OPG will be subject to further caps on wage increases at 1% annually for applicable three year periods, for both management and unionized employees, pursuant to Bill 124.”

4) At Ex. F3-1-1, p. 3, OPG stated: “OPG’s Support Services Costs reflect the requirements of Bill 124 … which limits the maximum annual increase in both wages and total compensation for OPG’s unionized and non-unionized employees to 1% for a three year ‘moderation period’”.

OPG filed a settlement proposal on July 16, 2021 covering nearly all issues in the proceeding, including compensation costs. With respect to operations, maintenance and administration (“OM&A”) expenses including compensation, per the terms of the OEB approved settlement proposal (Decision and Order, Schedule A, p. 25), “[t]he Parties agree to reduce the proposed total OM&A expenses for the nuclear facilities, excluding Darlington Refurbishment OM&A, Darlington New Nuclear OM&A and Centrally Held Costs, but including Asset Service Fees, for each year of the 2022-2026 period by 3.0%. The Parties agree to Darlington Refurbishment OM&A, Darlington New Nuclear OM&A and Centrally-Held Costs as proposed by OPG.”

With respect to the forecast capital in service additions (which included capitalized compensation costs) as part of rate base, per the terms of the OEB approved settlement proposal (Decision and Order, Schedule A, p. 20), “[t]he Parties further agree to the forecast rate base for nuclear facilities for 2022-2026 set out … below, subject to the OEB’s decision on the proposed in-service additions for the D2O Project. The reduction in settled rate base relative to OPG’s request relates to agreed-upon adjustments to the proposed 2022-2026 forecasted in-service additions for Nuclear Operations and Corporate Support Services”.

2.0 NUCLEAR REVENUE REQUIREMENT IMPACT AND MATERIALITY

The impact of overturning Bill 124 on OPG's forecast compensation costs for the nuclear facilities for the 2022-2026 period is expected to be in excess of OPG’s accounting order materiality threshold of $10M per year. While the exact impact cannot be determined until the outcome of current and future processes to establish the compensation provisions of collective agreements that were or would have been covered by a moderation period is known, it is very

likely that wage increases will exceed 1% in certain years. In this regard, a directional approximation of the impact can be observed from a response to an interrogatory submitted in EB-2020-0290 (Ex. L-F4-03-PWU-023), which asked OPG to "quantify the impact on the test period revenue requirement had wage escalation been set at inflation beginning in 2021". In response, OPG stated:

> OPG understands the question to refer to future collective agreements that will be subject to the Bill 124 moderation periods. If the wage escalation were to be set at an assumed inflation rate of 2% per year for April 1, 2021 to March 31, 2024 for the PWU and 2% per year for January 1, 2022 to December 31, 2024 for the Society, estimated revenue requirement impact would [be] an increase of approximately **$33M in 2022, $39M in 2023, $42M in 2024, $36M in 2025 and $28M in 2026**, for impacts on wages and resulting impacts on pension costs. As in EB-2016-0152, Ex. L-6.6-13 PWU-015, these estimates were determined on the basis of compensation costs reflected in OM&A expenses and are inclusive of associated income tax impacts (calculated at 25% tax rate /(1-25% tax rate)).

The estimates set out above are in excess of OPG's accounting order materiality threshold of $10M per year, and reflect wage increases that are lower than recent observed increases in inflation.

3.0 NEW VARIANCE ACCOUNT

OPG requests the OEB's approval to establish a new variance account, the Impact of Overturning Bill 124 Variance Account, to record the nuclear revenue requirement impacts resulting from the overturning of Bill 124.

3.1 Justification

This Application is being filed pursuant to the accounting order process as part of OPG's rate framework, as described in EB-2020-0290, Ex. A1-3-2 and accepted by the parties pursuant to the terms of the OEB approved settlement proposal (Decision and Order, Schedule A, p. 17):

> OPG proposes that unforeseen events affecting the nuclear business continue to be addressed through an accounting order process, subject to the $10M regulatory materiality threshold that

> has historically applied to OPG and which was accepted for this purpose in the EB-2016-0152 Decision. The approach is consistent with the accounting order application requirements currently in place for accounting changes impacting the calculation of OPG's nuclear liabilities and changes in depreciation end-of-life dates for the prescribed nuclear facilities. OPG's most recent accounting order application pursuant to these requirements was filed, and approved by the OEB, in EB-2018-0002.

OEB staff submitted an interrogatory in EB-2020-0290 (Ex. L-A1-03-Staff-009) requesting that OPG further describe the accounting order process. In response, OPG stated:

> Following a material, unforeseen event which OPG believes would satisfy the requirements [of an accounting order], OPG would provide notice to the OEB of its intention to file an application for an accounting order seeking approval to record the impacts related to the event in a deferral account. OPG would then file its application setting out the detail and rationale for the request. OPG would follow the process as determined by the OEB with respect to its review and adjudication of the application.

The cost impacts resulting from the overturning of Bill 124:

(i) will result in a nuclear revenue requirement impact that is not reflected in the payment amounts established by the EB-2020-0290 Payment Amounts Order, which arises from a change in a law and could not have formed a part of the approved revenue requirement as OPG was obliged to abide by applicable laws and had no knowledge of the outcome of the Bill 124 Decision at the time of the payment amounts application;

(ii) will result in an annualized nuclear revenue requirement impact that is expected to be higher than the $10M materiality threshold; and

(iii) recognizing that the prudence of any costs recorded would be determined in a separate process, are appropriate to be recorded in a variance account pending the consideration of prudence since these compensation costs reflect costs necessary for the continued operation of OPG's nuclear facilities.

3.2 Account Operation and Reporting

OPG proposes that the Impact of Overturning Bill 124 Variance Account be eligible to record the nuclear revenue requirement impacts of the overturning of Bill 124, effective March 1, 2023. No such impacts have arisen to-date, since the processes to establish the compensation provisions of collective agreements that were or would have been covered by a moderation period are currently ongoing. Accordingly, OPG requests that the OEB establish the proposed variance account effective March 1, 2023 on an interim basis, pending the outcome of this Application, to enable the recording of the impacts that arise once these processes are concluded.

The proposed variance account would record the revenue requirement impacts of the difference between the forecast compensation costs included in the EB-2020-0290 proposed nuclear revenue requirements[4] and such compensation costs for the nuclear facilities reflecting the overturning of Bill 124.[5] The OM&A expenses portion of compensation costs reflecting the overturning of Bill 124 would be determined based on the approach applied in the EB-2020-0290 Ex. L-F4-03-PWU-023 noted above. A similar approach would be used for the capital in-service additions portion of such compensation costs.

Illustrative accounting order and account entries for the proposed variance account are provided in Appendix A.

OPG proposes to apply interest to the monthly opening balance of this account at the interest rate set by the OEB from time to time pursuant to its interest policy for deferral and variance accounts.

If the proposed account is approved, OPG would file its balance in conjunction with its regular reporting on other variance and deferral accounts approved by the OEB.

3.3 OPG Future Applications

OPG will provide a proposal for the disposition of amounts recorded in the new variance account in a future application. As part of that application, OPG will also provide detailed

[4] EB-2020-0290 Ex. F4-3-1, Attachment 1 (updated July 9, 2021)
[5] Account additions would be calculated such that there is no duplication with other deferral and variance accounts.

information to support the amounts recorded in the account. The account balance will be included in the audit of OPG's deferral and variance account balances in support of such disposition.

OPG acknowledges that establishment of the proposed variance account does not constitute approval of the balance that will be recorded in this account. To the extent the Ontario government's appeal of the Bill 124 Decision affects OPG's ultimate obligations under the collective agreements, such impacts may appropriately be addressed in a future OPG application for the disposition of the account. Parties will have the opportunity to review and test the evidence filed in such a future application regarding the actual entries and variance account balance.

Impact of Overturning Bill 124 Variance Account
Ontario Power Generation Inc.
Accounting Order

OPG shall establish this new account, effective March 1, 2023, to record the nuclear revenue requirement impacts resulting from the overturning of the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* ("Bill 124").

Entries	**Debit**	**Credit**
DR Impact of Overturning of Bill 124 Variance Account	x,xxx	
CR OM&A Expenses		x,xxx
DR Impact of Overturning of Bill 124 Variance Account	x,xxx	
CR Depreciation Expense		x,xxx
CR Return on Rate Base		x,xxx
CR/DR Income Tax Expense	x,xxx	x,xxx

OPG shall apply interest to the monthly opening balance of this account at the interest rate set by the OEB from time to time pursuant to its interest policy for deferral and variance accounts.

OPG shall file the balance in the Impact of Overturning Bill 124 Variance Account in conjunction with its regular reporting on other deferral and variance accounts approved by the OEB.