



May 19, 2023

Ms. Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street
P.O. Box 2319
Toronto, ON M4P 1E4

Re: Ontario Power Generation Inc. Request to Establish a Variance Account
AMPCO Final Submissions
Board File No. EB-2023-0098

Dear Ms. Marconi:

Attached please find AMPCO's Final submissions in the above proceeding.

Best Regards,

A handwritten signature in blue ink, appearing to read 'Colin Anderson'.

Colin Anderson
President

Copy to: OPG

EB-2023-0098

Ontario Power Generation Inc.

Application for variance account to capture the nuclear revenue requirement impact of the overturning of Bill 124

AMPCO Submissions May 19, 2023

Ontario Power Generation Inc. (OPG) filed an application with the Ontario Energy Board (OEB) on March 1, 2023, under section 78.1 of the Ontario Energy Board Act, 1998 seeking 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).

Effective November 8, 2019, Bill 124 set a 1% maximum for annual increases in both wages and total compensation for unionized and non-unionized employees in the Ontario public sector for a three-year “moderation” period. On November 29, 2022 the Ontario Superior Court overturned Bill 124 and declared it to be “void and of no effect.”

Employees belonging to all of OPG’s bargaining units are subject to Bill 124. OPG is not seeking the proposed variance account for management employees.¹ The three-year time periods for the OPG’s major bargaining units are as follows:²

Employee Representation	Time Period
PWU	April 1, 2021 – March 31, 2024
Society	January 1, 2022 – December 31, 2024
Canadian Union of Skilled Workers (“CUSW”)	April 1, 2021 – March 31, 2024 ¹

For the reasons discussed below, AMPCO submits OPG’s application to establish a variance account should be denied.

¹ AMPCO-1 (a)

² AMPCO-1 (b)

The overturning of Bill 124 was not an unforeseen event as OPG claims.

The 1% legislated limits on compensation were the basis of the forecast compensation included in OPG's 2022-2026 Nuclear Payment Amounts application (EB-2020-0290) filed on December 31, 2020. Prior to the filing of EB-2020-0290, legal challenges to Bill 124 had been filed as follows:³:

- February 11, 2020, by the Ontario English Catholic Teachers Association
- Power Workers' Union: November 24, 2020
- Society of United Professionals: November 24, 2020

OPG was aware of the above notices⁴, yet the EB-2020-0290 evidentiary record contains no references to the legal challenge to Bill 124.⁵

The OEB approved a Settlement Proposal dated July 16, 2021, which represents an overall reduction in revenue requirement of \$603.7 million over the 5-year period, including decreases in requested OM&A costs and rate base.⁶ OPG was aware of the constitutional challenges launched by labour organizations against Bill 124 prior to the settlement conference. OPG would have known at the time that the impact of a successful challenge would result in an annualized nuclear revenue requirement impact that is expected to be higher than its \$10M materiality threshold. OPG knew there was a possibility that the legal challenges to Bill 124 could overturn Bill 124, and the impact would be substantial, but OPG did not at that time request a variance account to record the impacts as part of its application or settlement with the parties.

AMPCO submits the overturning of Bill 124 is a change of law that OPG should reasonably have anticipated during the 2022-2026 payment amounts application. OPG's evidence is that the change in law 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.⁷ 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 124.⁸ These potential incremental costs were clearly able to be anticipated and reflected in discussions and evidence; OPG cannot claim that they were in any way unforeseen. Given the materiality of overturning Bill 124, OPG had an obligation to identify the legal challenge and its implications as part of its application.

³ OPG May 12, 2023 Letter

⁴ SEC-2 (a)

⁵ SEC-3

⁶ EB-2020-0290 Exhibit 0 Tab 1 Schedule 1 Page 15

⁷ Application p. 2

⁸ Application p. 2

OPG has not met the criteria to establish a variance account.

OPG's most recent accounting order application was filed, and approved by the OEB, in EB-2018-0002. The Decision⁹ references three eligibility criteria that must be met as follows:¹⁰

- Causation: The forecasted expense must be clearly outside of the base upon which rates were derived.

The approved nuclear revenue requirements for 2022 to 2026 arrived at through settlement were based on compensation assumptions with respect to Bill 124, notwithstanding OPG's knowledge of pending decisions as a result of legal challenges. The revenue requirement impact resulting from the proposed variance account is incremental to the payment amounts approved.

- Materiality: The forecasted amounts must exceed the OEB-defined materiality threshold and have a significant influence on the operation of the distributor, otherwise they must be expensed in the normal course and addressed through organizational productivity improvements.

AMPCO takes no issue with materiality. It is expected that the amounts recorded in the proposed variance account will exceed the OEB-defined materiality threshold.

- Prudence: The nature of the costs and forecasted quantum must 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 why the option selected represents a cost-effective option (not necessarily least initial cost) for ratepayers.

AMPCO submits the nature of the costs and forecasted quantum are not reasonably incurred.

OPG's total compensation levels have been a contentious issue in previous payment amounts proceedings before the OEB. The OEB has made disallowances related to excessive compensation levels in all three previous full payment amounts proceedings: \$35 million in the first payments case, \$145 million over two years in EB-2010-0008, and \$200 million over two years in EB-2013-0321.¹¹

In its EB-2016-0152 Decision, the OEB noted "Although OPG has made some progress in controlling its overall compensation costs, overall the costs remain above benchmark and are

⁹ DECISION AND ORDER EB-2018-0002 p.3

¹⁰ Filing Requirements For Electricity Distribution Rate Applications - 2017 Edition for 2018 Rate Applications - Chapter 2 Cost of Service, July 20, 2017, Section 2.9.6 Establishment of New Deferral and Variance Accounts

¹¹ DECISION AND ORDER EB-2016-0152 p.74, both the regulated hydroelectric and nuclear businesses

not reasonable.” The OEB reduced OPG’s nuclear OM&A budget by \$30 million per year on account of excessive compensation.¹²

The 50th percentile (P50) is used as the benchmark for most positions. In EB-2020-0290, OPG’s total compensation levels are still higher than the P50.¹³ Parties negotiated an overall OM&A budget as part of the settlement in EB-2020-0290 that was based in part on OPG’s total compensation costs relative to the P50 and OPG’s 1% assumption with respect to legislated limits on compensation. Higher increases in compensation over the period and higher overall compensation levels compared to the P50, would have been seen as excessive and would not have been accepted by the parties, consistent with previous OEB Decisions. OPG should have disclosed this compensation risk to the Board.

AMPCO submits OPG has not met the prudence criterion.

OPG overearned in 2022.

OPG confirms that a preliminary estimate of the 2022 actual ROE for the regulated facilities is in the range of 12.5% to 13.0%,¹⁴ which is more than 300 basis points above the ROE of 8.66% approved by the OEB.^{15 16}

AMPCO submits that OPG’s significant over-earnings in 2022 demonstrates that it does not require any incremental funding.

¹² DECISION AND ORDER EB-2016-0152 p.84

¹³ EB-2020-0290, Exhibit F4-3-1, Attach 2, p.12-13

¹⁴ OPG May 12, 2023 Letter

¹⁵ OEB 2022 Cost of Capital Parameter Update Letter, October 28, 2021

¹⁶ DECISION AND ORDER EB-2020-0290 p.53