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Ontario Power Generation Inc. (OPG)
Application for variance account to capture the nuclear revenue requirement impact of the overturning of Bill 124
EB-2023-0098

Submission of the
Vulnerable Energy Consumers Coalition
(VECC)

May 19, 2023

Vulnerable Energy Consumers Coalition

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Summary

1. OPG seeks 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").[1] The Bill impacts the wages and salaries of employees represented by the Power Workers' Union ("PWU") and the Society of United Professionals ("Society"). OPG is not seeking to include compensation impacts related to any non-unionized employees.[2]

2. OPG's position is that the overturning of Bill 124 is a change of law that it could not have reasonably been anticipated during the 2022-2026 payment amounts application.[3]

3. 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 requested that the OEB issue an interim order effective March 1, 2023 approving the establishment of the requested variance account on an interim basis. The Board issued the requested order on March 22, 2023. Interested parties were not given an opportunity to offer submissions prior to the issuance of that order.

4. VECC submits the Board should not grant approval of the variance account as doing so would violate the agreement among parties and as approved by the Board in EB-2020-0290.

5. We also hold that granting of the account (or accounts) on the basis that the ultimate determination of the matter will be addressed at the time of disposition of any such accounts is prejudicial to the parties of the settlement agreement approved by the Board in EB-2020-0290

The Application

6. An applicant must meet three tests for the establishment of a new deferral or variance account[4].

    - Causation: the forecasted expense must be clearly outside of the base upon which rates were derived.
    - Materiality: the forecasted amounts must exceed the OEB-defined materiality threshold and have a significant influence on the operation of the distributor,

[1] See: Ontario English Catholic Teachers Assoc. v. His Majesty, 2022, ONSC 6658. Online: https://www.canlii.org/en/on/onsc/doc/2022/2022onsc6658/2022onsc6658.pdf
[2] AMPCO-7
[3] Application, page 2, par. 5
[4] Filing Requirement for Electricity Distribution Rate Applications 2021 Edition. These are unchanged from those also provided for Electricity Transmitters and Natural Gas Distributors.

otherwise they must be expensed in the normal course and addressed through organizational productivity improvements.

- Prudence: the nature of the costs and forecasted quantum must be based on a plan that sets out how the costs will be reasonably incurred, although the final determination of prudence will be made at the time of disposition. In terms of the quantum, this means that the applicant must provide evidence demonstrating as to why the option selected represents a cost-effective option (not necessarily least initial cost) for ratepayers.

7. We submit that the Applicant fails all three tests.

Causation

8. Generally, the issue of causation is straightforward. In this case it is not. Causation requires that the Board establish that the event is clearly outside the basis upon which rates were derived. We submit that the Board cannot know that the issue of Bill 124, including its possible demise, was outside of the way in which rates were established in this case.

9. In its Decision and Order EB-2020-0290 the Board approved the Settlement Agreement among the parties. It adjudicated only two issues that were not settled – Small Modular Reactor-Related Issues and D2O Project-Related Issues. The Board made no changes to that settlement nor did it make any comments as to any matters within that agreement it might find problematic.

10. OPG makes the claim that it could not reasonably have anticipated the overturning of Bill 124 during the EB-2020-0290 proceeding. This is clearly an untenable position. OPG filed the settlement agreement with the Board on July 16, 2021. Settlement negotiations began June 7, 2021. The first challenge to the new law was initiated by the Ontario English Catholic Teachers Association who filed their Notice of Application in the Superior Court of Justice on February 11, 2020[5].

11. A number of parties in this proceeding have attempted to query OPG as to what Bill 124 analysis it had undertaken and when it did so. The Utility's response is best described as evasive.[6] Ultimately, OPG purports to have not taken a view on the likelihood of success or failure of any of the legal challenges to Bill 124.[7] Again we find this statement to be untenable.

[5] VECC-2
[6] See VECC-2, SEC-2, CME-1
[7] CME-1

12. What is meant by “not taking a view” is ambiguous. Does this mean that no one at OPG considered the risks of changes to the law? Or that no discussions took place about the constitutional legality of the law and notwithstanding the matter was before the courts prior to and at the time of the EB-2020-0290 settlement conference? Are we to believe that one of the biggest corporate entities in Canada blithely ignored a potential historical change in law and one that impacted the vast majority of its workforce and compensation costs?

13. We submit that it is highly implausible that OPG was unaware as to the likelihood of overturning of Bill 124 or the consequences thereof. One need not be a legal scholar to understand the potential violation of the Canadian Charter of Rights and Freedoms by a law that purports to usurp collective bargaining. In December of 2021 an arbitrator in OPG labour negotiations included a “Reopener Provision” in its two-year collective agreement with the Society. One must ask - when did OPG become aware of a request for a reopener provision?

14. We think OPG usually fully competent with the large amounts of ratepayer money expended on its human and legal resources and that it could not be blind to such obvious and large financial risks. If that were so, then that would in itself be reason enough to deny this application.

15. This matter is not one which unequivocally occurred subsequent to the process of the last rate proceeding. The events of Bill 124 are concurrent with the former application and its processes including the settlement conference. The Board cannot know what discussions happened during the settlement process in the spring and early summer of 2021. All parties are sworn to secrecy. Even if they were not and the Board had insight into those negotiations it still would not know what was in the minds of the parties at that time. As long-time participants in these types of negotiations we can unequivocally state that saying or doing nothing with respect to an issue is just as an important a strategy as actively negotiating.

16. The question the Board must now turn its mind to is whether it is reasonable to believe that the question of Bill 124 could not have entered into the minds of any of the parties to the settlement negotiations. The negotiations took place more than a year after the first appeal and that Bill 124. The matter was live before the courts at the time of the settlement conference. Is it then reasonable to conclude that no party (including OPG) had the issue in mind when it was in negotiations? Parties to the proceeding were clearly aware of Bill 124 and sophisticated (and maybe even naïve) parties aware of the potential for its reversal.

17. Since the Board cannot know what if any impact Bill 124 had in those negotiations it is left with only two choices. It can deny the application by making the reasonable assumption that parties were sufficiently aware of the issue as to have imputed it into

their negotiations. It is not necessary to conclude the parties actually did so only whether it is plausible that they could have could have done so.

18. In the alternative the Board could, as per the requirements of the approve settlement proposal, return to entire matter back to the parties for reopening of negotiations. To be clear this would necessarily require that all the issues would be subject to renegotiations. While this is a plausible alternative its consequences could be prolonged and upend the entire EB-2020-0290 proceeding.

Materiality

19. OPG suggests the materiality threshold of $10 million is met. The entirety of its evidence on that matter a reference to a single interrogatory in EB-2020-0290[8] and a single table in response to Board Staff interrogatory as shown below.[9]

Table 1: Forecasted Amounts to be Recorded into Proposed Bill 124 Variance Account ($M)

Year in which impact pertains to	Year in which OPG plans to record the amount	Amount for Society	Amount for PWU	Total Estimated Amount
2019	n/a	n/a	n/a	n/a
2020	n/a	n/a	n/a	n/a
2021	n/a	n/a	n/a	n/a
2022	2023	Not available	14	14
2023	2023		48	48
2024	2024		30	30
2025	2025		24	24
2026	2026		14	14
Total			**130**	**130**

20. However, OPG also declined to answer questions which would go to verifying how these estimates are calculated including a refusal to update employment estimates (Appendix 2-K) at AMPCO-6. As such in our submission the Applicant has failed the test of demonstrating the annual materiality of its proposal and notwithstanding being given an opportunity to clarify the matter.

[8] Application pages 9- Section 2.0
[9] Staff-1

21. We also disagree with the method by which OPG would intend to account for the variance -and hence its materiality[10].

"*OPG would recompute such forecast amounts proposed in EB-2020-0290, by year, substituting the then-assumed compensation parameters with such actual parameters reflecting the overturning of Bill 124, while holding constant other labour cost variables such as the number of full-time equivalent employees*."

22. It is unclear to us why the variance would be calculated based on holding the full-time equivalent number of employees the same as that proposed in EB-2020-0290 and would not instead record the lesser of that or the actual number of employees.

23. OPG also refused to answer Board Staff questions with respect to actual return of the Utility. In doing it made the following statement[11]:

> *The company's return on the combined prescribed assets is unrelated to whether the nuclear compensation costs to be recorded to the proposed variance account are outside of existing payment amounts or to the materiality of those costs and, as a result, do not advance the OEB's consideration as to the establishment of the account*.

24. We disagree. OPG's takes an unnecessarily narrow view of the meaning of "materiality". Materiality is to be determined both in the absolute and relative sense of the word. When deciding as to whether it should establish an account which will ultimately visit past costs onto future customers the Board must assure itself that the need is material in relation to the Utility's ability to achieve a reasonable return. In this case that test is not met.

25. When a regulated utility seeks to impose extraordinary costs not initially contemplated in rates the Board is not only within it rights, but is obligated to consider whether the request is reasonable in light all events. The Board cannot be in the position of allowing costs to be recorded and then potentially be recovered if at the same time the Utility is making extraordinary returns.

Prudence

26. The issue of prudence raises the same concerns as that of causation. At this juncture can the Board answer the question as to whether an increase in compensation costs that would and will occur in the absence of Bill 124 represent a prudent compensation cost to incorporate into rates? Is it better placed now to consider that question than

[10] SUP-1
[11] Staff-4

when the matter was before parties at the settlement conference. Does it wish to review all the compensation evidence and make its own determination? Given OPG's long history of compensation above the median of its peers and the Board's numerous comments and disallowances on the matter of compensation is an increase now due to a reversal to a patently suspicious law a just and reasonable outcome?

27. In any event the settlement agreement prevails as a binding document. It was approved by the Board as an appendage and not only forms the basis of the current OPG prices but it also governs the relationship between the intervening parties and OPG.

Response of the Applicant

28. VECC's submissions revolve around two issues. The first is whether Bill 124 and its potential and actual consequences constitutes and "unforeseeable event". The second issue is whether the revocation of Bill 124 visit upon OPG an unreasonable harm. OPG belatedly addressed both those issues in its May 12, 2023 response to SEC's letter of May 9 which sought a full answer to questions poised.

29. Their response does not add much light on either issue other than to confirm that it was in early 2020 that parties would be aware of the legal challenges to Bill 124. As for returns we note that OPG expects equity returns in the range of 12.5-13%. This is significantly above the 2022 ROE value set by the Board for electricity distributors in October 2021 of 8.66%.

30. It is OPG's view that the overturning of Bill 124 represents an unforeseen event with a material impact on the nuclear business. It is VECC's view that the matter was entirely foreseeable and that OPG is now reneging from what it has agreed to with intervenors in EB-2020-0290.

The Settlement Agreement

31. The Settlement Proposal once approved by the Board becomes not only the basis of the prices that the Board has established but it also governs the relationship of the signing parties. These provisions include[12]:

    - However, as between the Parties, and subject only to the OEB's approval of this Settlement Proposal, this document is intended to be a legal agreement, creating mutual obligations, and binding and enforceable in accordance with its terms.

[12] Decision and Order, EB-2020-0290, November 15, 2021

- None of the matters in respect of which a settlement has been reached is severable. Numerous compromises were made by the Parties with respect to various matters to arrive at this Settlement Proposal. Reductions or increases to the agreed-upon amounts may have financial consequences in other areas of this Settlement Proposal, which may be unacceptable to one or more of the Parties. If the OEB does not accept the Settlement Proposal in its entirety, then there is no agreement, unless the Parties agree, in writing, that the balance of this Settlement Proposal may continue as valid settlement subject to any revisions that may be agreed-upon by the Parties.
- In the event that the OEB directs the Parties to make reasonable efforts to revise the Settlement Proposal, the Parties agree to use reasonable efforts to discuss any potential revisions, but no party will be obligated to accept any proposed revision. The Parties agree that all of the Parties must concur with any revised settlement proposal, or take no position, prior to its resubmission to the OEB for its review and consideration as a basis for making a decision.

32. The settlement proposal is an agreement among the parties. As such OPG has a duty to consult with and enter into negotiations with the intervening parties in EB-2020-0290 if wishes to amend that agreement.

33. We acknowledge the difficult situation this application brings not just to this particular proceeding but also to the entire notion of how an approved settlement should be interpreted over its lifetime. As such it may be tempting for the Board to punt the matter to the future by approving the account and letting the settlement of the issues be determined at the time of a proposed disposition. In our view this would be an incorrect way to proceed.

34. In essence this application is about whether the issue of Bill 124 was a matter in the minds of parties in EB-2020-0290. Whether it was referenced explicitly or considered implicitly is of no consequence. What is of consequence is whether the Board can upset the agreement of parties by insinuating what they knew and what they did with what they knew. Delaying this decision will not add to the body of evidence or ability of the Board to bring a reasonable outcome to the ratepayers who are required to pay the consequences.

VECC submits that it has acted responsibly and efficiently during the course of this proceeding and requests that it be allowed to recover 100% of its reasonably incurred costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED