EB-2023-0098

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

Submissions of the Power Workers' Union

1. On June 5, 2019, the Ontario provincial government introduced the Protecting a Sustainable Public Sector for Future Generations Act, 2019 ("Bill 124") which capped public sector wage increases to one percent annually. On November 29, 2022, Bill 124 was ruled unconstitutional by the Ontario Superior Court (the "Court Decision").

2. OPG is requesting approval to establish a variance account to record the nuclear revenue requirement impacts of the Court Decision. The revenue requirement impacts arise from additional prudently incurred compensation costs above the one percent prescribed by Bill 124, which was the basis for compensation costs included in OPG's 2022-2026 payment amounts for prescribed generating facilities proceeding (EB-2020-0290).

3. Bill 124 was in place throughout OPG's prescribed generation payment amounts proceeding, from the date of the initial application was filed on December 31, 2020 to the settlement agreement that was approved November 15, 2021 (the "Settlement"). The Court Decision was not released until over a year after the settlement agreement was approved.

4. The Court Decision had immediate consequences. It has led to a new collective bargaining agreement with the Power Worker's Union ("PWU") and renewed collective

bargaining negotiations with the Society of Unionized Professionals ("SUP"). Any reasonable wage increases that reflect the current and recent extraordinary inflation pressures will cause material revenue requirement impacts for OPG. This increase is above and beyond what could be considered normal business risk for OPG.

5. It is not relevant that OPG was aware of legal challenges to Bill 124 at the time the Settlement was entered into. It would not have been reasonable to include any level of compensation costs in excess of the prescribed one percent wage increases in OPG's revenue requirement. Unlike other business risks, OPG could not reasonably consider a range of potential wage increases and include a contingency for wage increase above the legislated level.

6. The outcome of the legal challenge to Bill 124 was not known during the payment amounts proceeding. As such, all parties worked under the assumption that the bill would remain in place at the low one percent wage increases embedded in OPG's revenue requirements. The escalation of OPG's compensation costs was not based on an inaccurate forecast – it was based on legislation that has since been overturned.

7. It would not have been reasonable for OPG to include any compensation costs beyond what was legislated. Any compensation costs in excess of the legislated amount included in OPG's revenue requirement surely would have been objected to by intervenors and/or disallowed by the Board.

8. The implementation and subsequent overturning of Bill 124 made annual changes to compensation costs largely uncontrollable for OPG. Since the impacts are related to legislation, these impacts on OPG's revenue requirements are analogous in a regulatory rate-setting perspective to other legislated changes. Legislated tax changes are sufficiently common that there is a generic account for PILs and Tax variances (USoA# 1592).

9. It is appropriate for OPG to request approval to establish a variance account at this time so it can begin tracking incremental amounts as of March 1, 2023. There was no reason to establish this variance account during the payment amounts proceeding because Bill 124 was still in place and would remain enacted for over a year. To deny the present application would effectively amount to a hindsight requirement for every

applicant to account for every conceivable variance in its forecasts. This would create undue complexity. The OPG's present manner of proceeding is a perfectly appropriate response to a material change in circumstances.

10. OPG's application for the variance account satisfies the causation, materiality, and prudence criteria for the establishment of a deferral or variance account. OPG's return on equity is not relevant to any of these criteria. The PWU notes the years relevant to this variance account are in the future, in which the ROE is currently unknown.

11. Absent any legislation that unconstitutionally suppresses the wages of public sector workers by interfering with the collective bargaining process, OPG's prudently incurred compensation costs would have been materially higher. Denying the opportunity for OPG to recover its prudently incurred compensation costs would violate the regulatory compact between regulators and regulated utilities.

12. Any objections to the ultimate recovery of the costs in question will be heard on the merits in a subsequent proceeding, and are not the proper subject of this narrow application. As such, the PWU respectfully submits that any objections in this proceeding should be carefully scrutinized to ensure that the eventual merits issue does not unduly influence the determination of this preliminary procedural application.

13. The PWU submits that the creation of a variance account to record the revenue requirement impacts of overturning Bill 124 is appropriate.

All of which is respectfully submitted.