May 19, 2023

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

Dear Ms Marconi:

EB-2023-0098 – OPG – Bill 124 Accounting Order – Final Submissions

Please find, attached, the Final Submissions of the Consumers Council of Canada pursuant to the above-referenced proceeding.

Please feel free to contact me if you have questions.

Yours truly,

Julie E. Girvan

Julie E. Girvan

CC: All parties

SUBMISSIONS OF THE CONSUMERS COUNCIL OF CANADA

RE: EB-2023-0098

ONTARIO POWER GENERATION – BILL 124 ACCOUNTING ORDER APPLICATION

INTRODUCTION:

On March 1, 2023, Ontario Power Generation (OPG), applied to the Ontario Energy Board (OEB) for 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), which prescribed limits on compensation increases in the Ontario public sector, including OPG. Bill 124 restricted both union and non-union provincial public sector wage increases and total compensation increases to 1% annually for a three-year moderation period effective November 8, 2019.

In its 2022 to 2026 payment amounts application, filed on December 31, 2020, OPG based its compensation cost forecasts on adherence to the restrictions of Bill 124.[1] The variance account for which OPG seeks approval is to record the revenue requirement impacts of the difference between the forecast compensation costs included in the EB-2020-0290 proposed revenue requirements and such compensation costs for the nuclear facilities reflecting the overturning of Bill 124.[2]

These are the submissions of the Consumers Council of Canada (Council) regarding OPG's request to establish the variance account. The Council submits that OPG's request for the establishment of the account should be rejected by the OEB.

SUBMISSIONS:

The Event Was Not Unforeseen:

OPG is relying on its evidence from the EB-2020-0290 application that described its proposed regulatory framework and a process to deal with unforeseen events that was agreed to by parties to the Settlement Agreement and ultimately approved by the OEB:

> OPG proposes that unforeseen events affecting the nuclear business continue to be addressed through an accounting order process, subject to the $10 million regulatory materiality threshold that has historically applied to OPG and which was accepted for this purpose in the EB-2016-0152 Decision. This approach is consistent with the accounting order application requirements currently in place for accounting changes impacting the

[1] Application, EB-2023-0098, p. 8

[2] Application, p. 12

calculation of OPG's nuclear liabilities and changes in depreciation end-of-life dates for the prescribed nuclear facilities. OPG's most recent accounting order application pursuant to these requirements was filed and approved by the OEB in EB-2018-0002[3]

OPG characterizes the overturning of Bill 124 as "a change of law that OPG could not reasonably have anticipated during the 2022-2026 payment amounts application and 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. Such costs are necessary for the continued operation of the nuclear facilities[4]." In effect, OPG's position is that the cost impacts were "unforeseen" and "material".

The Council does not agree that the overturning of Bill 124 is a change of law that was unforeseen. Legal challenges to Bill 124 had been filed in 2020 prior to OPG filing its payment amounts application. OPG has conceded that it became aware of the "legal challenges after the matters were reported in the media[5]."

Despite OPG's knowledge of the legal challenges made by various bargaining units OPG made no reference to the legal challenges in the EB-2020-020 evidentiary record[6]. OPG made no requests for the variance account in its Application and no provision for such an account was established through the Settlement Proposal that was agreed to by parties and ultimately approved by the OEB.

Clearly, OPG knew there was a risk that Bill 124 could be overturned. OPG was aware of that risk and chose not to deal with that risk through its Application. Although the Council accepts OPG has a right to apply for accounting orders to deal with unforeseen events, OPG's own evidence is that this circumstance was not unforeseen. That fact alone should be reason for the OEB to reject OPG's request for the establishment of the variance account.

OEB Tests:

The OEB consistently reviews applications for deferral and variance accounts on the basis of causation, materiality and prudence. In OPG's most recent application for an account the OEB affirmed that it considers these criteria relevant.[7]

With respect to causation the OEB considers whether the forecasted expense is outside of the base on which rates were derived. Although OPG was aware of the risk it entered into a Settlement Proposal that did not have a provision to increase compensation costs for any reason.

[3] Application, p. 11
[4] Application, p. 2
[5] OPG letter to the OEB, dated May 12, 2023
[6] SEC-3
[7] Decision and Order – EB-2018-0002, May 31, 2018, p 3

The Settlement Proposal was agreed to by all parties. From the Council's perspective OPG cannot now request to open up one element of that agreement on the basis that the overturning of Bill 124 is an "expense outside of the base on which rates were set" and, as noted above "unforeseen". The OEB has no knowledge of how Bill 124 could have impacted the Settlement Proposal as those negotiations are confidential. Opening a Settlement Proposal on one issue is not appropriate as the negotiations were likely the subject of many compromises on the part of all parties.

With respect to materiality the Council acknowledges that if OPG had met the other criteria materiality is not an issue if that threshold is strictly applied. Its evidence is that the amount will exceed $10 million. However, OPG has indicated that in 2022 its preliminary estimate of its return on equity (ROE) is between 12.5% and 13%[8]. This is relative to an ROE embedded in the payment amounts of 8.66%. It is also relative to an approved revenue requirement of over $2.5 billion per year. The Council questions the extent to which these amounts are truly "material" to OPG's operations. Typically, the OEB considers actual ROE when reviewing Z-factor claims and Incremental Capital Module (ICM) funding. If an applicant's actual ROE exceeds the OEB approve ROE by 300 basis points the request for funding is rejected. In this case OPG's actual ROE for 2022 will exceed 300 basis points relative to its approved ROE. The OEB should consider this when assessing materiality.

With respect to prudence the Council does not accept that OPG's request is prudent. OPG has in the past been criticized by the OEB and subject to disallowances on the basis that its compensation costs are above the market median. In its evidence, in the 2022-2026 Application, OPG's compensation levels remained above the median[9] even when subjected to the requirements of Bill 124. To ask for further increases above those levels would not be, from the Council's perspective, prudent regardless of the outcome of OPG's negotiations with its bargaining groups. This is not a cost impact that should be borne by ratepayers.

Customer Engagement:

OPG's application did not address customer engagement. The OEB consistently relies on customer engagement is assessing applications and the extent to which the application incorporates customer engagement. From the Council's perspective, the lack of customer engagement represents a gap in OPG's application. The Council questions the extent to which customers would support an application for further funding for compensation in the context of compensation levels already deemed high and significant overearnings above the allowed included in the payment amounts.

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[8] OPG's letter to the OEB, dated May 12, 2023

[9] EB-2020-0290, F4-SEC 149