EB-2023-0098

ONTARIO ENERGY BOARD

Ontario Power Generation Inc.

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.

SUBMISSIONS OF CANADIAN MANUFACTURERS & EXPORTERS ("CME")

May 19, 2023

Scott Pollock
Borden Ladner Gervais LLP
Barristers & Solicitors
100 Queen Street
Suite 1300
Ottawa, ON K1P 1J9

Counsel for CME

Table of Contents

1.0 INTRODUCTION 3

2.0 OPG'S APPLICATION IS ESSENTIALLY A Z-FACTOR APPLICATION 4

3.0 OVERTURNING BILL 124 WAS FORESEEABLE 6

4.0 CREATING A NEW VARIANCE ACCOUNT WOULD DEFEAT THE SETTLEMENT AGREEMENT 9

5.0 OPG ROE'S DEMONSTRATES OPG DOES NOT NEED ADDITIONAL FUNDING 10

6.0 COSTS 11

1.0 INTRODUCTION

1. These submissions are made on behalf of Canadian Manufacturers & Exporters ("**CME**") with respect to the application made by Ontario Power Generation ("**OPG**") for an accounting order to establish a variance account to capture the nuclear revenue requirement impacts of the overturning of Bill 124.

2. OPG submitted its application for an accounting order on March 1, 2023. In its application, OPG requested approval of an accounting order to establish a variance account that would record the variance between the costs for unionized employees built into existing payment amounts and the increased amounts OPG expects to have to pay to its unionized workforce as a result of the Court overturning the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, S.O. 2019, c. 12 (the *"**Act**"* or "**Bill 124**").

3. Pursuant to the Ontario Energy Board's (the "**OEB**" or the "**Board**") Notice of Hearing and Procedural Order, issued on March 22, 2023, the parties have engaged in a written hearing process, where parties have asked interrogatories and been provided with some answers from OPG. The Board's procedural Order also provided that any submissions made by Board Staff or intervenors were required by May 19, 2023. These are CME's submissions in this respect.

4. CME submits that the Board should reject OPG's request for an accounting order. OPG could have reasonably anticipated and foreseen the Court's decision to overturn Bill 124.

5. OPG knew or ought to have known prior to the settlement conference in EB-2020-0290 that numerous labour organizations filed close to a dozen applications in the Superior Court of Justice to declare the *Act* to be unconstitutional and of no force or effect. OPG also knew or ought to have known that it was reasonably likely that a Court could agree with the applicants and overturn the *Act*.

6. Accordingly, the circumstances at issue in this case do not meet the threshold requirement for an accounting order for a new variance account pursuant to the terms of the settlement agreement in EB-2020-0290.

2.0 OPG'S APPLICATION IS ESSENTIALLY A Z-FACTOR APPLICATION

7. OPG was last before the Board for rebasing as part of the EB-2020-0290 proceeding. In that case, the parties were able to settle the majority of the matters at issues between the parties.[1] As part of its application, OPG proposed that it would address "unforeseen" events through an accounting order process.[2] During the interrogatory phase of EB-2020-0290, OPG further described the accounting order process in the following terms:[3]

> ***"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… (emphasis added)***

8. The parties generally accepted OPG's rate making framework proposal as part of the settlement agreement that was later accepted by the Board, including its proposal regarding the accounting order process for unforeseen events.[4]

9. OPG stated that the general test that must be met in order to be eligible for a new variance and deferral account including the following components: materiality, causation and prudence.[5] In short, the forecasted event must generate costs that are greater than OPG's $10 million materiality threshold, must be outside of the base upon which the revenue requirement was set, and that the amounts that are (eventually) recovered from ratepayers must be prudently incurred.[6]

[1] While there were unsettled issues such as the treatment of cost overages from the D20 project and issues surrounding small module reactors, for the purposes of the matters at issue in this proceeding, the parties were able to reach a resolution to those issues through the settlement process.
[2] EB-2020-0290, Exhibit A1, Tab 3, Schedule 2, p. 13 of 16.
[3] EB-2020-0290, Exhibit L-A1-03-Staff-009.
[4] See the settlement agreement in EB-2020-0290.
[5] For instance, see EB-2023-0098, Exhibit L, Staff-04, p. 1.
[6] For a description of these requirements in OPG's application, see EB-2023-0098 application, p. 11.

10. These requirements are not expressly set out in OPG's filing guidelines for variance and deferral accounts.[7] However the requirements for a new variance account are set out in Chapter 2 of the Board's filing requirements for both electricity transmitters as well as distributors.[8]

11. In addition to the three general requirements, OPG correctly stated that in order to be eligible for a new variance account pursuant to the EB-2020-0290 settlement agreement, it is also required to demonstrate that the event that caused the alleged need for the account and the related entries must be "unforeseen".[9]

12. OPG failed to properly identify what constitutes an "unforeseen" event in the context of the eligibility requirements in the framework outlined in EB-2020-0290. When asked directly about its understanding of what the phrases "unforeseen" and "reasonably anticipated" meant, OPG only stated that without additional context, those words carried their ordinary meaning.[10]

13. CME submits "unforeseen" in the context of an application to record material additional amounts that OPG intends to ultimately collect from consumers should be the Board's definition of "unforeseen" from Z-Factor applications.

14. The Board's Z-Factor mechanism was designed to be used by regulated utilities when they faced unforeseen costs.[11] Like new variance and deferral accounts, the Board's test for Z-factors include the same three eligibility criteria as new variance accounts: materiality, causation and prudence. However, the Board's filing guidelines for distributors and transmitters outline that in order to be eligible for Z-Factor treatment, or regulatory

[7] The *Filing Guidelines for Ontario Power Generation Inc.: Setting Payment Amounts for Prescribed Generation Facilities*, Revised November 11, 2011 states that OPG should identify what accounts it wishes the Board to authorize but does not provide guidance on the requirements necessary to establish those accounts.
[8] *Filing Requirements for Electricity Transmission Applications*: *Chapter 2 Revenue Requirements Applications*, February 11, 2016 at section 2.10, p. 35; *Filing Requirements For Electricity Distribution Rate Applications - 2022 Edition for 2023 Rate Applications* – Chapter 2 Cost of Service, December 15, 2022, section 2.9.2, p. 66.
[9] See for instance, EB-2023-0098, Application, pp. 10-11.
[10] EB-2023-0098, Exhibit L, CME-01, part d).
[11] For instance, see the Board's decision in *Sioux Falls Lookout Inc., Re*, EB-2021-0057, Decision and Order, March 3, 2022 at para 45: "Based on the OEB's Report on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors and the Filing Requirements, Z-factors are intended to provide for unforeseen events outside of a distributor's management control."

relief from "unforeseen costs", the applicant must demonstrate that management could not have been able to plan and budget for the event.[12]

15. The reason for this requirement is straightforward. If a utility were allowed to recover additional amounts from ratepayers simply for failing to foresee something, utilities would be rewarded for failing to properly manage risk. The Board wisely added additional requirements to the eligibility criteria to only allow recovery of costs that were outside of the control of management ability to plan. Only those events that are outside of management's reasonable and competent planning and budgeting are truly "unforeseen" and should be collectable from consumers.

16. Accordingly, in reviewing OPG's application for a new variance and deferral account, the Board should determine whether OPG could have planned for the overturning of Bill 124. As set out below, CME's submission is that a reasonable and prudent utility would have known that Bill 124 could have been overturned and would have planned for it as part of EB-2020-0290.

3.0 OVERTURNING BILL 124 WAS FORESEEABLE

17. When applying to the Board, the applicant, including OPG bears the burden of proof to demonstrate why the Board should grant it the requested relief.[13] Accordingly, in the context of a request for a new variance account pursuant to the settlement agreement the applicant must demonstrate how it meets the causality, materiality, prudence, and the "unforeseen" criteria. The burden of proof is on OPG to demonstrate that overturning Bill 124 was "unforeseen".

18. OPG's application offers a dearth of evidence regarding foreseeability. In several instances, OPG baldly declares that the Court's decision could not have been "reasonably

[12] *Filing Requirements for Electricity Transmission Applications*: *Chapter 2 Revenue Requirements Applications*, February 11, 2016 at section 2.8, p. 32; *Filing Requirements For Electricity Distribution Rate Applications - 2022 Edition for 2023 Rate Applications* – Chapter 3 Incentive Rate-Setting Applications, May 24, 2022, section 3.2.8.1, p. 22.
[13] See *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, Sched. B., section 78.1(6).

anticipated"[14] or that OPG had "no knowledge" of the outcome of the Court proceedings.[15] However, that is the extent of the evidence on the application about foreseeability. OPG offers no evidence regarding its inability to plan or budget for the impacts of overturning Bill 124, or what its reasonable expectations were in the circumstances, or what it could or could have reasonably anticipated and why.

19. OPG's lack of evidence on this point is reason enough for the Board to deny OPG's application, as it has failed to discharge its burden demonstrating that the Court's decision was unforeseen.

20. However, the circumstances surrounding Bill 124 and the Court's decision disclose that OPG should have reasonably foreseen that the *Act* could be declared unconstitutional. A reasonable utility would have known, prior to the settlement conference in EB-2020-0290 that numerous labour organizations filed Court challenges seeking to overturn Bill 124, and that like any Court proceeding, the applicant could be successful. In this regard:

    (a) According to the Court's decision in *Ontario English Catholic Teachers Assoc. v. His Majesty*, 2022 ONSC 6658, ten separate applications were brought by a variety of groups requesting that the Court find that Bill 124 was of no force or effect;[16]

    (b) OPG confirmed that these applications would be matters of public record that were open to OPG to review;[17]

    (c) The applications that are available online specifically request in their prayers for relief that the Court declared Bill 124 to be unconstitutional and of no force and effect;[18]

[14] EB-2023-0098 at para 5.
[15] EB-2023-0098 at p. 9.
[16] *Ontario English Catholic Teachers Assoc. v. His Majesty*, 2022 ONSC 6658 at para. 3.
[17] EB-2023-0098, Exhibit L, CME-01, p. 3.
[18] For instance, the online copies of the filed applications found in the preamble to EB-2023-0098, Exhibit L, CME-01 both explicitly include this in the request for relief.

(d) Many of the labour organizations that filed applications with the Superior Court challenging Bill 124 made public press releases announcing the fact that they were challenging the constitutionality of Bill 124;[19] and

(e) Mainstream media outlets reported on the challenges both online and in print.[20]

21. When OPG was asked directly about whether or not it knew that the applications had been filed prior to the settlement negotiations, OPG directed CME to an answer it gave to SEC. OPG's answer simply stated that it knew "after the corresponding Notice of Application were filed".[21]

22. This answer was not responsive to CME's interrogatory, as it does not confirm whether OPG knew before or after the settlement negotiations in EB-2020-0290. The School Energy Coalition ("**SEC**") wrote a follow up letter with respect to those interrogatories asking OPG for a responsive answer to the question.[22] In its follow up response, OPG once again failed to responsively answer whether or not it knew, prior to the settlement conference in EB-2020-0290 that the legal challenges against Bill 124 could be successful.[23]

23. However, CME submits that given the amount of information available about the legal challenges to Bill 124, and the publicity surrounding the legal proceedings, a reasonable utility would have known that Bill 124 was being challenged by a large cross-section of public-sector union organizations prior to the settlement conference in EB-2020-0290.

24. Moreover, it was within OPG's reasonable expectation that Bill 124 could have been overturned as a result of those challenges. OPG stated in its answer to a CME interrogatory that it did not "take a view on the likelihood of success or failure of any of the legal challenges to Bill 124".[24] However, as a matter of common sense and experience,

[19] See the preamble to EB-2023-0098, Exhibit L, CME-01 for examples.
[20] See the preamble to EB-2023-0098, Exhibit L, CME-01 for examples.
[21] EB-2023-0098, Exhibit L, CME-01, part b); Exhibit L, SEC-02.
[22] Shepherd Rubenstein Letter requesting answers to interrogatories, dated May 9, 2023
[23] Ontario Power Generation Responding Letter, dated May 12, 2023.
[24] EB-2023-0098, Exhibit L, CME-01, p. 3.

when legislation is challenged in the Court, one of the outcomes that any observer would anticipate is that the legislation could be overturned.

25. This is all the more true for OPG given:

(a) OPG has a sizable regulatory team, in house legal counsel, and external counsel that provide it with legal and regulatory advice. In short – OPG is a very sophisticated party that has participated in litigation in the Superior Court of Justice, and would understand the potential outcomes from the applications filed challenging Bill 124.

(b) Bill 124 was challenged by multiple large, well-funded and organized litigants. The applicants would therefore have a greater chance of success than a single, potentially vexatious, litigant.

26. OPG could have planned for Court's decision regarding Bill 124. Before the settlement conference in EB-2020-0290, all of the information necessary was publicly available and prominently displayed in online and print resources. As the applicants in EB-2020-0290, OPG could have amended their application to provide for a variance account or could have negotiated for one as part of the settlement negotiation between the parties. It chose not to do so.

4.0 CREATING A NEW VARIANCE ACCOUNT WOULD DEFEAT THE SETTLEMENT AGREEMENT

27. The settlement agreement negotiated between the parties and accepted by the Board represents a careful balancing between the parties of various interests, desires, and concessions which came to a (near) complete resolution of the issues between the parties. Allowing OPG to create a new variance account to record additional amounts for recovery from consumers for a situation that was well-publicized would defeat the purpose of the balancing between the parties in the settlement agreement.

28. Unlike a decision by the Board on the merits of an application, where individual issues are determined by the Commissioners based on the evidence and the submissions of parties, resolutions to a settlement agreement represent a careful balancing of parties' interests across multiple issues. For instance, parties may be willing to accept a less favourable settlement in some areas in order to secure more favourable terms in another.

29. The settlement agreement reached by the parties in EB-2020-0290 is no different. Parties reached the agreement they did on the understanding that OPG's costs and its variance and deferral accounts were those reflected in OPG's application.

30. If OPG had included a proposal for an additional variance and deferral account, or provided a potentially higher revenue requirement as a result of a successful challenge to Bill 124 as part of EB-2020-0290, parties would not necessarily have accepted the same terms in the rest of the settlement agreement. For instance, parties may have pushed for a more significant reduction in capital spending in order to offset those potential increases.

31. While the settlement agreement provided OPG with an opportunity for an accounting order process for "unforeseen" events, CME submits that the notorious, public and widespread challenge to Bill 124 should not be considered "unforeseen", and the Board should not allow OPG to gain the benefit of a new variance account while allowing it to enjoying the rest of the settlement undisturbed.

5.0 OPG ROE'S DEMONSTRATES OPG DOES NOT NEED ADDITIONAL FUNDING

32. In their interrogatories, SEC, CME and Board Staff each asked for OPG to provide, amongst other things, their most recent achieved return on equity ("**ROE**") for the year 2022. OPG initially refused to answer these questions, stating that it was not one of the eligibility criteria for it to be granted a new variance account.[25]

[25] EB-2023-0098, Exhibit L, CME-02; Exhibit L, Staff-04.

33. On May 9, 2023, SEC sent a follow up letter requesting OPG answer SEC, CME and Board Staff's interrogatories. In its response, OPG stated that its estimate of ROE for 2022 is between 12.5% and 13.0%, whereas the OEB's allowed ROE is 9.36%.[26] Accordingly, OPG estimates that it will earn greater than 300 basis points more than their allowed ROE.

34. Given that level of over-earning, CME submits that OPG does not require additional amounts from consumers. Just and reasonable payment amounts do not require collection of additional amounts, on top of OPG's significant over-earning. Accordingly, the Board should deny OPG's application.

6.0 COSTS

35. CME requests that it be awarded 100% of its reasonably incurred costs in connection with this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of May, 2023.

Scott Pollock

Counsel for CME

136780274:v2

[26] Cost of Capital Parameter Updates, online: https://www.oeb.ca/regulatory-rules-and-documents/rules-codes-and-requirements/cost-capital-parameter-updates, last revised October 20, 2022.