



**SOCIETY of
UNITED PROFESSIONALS**
IFPTE 160

19th May, 2023

Michelle Johnston
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VIA Email and RESS Filing

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

**Re: EB-2023-0098 Ontario Power Generation Inc. (OPG)
Application for a Variance Account to capture the nuclear revenue requirement
impacts of the overturning of Bill 124
Submissions of the Society of United Professionals**

Dear Ms. Marconi,

Please find attached the Society of United Professionals' (SUP) Submissions in the matter of Ontario Power Generation Inc.'s (OPG) "Application for a Variance Account to capture the nuclear revenue requirement impacts of the overturning of Bill 124" (EB-2023-0098).

Sincerely,

[Original signed by]

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Copy by email: interested parties



SOCIETY *of*
UNITED PROFESSIONALS
IFPTE 160

Society of United Professionals'
SUBMISSIONS

Re: EB-2023-0098 Ontario Power Generation Inc. (OPG)
Application for a Variance Account to capture the nuclear revenue requirement
impacts of the overturning of Bill 124

19th May, 2023

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EB-2023-0098 - Society of United Professionals' Submissions

Introduction

On March 1, 2023, Ontario Power Generation (OPG) applied to the Ontario Energy Board (OEB) for approval of an accounting order to establish a variance account to record, from March 1, 2023 until the effective date of the OEB's next payment amounts order, the nuclear revenue requirement impact resulting from the Ontario Superior Court's overturning of the *Protecting a Sustainable Public Sector for Future Generations Act*, 2019 (Bill 124).

The Society of United Professionals (SUP) supports OPG's application requesting approval of this new variance account.

Background and Key Dates

February 11, 2020 – Date of filing of first Bill 124 legal challenge by the Ontario English Catholic Teachers Association. (per OPG letter of May 12, 2023)

November 24, 2020 - Power Workers' Union (PWU) Bill 124 challenge filed. (per OPG letter of May 12, 2023)

November 24, 2020 - SUP Bill 124 challenge filed. (per OPG letter of May 12, 2023)

December 31, 2020 - OPG EB-2020-0290 Payment Amounts application filed (per OEB RDS)

July 16, 2021 – Settlement Agreement on all but two of the issues in the above mentioned proceeding filed by OPG (per OEB RDS)

January 12, 2022 – OEB decision on two remaining unsettled issues issued (per OEB RDS)

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. OPG's unions indicated that they would be seeking enhanced wages for the periods their members' compensation was or would have been restrained due to Bill 124.

The Government of Ontario has since filed an appeal of the Court's decision to overturn Bill 124.

Per OPG's application, "the three-year Bill 124 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.”

Argument in Favour of Establishing the New Variance Account

On page 11 of its application for the new variance account, OPG summarizes the generally accepted criteria for establishment of a new account and how it has met each. According to OPG, the OEB has articulated these three eligibility criteria for establishing such accounts: causation, materiality, and prudence.

Causation: As discussed in OPG’s response to L-Staff-03, both the initially suppressive effect of Bill 124 and the subsequent court decision overturning this piece of legislation should be seen as external uncontrollable events that impact compensation amounts that OPG is obligated to pay under the terms of collective agreements.

The additional compensation for the PWU and SUP moderation periods that will almost certainly be caused by the overturning of Bill 124 could not have been reasonably foreseen or estimated by OPG during the EB-2020-0290 proceeding because the direction, nature and timing of court’s decision was not reasonably predictable. Even if OPG had correctly guessed that the court would eventually overturn Bill 124 on a constitutional basis, there would have been no regulatory basis for including anything in excess of the Bill 124 wage caps that were included in payment amounts. Bill 124 was the law in existence until the court overturned it. Including any amounts in excess of Bill 124 maximums at that point in time would not have been considered prudent or consistent with regulatory theory, even if a reasonable estimate of actual future obligations could have been made at that time.

Materiality: The impact of overturning Bill 124 is expected to exceed the \$10 million OEB materiality limit for new variance account requests by a significant margin. For specific estimates see OPG’s response to L-Staff-01.

Prudence: OPG is not making a request for a prudency review at this time. It is only requesting that a variance account mechanism be established to track the revenue requirement impacts of additional compensation amounts it will have to pay due to the overturning of Bill 124. These increased compensation amounts that will give rise to significant revenue requirement impacts to be recorded in the variance account, will be established through a mix of collective bargaining, interest arbitration or, potentially, through additional legal action.

SUP considers that OPG has clearly established that it meets the OEB criteria for the establishment of a variance mechanism to track the revenue requirement impacts of additional compensation amounts that will result from the overturning of Bill 124.

Effective Date

SUP agrees that OPG's proposed effective date for the new variance account of March 1, 2023 is appropriate. This date aligns with the date of OPG's application for this variance account.

Impacts resulting from additional compensation paid in respect of moderation periods prior to March 1, 2023 should still be collected in the variance account as long as the relevant amounts are paid after the March 1, 2023 effective date of the variance mechanism. For example, amounts paid after March 1, 2023 as retroactive compensation for moderation periods prior to March 1, 2023 should still qualify for inclusion. SUP asserts that this interpretation is consistent with the OPG position outlined in L-Staff-02 d.

The OEB in its order should be careful to clarify that the effective date for the variance account relates to the timing of compensation payments, not to the moderation periods that triggered some of them. Retroactive payments made in respect of pre-March 1, 2023 labour should still be recorded.

Remaining Contingency

The Ontario Government's decision to appeal the court decision that overturned Bill 124 leaves a remaining contingency that will have to be addressed at a future date.

OPG notes in its application that: "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." (page 13)

In its response to L-SUP-06 OPG notes: "In the event the appeal is successful, OPG would comply with any resulting legal obligations it would have related to employee compensation."

Other Issues

In its letter of May 9, 2023, SEC asked that OPG file responses to interrogatories from various parties dealing with the timing of its knowledge of various constitutional challenges of Bill 124. In addition, SEC requested that OPG provide actual ROE information that it had declined to provide several intervenors based on deemed irrelevance given the limited scope of this proceeding. This hearing is to assess whether a new variance account should be established, not to determine whether and when amounts recorded therein should ultimately be collectible.

Timing of Knowledge of Bill 124 Appeals

It is clear from OPG's May 12, 2023 letter responding to SEC's earlier May 9 letter, that three major challenges to the constitutionality of Bill 214 were well underway prior to the filing of OPG's EB-2020-0290 submission.

SUP considers this fact to be irrelevant to the matter at hand.

Absent a crystal ball, the eventual outcome of these constitutional challenges would not have been determinable by OPG prior to the court decision. In its response to L-CME-01 c, OPG noted that it "did not take a view on the likelihood of success or failure of any of the legal challenges to Bill 124."

The trigger for additional compensation costs and associated revenue requirement impacts is the court decision overturning Bill 124. Only then were the illegal constraints on PWU and SUP compensation levels for the moderation periods lifted. That event represented the critical accounting and regulatory event that triggered the need for the establishment of a variance account.

SUP believes that the existence of legal challenges prior to the EB-2020-0290 proceeding is a complete red herring. The matter did not come up in the hearing because it was not relevant to costs known and sought for recovery at that time. Per OPG's response to L-SEC-3: "Based on OPG's review, the EB-2020-0290 evidentiary record contains no references to the legal challenge to Bill 124." Nevertheless, it is highly likely that every participant in the payment amounts process was generally aware that legal challenges to Bill 124 had occurred as the EB-2020-0290 hearing progressed. The fact that OPG did not request a variance account at the time of that proceeding to accommodate the impacts of a possible future overturning of Bill 124 should not prejudice its completely valid request now.

ROE

In its May 9, 2023 letter, SEC requested that OPG provide actual ROE information without making a convincing case for why this is relevant to the simple establishment of a new regulatory account. OPG's position is that "an applicant's actual ROE is not relevant to the establishment of a deferral or variance account." In addition, OPG notes that "there is no "means test" or "need" criterion for establishing a deferral or variance account in the OEB's regulatory model under which it operates.

SUP concurs with this view.

The decision before the Board is whether or not to allow or require OPG to establish a variance account and conceptually how the various components of revenue requirement should be reflected within it.

SUP would also note that actual ROE prior to the effective date of March 1, 2023 is, if relevant at all, only part of the story. If ROE is going to be taken into account in future, SUP would argue that ROE for the entire period up to the next payment amounts effective date needs to be considered. Obviously this cannot be assessed now, reinforcing the view that ROE should be considered a potential factor for argument at a future prudency review rather than now at the account establishment stage.

In addition, if actual ROE is going to be considered in some way, other impactful regulatory mechanisms such as earnings sharing need to be taken into account to ensure a logically consistent and coherent conclusion.

Calculation Methodology

In its response to L-SEC-07, OPG noted that “OPG is not seeking approval for the calculation methodology for the variance account in this proceeding. If the Impact of Overturning Bill 124 Variance Account is approved, OPG would determine account entries using the approach described in the Application unless otherwise directed.”

SUP concurs with OPG’s intentions to generally follow the approach outlined in its submission, subject to any further specific direction provided by the OEB.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS
19th DAY OF MAY, 2023**