EB-2023-0098

APPLICATION FOR AN ACCOUNTING ORDER ESTABLISHING A VARIANCE ACCOUNT TO CAPTURE THE NUCLEAR REVENUE REQUIREMENT IMPACTS OF THE OVERTURNING OF BILL 124

Submissions of

Ontario Power Generation Inc.

May 30, 2023

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OVERVIEW

These are the reply submissions of Ontario Power Generation Inc. ("OPG") related to its request for the approval of 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") and thereby eliminating the Bill 124 prescribed limits on compensation increases in the Ontario public sector, including OPG. On November 29, 2022, the Ontario Superior Court ruled Bill 124 to be contrary to the *Canadian Charter of Rights and Freedoms* and of no force and effect ("Bill 124 Decision").

The legislated limits on compensation set out in Bill 124 were the basis of the forecast compensation costs reflected in OPG's approved nuclear revenue requirements for the 2022-2026 period in the EB-2020-0290 proceeding. Employees belonging to all of OPG's bargaining units were subject to Bill 124 and, following the Bill 124 Decision, the representative unions had indicated that they would be seeking enhanced wages for the periods their members' compensation has or would have been restrained due to Bill 124.

This Application is filed pursuant to the accounting order process for addressing unforseen events set out in OPG's approved rate framework accepted by the parties pursuant to the terms of the Ontario Energy Board ("OEB") approved settlement proposal in the EB-2020-0290 proceeding ("Approved Settlement Agrement"). The overturning of Bill 124 is a change of law that OPG could not foresee 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. The annual revenue requirement impact will be in excess of the company's $10M annual materiality threshold stipulated in the agreed accounting order process and are estimated to exceed $130M.

It was not possible for OPG to conclude on the likelihood of Bill 124 being overturned during the EB-2020-0290 proceeding or any other time leading up to the Bill 124 Decision. The outcome of a legal challenge is entirely dependent on the merits of the facts and arguments presented by

the litigants and the discretion of the court presiding. A successful constitutional challenge can have multiple outcomes, not all of which result in a law being declared of no force and effect. In addition, a party that has commenced a legal challenge of legislation is not bound by law to prosecute its challenge to the very end. The Ontario Superior Court has broad remedial powers and may take a range of actions in constitutional matters. The timing of the court's decision was also unknowable during the EB-2020-0290 proceeding. The existence of a mere possibility of an event does not mean that the event is not "unforeseen". This is incorrect on the plain language meaning of the term, which requires that the event in question be *probable* (i.e., likely to occur), and court interpretations. As a non-participant in the court proceedings, OPG had no special insight into the likelihood of the legal challenges' outcomes or potential remedies beyond the public facts that were available to all parties, and therefore could not accurately forecast the potential nature, timing and therefore impact of the ultimate outcome.

Parties opposed to OPG's application ignore the substantial uncertainties that existed around the outcome of the Bill 124 legal challenges during the EB-2020-0290 proceeding. Instead, they effectively invite the OEB to view the issue through the lens of perfect hindsight, taking the ultimate outcome of the Bill 124 Decision as a probable outcome just because the result in question occurred. The OEB should not impute hindsight as proposed by these parties. The OEB should consider the facts that were known to OPG at the time of the EB-2020-0290 proceeding, which were not sufficient to suggest that the overturning of Bill 124 was foreseeable.

Some parties suggest that the EB-2020-0290 payment amounts application was the appropriate time for OPG to seek the variance account in question, thereby implying some prejudice to ratepayers from the establishment of an account in the current proceeding instead. Given the significant uncertainties related to the potential outcome of the legal challenges, OPG lacked the factual basis to request the account at the time. Moreover, no prejudice results to ratepayers from establishing the account effective March 1, 2023 relative to the time of the OEB's Decision and Order on EB-2020-0290. No entries could have been made to the account prior to the establishment of collective agreements with the Power Workers' Union ("PWU") and the Society of United Professionals ("Society") giving rise to the cost impacts of the Bill 124 Decision, which occurred subsequent to March 1, 2023, and no costs from the overturning of Bill 124 were

recorded in OPG's financial records prior to March 1, 2023. Assuming the proposed effective date of March 1, 2023, the entries in the account would be identical to those that would have been made to a hypothetical account established as part of the EB-2020-0290 proceeding or any other time leading up to March 1, 2023.

OPG's request in this application is simply to establish an account and for the right to record the full scope of the cost impacts that it incurs as a result of the change in law resulting from the Bill 124 Decision. There is no cost to ratepayers from the OEB's decision in this proceeding. The balance of fairness favours granting OPG's request and allowing a subsequent panel of the OEB to assess the appropriate disposition of those amounts.

In addition to meeting the criteria set out in OPG's accounting order process, OPG's application meets each of the OEB's three criteria of causation, materiality and prudence. The compensation amounts to be recorded in the proposed variance account are clearly outside the base upon which OPG's payment amounts were derived in EB-2020-0290. Something unforeseeable is something that is not reasonably predictable or is speculative, such that the related costs cannot properly form part of the base costs included in the revenue requirement. For the reasons set out in OPG's evidence and this submission, the overturning of Bill 124 is an unforeseen event, and there are no facts whatsoever on the record of the proceeding, including the Approved Settlement Agreement itself, that the potential impacts of this event were contemplated in the approved revenue requirement or otherwise excluded from the scope of the agreed unforeseen event mechanism.

The amounts that OPG expects to record in the account far exceed both the defined $10M materiality threshold and amounts the OEB has previously found to be material in the context of OPG accounting order applications. OPG forecasts that for PWU-represented employees, it would record approximately $130M to the proposed account in the period from 2023 to 2026, exceeding $10M in each year. Although amounts for Society-represented employees were not

available due to the pending arbitration outcome when the interrogatory responses were filed, those amounts will further increase the total amounts to be recorded.[1]

Some parties argue against OPG's application due to the fact that OPG's estimated achieved return on equity ("ROE") for the regulated business for 2022 exceeds the ROE reflected in the approved payment amounts. There is no requirement that the OEB consider the implications of OPG's achieved ROE to provide the relief sought by OPG in this proceeding. Actual financial results for a past year are not relevant to the prospective costs proposed to be recorded in the account. Additionally, there can be no certainty that the level of financial performance achieved in 2022 will continue in subsequent years and in any event the Approved Settlement Agreement already provides for an asymmetrical earnings sharing mechanism to address any over-earnings.

With respect to prudence, OPG has demonstrated that the cost impacts of the Bill 124 Decision would be recorded to the account based on a reasonable plan, reflecting collective agreements duly reached through collective bargaining processes with the PWU and the Society as described in the Application. The opposing parties have inappropriately asked the OEB to prejudge the outcome of the substantive future prudence proceeding by pre-emptively ruling on the outcome of such application. This is not a reasonable request and it is not consistent with the two-phase prudence test articulated in the *Filing Requirements for Electricity Distribution Rate Applications* ("Filing Requirements"). Any aspects of prudence to be considered in the future disposition of the account balance should not affect the OEB's consideration of whether to approve the account requested in the current application.

OPG submits that its proposed effective date for the variance account as of the interim effective date of March 1, 2023 is reasonable and should be granted. It is the date of OPG's application and a date after the Bill 124 Decision that gave rise to the current factual basis for the requested account, and precedes the establishment of collective agreements giving rise to the cost impacts of the Bill 124 Decision. OPG filed the application on a timely basis once the factual basis for the

1. OPG confirms that it has since then received the arbitration decision, which is currently estimated to result in an incremental cost impact of $58M due to the Bill 124 Decision.

account became clear. This date would allow OPG to record the full impacts of the Bill 124 Decision in line with the purpose of the account.

The entirety of the costs of the Bill 124 Decision accrued after the effective date should be eligible for the requested account, including any "true-up" payments in connection with collective agreement periods prior to the effective date. Contrary to OEB Staff's submissions, this does not give rise to retroactive ratemaking concerns. The company did not have a legal obligation and could not definitively quantify such costs before the corresponding collective agreements were established after March 1, 2023.

For the reasons that follow, OPG submits that the proposed account be established as requested.

1.0 THE OVERTURNING OF BILL 124 WAS AN UNFORESEEN EVENT

OPG's application was filed pursuant to the accounting order process included in OPG's rate framework approved by the OEB through the Approved Settlement Agreement (EB-2020-0290, Decision and Order, Schedule A, p. 17).[2] This process provides that unforeseen events affecting OPG's nuclear business will continue to be addressed through an accounting order process, subject to the $10M annualized materiality threshold.

The parties opposing OPG's request in this application generally focus on whether the Bill 124 Decision was "unforeseen" during OPG's 2022-2026 payment amounts application (CCC Submissions, p. 2; CME Submissions, p. 5; OEB Staff Submissions, p. 2; SEC Submissions, p. 2; VECC Submissions, p. 7). The prevailing view among the opposing parties appears to be that, since various constitutional challenges to Bill 124 were unfolding in the Ontario Superior Court while EB-2020-0290 was before the OEB in 2021, OPG knew or should have known that the law could be overturned during the 2022-2026 rate term. Accordingly, the opposing parties argue, the Bill 124 Decision should not be considered "unforeseen" during that proceeding and its

2. The accounting order process was described in OPG's EB-2020-0290 evidence at Ex. A1-3-2, p. 13 and further at Ex. L-A1-03-Staff-009.

impacts cannot now be recorded in a variance account requested pursuant to the accounting order process accepted by the parties under the terms of the Approved Settlement Agreement.

As OPG explained in the interrogatory responses and subsequent letter dated May 12, 2023, OPG knew that multiple parties had filed legal challenges to Bill 124 while EB-2020-0290 was in progress, having become aware of these challenges, in the same manner as any member of the public, when they were first reported in the media (Ex. L-SEC-02; OPG letter dated May 12, 2023). A successful legal challenge was only one outcome that was possible. However, a possibility does not mean that an event is not "unforeseen". As set out below, OPG submits that the opposing parties' definition of the term "unforeseen" is incorrect and the application of that definition is therefore inappropriate.

Essentially, the opposing parties argue that existence of a mere possibility of an event means that the event is not "unforeseen". This is incorrect on the plain language meaning of the term, which requires that the event in question be *probable.*[3,4] This definition is consistent with other sources[5] and interpretations by the courts.[6,7]

The event at issue is the Bill 124 Decision. Fundamentally, the parties' claim that this event was not unforeseen is flawed because knowledge of the commencement of a legal challenge cannot and does not imply any knowledge of or a degree of certainty as to the outcome of those proceedings. CME and VECC's suggestions that OPG, due to its size and nature, would or should have been in a position to effectively predict the likelihood of complex constitutional challenges (which to this day remains in appeal) are without basis and are factually incorrect. The outcome of a legal challenge is entirely dependent on the merits of the facts and arguments presented by the litigants and the discretion of the court presiding. OPG was not a party to the litigation and it did not and could not have any special insight into the status or probable outcomes

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3. "Unforeseen." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/unforeseen. Accessed 24 May, 2023.
4. "Expect." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/expect. Accessed 24 May, 2023.
5. For example, The Britannica Dictionary (www.britannica.com), Collins (www.collinsdictionary.com), and Cambridge Dictionary (dictionary.cambridge.org).
6. *Fullowka v. Royal Oak Ventures Inc.*, 2008 NWTCA 4, 2008 CarswellNWT 32, para 53-54.
7. *Condominium Plan No. 7220764 v. Bundi*, 2020 ABQB 757, 2020 CarswellAlta 2341, para. 46-47 and 49-50.

of these challenges (Ex. L-SEC-02). It was therefore impossible for OPG to conclude whether Bill 124 would likely be overturned during the EB-2020-0290 proceeding or any other time leading up to the Bill 124 Decision, making the decision an unforeseen event.

The opposing parties' submissions ignore the substantial uncertainties that existed around the outcome of the Bill 124 legal challenges. Instead, they effectively invite the OEB to view the issue through the lens of perfect hindsight, taking the ultimate outcome of the Bill 124 Decision as a probable outcome just because the result in question occurred. The OEB should not impute hindsight as proposed by these parties. Instead, the OEB should consider the facts that were known to OPG at the time of the EB-2020-0290 proceeding, which were not sufficient to suggest that the overturning of Bill 124 was foreseeable.

In addition to an inability to predict whether the legal challenges would be successful, OPG would have been unable to demonstrate the materiality of the monetary consequences arising from a successful challenge. A successful constitutional challenge can have multiple outcomes, not all of which result in a law being declared of no force and effect. The Ontario Superior Court has broad remedial powers and may take a range of actions in constitutional matters. For example, legislation found to violate the *Canadian Charter of Rights and Freedoms* may be referred back to the legislature to address the offending provisions, rather than being struck down. In addition, a party that has commenced a legal challenge of legislation is not bound by law to prosecute its challenge to the very end. Constitutional challenges have been withdrawn prior to being finally presented to a court for determination. The timing of the court's decision was also unknowable during the EB-2020-0290 proceeding. Both the specific remedy employed by the court and the timing of its decision would affect OPG's subsequent actions and the extent of incremental cost impacts the company might incur during the 2022-2026 period.

1.1 Responses to Specific Submissions on OPG's Knowledge during EB-2020-0290

Below OPG responds to certain characterizations of the company's evidence and its specific knowledge during the period of the EB-2020-0290 proceeding.

1.1.1 **OEB Staff**

OEB Staff speculate that OPG's response to Ex. L-Staff-05 is inaccurate. In that interrogatory, OEB Staff asked when OPG became aware that a provision to reopen compensation should Bill 124 challenges be successful ("Reopener Provision") would be included in the collective agreement with the Society. OPG's response was that it became aware that the collective agreement would include a Reopener Provision during the interest arbitration held on November 19, 2021. OEB Staff argue that it "seems very unlikely… that this was when OPG became aware that SUP would be seeking such a provision" (OEB Staff Submissions, p. 4), and VECC makes a similar submission (VECC Submissions, p. 4, para 13).

OPG's response is accurate: the company was not aware of what the new collective agreement's terms would be until the arbitration hearing held on November 19, 2021. While OPG cannot disclose the contents of the parties' briefs leading up to the arbitration, it would typically be aware of the union's requests in advance of the arbitration hearing. However, the fact that a party may be seeking certain outcomes from a collective bargaining process and that a possibility of such an outcome inherently exists does not entail an expectation that the party would receive it in the ultimate award by an independent arbitrator.

Moreover, as OPG explained in the interrogatory response, the Reopener Provision would only be triggered if the Ontario Superior Court ultimately overturned Bill 124, which as discussed was not something that could have been foreseen prior to the Bill 124 Decision. Therefore, even with the knowledge that the Reopener Provision would be awarded, OPG lacked sufficient factual basis during the EB-2020-0290 proceeding to demonstrate that activation of the provision was probable.

1.1.2 **CME**

CME argues that OPG's response to Ex. L-CME-01, part (b) was non-responsive, in that it did not confirm whether OPG knew about the legal challenges to Bill 124 prior to the EB-2020-0290 settlement conference in the summer of 2021. OPG disagrees.

As noted in Ex. L-SEC-02 referenced in response to the CME's interrogatory and in OPG's letter of May 12, 2023, OPG became aware of the legal challenges after they were first filed by the parties in 2020 and reported in the media. As further explained, OPG could not put a specific date on when it learned about specific legal actions, as it was not a party to any and does not have a way of verifying when specific individuals in the company became aware of a given legal action. As discussed above, the date of OPG's knowledge of a legal action does not imply a date that the overturning of Bill 124 became foreseeable (i.e., likely to occur).

CME also argues that OPG failed to meet its burden of proof to demonstrate that the overturning of Bill 124 was unforeseen (CME Submissions, p. 5-7, para 13-19). By incorrectly drawing on the OEB's policy for recovery of Z-factor amounts, CME asserts that OPG is obliged to demonstrate that it could not have planned and budgeted for the overturning of Bill 124.

CME's analogy to the filing requirements for Z-factor claims is not applicable to the relief sought in this proceeding. Those filing requirements, which are set out in Chapter 3 of the *Filing Requirements for Electricity Distribution Rate Applications*, s. 3.2.8., apply to local distribution companies ("LDCs") and are not a component of the accounting order process incorporated into the Approved Settlement Agreement as referenced above. Moreover, the Z-factor requirements apply to an LDC's application to recover the costs of a Z-factor event, not to an application to establish an account to record such events. A Z-factor account is established generically for all LDCs under the Accounting Procedures Handbook for Electricity Distributors. In effect, this application is a threshold that LDCs do not need to meet when they experience an unforeseen event that qualifies for Z-factor treatment. For these reasons, the Z-factor requirements referenced by CME should have no bearing on this application.

In any event, the overturning of Bill 124 was not a risk that OPG failed to budget for accurately – it is, by its very nature, a change of law that was beyond OPG's ability to control or predict. As described in this application, OPG's evidence in EB-2020-0290 was transparent that the forecast compensation costs for the applicable three-year moderation periods were set based on the wage restrictions legislated in Bill 124 (Application, p. 8-9, s. 1.2), as reflected in the business plan approved by OPG's Board of Directors and concurred by OPG's shareholder. OPG submits that it is highly unlikely that it would have been acceptable to the OEB (or intervenors) had OPG sought to recover forecasted compensation costs on an assumption that the law in place at the time would be overturned, nor does OPG believe that it would have been appropriate for it to do so. As indicated above, there was an insufficient basis to establish that the ultimate overturning of Bill 124 was probable and foreseeable, and the constitutional remedy in the event it was overturned was unknown to OPG.

1.1.3 **SEC and AMPCO**

SEC argues that the information asymmetry that exists between OPG, as an applicant, and other parties to the EB-2020-0290 proceeding means that the company had a duty to bring forward information on the legal challenges to Bill 124 in the context of the EB-2020-0290 payment amounts application (SEC Submissions, p. 4). AMPCO makes a similar argument that OPG had an obligation to identify the legal challenge and its implications as part of the application (AMPCO submission, p. 2). These arguments should be rejected by the OEB, as there was no information asymmetry between the parties in relation to the legal challenges to Bill 124. The information that the court proceedings had been commenced was public information and as a non-litigant OPG was in no better position than the intervenors as to the litigation and any potential outcome. Furthermore, any positive obligation to disclose information is based on the OEB's Rules of Practice regarding information constituting a material change. However, nothing materially occurred in this regard until the Bill 124 Decision was issued in November 2022, well after the EB-2020-0290 proceeding.

SEC and AMPCO suggest that OPG had additional information about the risks related to the legal challenges that it could have disclosed, with AMPCO going as far as to claim that "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" (AMPCO Submissions, p. 2). This is factually incorrect. As VECC observes in their submissions, both OPG and the other parties to EB-2020-0290 were likely aware of a possibility that Bill 124 could be overturned (VECC Submissions, p. 4, para 16). As noted above, OPG was not a participant in these proceedings, had no special insight into the likelihood of the legal challenges' outcomes or potential remedies beyond the public facts that were available to all parties, and therefore could not accurately forecast the potential timing or impact of the ultimate outcome. Accordingly, there was no information asymmetry when it came to OPG's knowledge of the legal challenges to Bill 124, nor did OPG have any further information to disclose on the likelihood or extent of the impact that could materialize.

1.2 The Opposing Parties' Position Would Significantly Expand the Scope of Future Rebasing Applications

The opposing parties argue that the overturning of Bill 124 was foreseeable. They believe that OPG could have addressed this risk during the EB-2020-0290 proceeding and, having failed to do so, should now be prevented from recording the cost consequences of that legal result in the proposed variance account. Other than OEB Staff who suggest that the risk of a potential change in law should be dealt with like any other business risk (OEB Staff Submissions, p. 2), the opposing parties appear to argue that OPG should have sought a variance account at the time of the EB-2020-0290 proceeding (CME Submissions, p. 9, para. 26; SEC Submissions, p. 2; AMPCO Submissions p. 2; CCC Submissions, p. 2).

Given the significant uncertainty of the ultimate outcome, timing and potential impact of the legal challenges to Bill 124 as discussed above, OPG disputes that it would have been appropriate to establish the proposed variance account at the time of EB-2020-0290. In OPG's view, it would have been appropriate for it to propose a variance account if the overturning of Bill 124 was known to be probable and the account would capture the uncertainty in resulting compensation outcomes. However, if the majority of opposing parties' view of what is considered foreseeable is correct, which OPG submits it is not, this would imply significant consequences to the rebasing

applications. Instead of applications based on foreseeable and probable parameters, the opposing parties suggest that OPG (and other applicants) should request an account for risk based on mere possibility, addressing all of the possible and potential exogenous risks and not just probable risks. This would effectively mean that applicants should be actively considering matters and circumstances related to third parties that do not involve the company and are outside of the company's control, even if their probability is remote, and on that basis requesting approval of new accounts during rebasing proceedings.

For example, the parties' definition of "unforeseen" would suggest that deferral or variance accounts should be sought to capture the impacts of potential changes of law that could result under different political parties' platforms should they form government as a result of a future election. It could also lead applicants to file evidence from independent legal experts regarding the likelihood that ongoing or potential litigation between third parties could affect the applicant's business. In OPG's submission, it would neither be appropriate nor an efficient use of the regulatory process to engage in such speculation on the likelihood of potential exogenous risks, nor was this the intention of the accounting order process included in OPG's rate framework.

OEB Staff suggest that the risk of a potential change in law resulting from the legal challenges of Bill 124 should not be eligible for a variance account, even if it had been raised during the 2022-2026 payment amounts proceeding, and should be treated like any other variance from forecasted costs (OEB Staff Submissions, p. 2, 5-6). Similar to CME's flawed argument that OPG should have planned for this potential change of law as discussed above, OEB Staff's position on what is foreseeable would mean that applicants should attempt to include all possible risks in their cost forecasts, no matter how remote and speculative they might be. However, in order to ensure just and reasonable payment amounts, cost forecasts should be based on foreseeable and probable events and not those that reflect a mere possibility. To do otherwise (as suggested by OEB Staff and CME) would be inappropriate as any resulting payment amounts paid by ratepayers would not reflect the best forecast. The underlying rationale for the "unforeseen" criteria in the accounting order process incorporated into the Approved Settlement Agreement is to avoid this outcome by capturing the material cost impacts of events that were not probable or forecastable, such as the overturning of Bill 124.

In the case of the overturning of Bill 124, OPG has estimated that the impact on PWU-represented employees alone will be approximately $130M over the remainder of the rate period (Ex. L-Staff-01), with the additional amount to be incurred for Society-represented employees. If the OEB Staff's position is correct, OPG should have sought to include these amounts (or some other estimate) in its forecasted compensation costs in EB-2020-0290, despite the high degree of uncertainty around the costs at the time of the proceeding. As noted, OPG does not believe that this would have been an appropriate or sensible outcome.

1.3 Timing of OPG's Variance Account Request Does Not Prejudice Ratepayers

In suggesting that the EB-2020-0290 payment amounts application was the appropriate time for OPG to seek a variance account to capture the potential impacts of the legal challenges to Bill 124, parties imply that some harm results to ratepayers from the establishment of an account in this proceeding that would not have occurred if the same account had been established in the EB-2020-0290 proceeding. Other than arguing that the outcome of the settlement process may have been different had OPG identified the need for a variance account as part of EB-2020-0290, which is addressed in section 2.1 of these submissions, none of the parties have articulated how this harm arises.

In actuality, no prejudice results to ratepayers from establishing the proposed account effective March 1, 2023 relative to establishing it at the time of the OEB's Decision and Order on EB-2020-0290 issued on November 15, 2021 (or any other time leading up to March 1, 2023, whether before or after the Bill 124 Decision issuance on November 29, 2022). As further discussed in section 4.0 of these submissions, no entries could have been made to the account prior to the establishment of the collective agreements giving rise to the cost impacts of the Bill 124 Decision subsequent to March 1, 2023 and no costs from the overturning of Bill 124 were recorded in OPG's financial records prior to March 1, 2023. Assuming the proposed variance account is effective March 1, 2023, the entries in it would be identical to those that would have been made to a hypothetical account established at any time prior to March 1, 2023.

OPG's request in this application is simply for the right to record the full scope of the cost impacts that it incurs as a result of the change in law resulting from the Bill 124 Decision. There is no cost to ratepayers from the OEB's decision in this proceeding, and no incremental account balance would accrue relative to the amounts that would have been recorded if the account had been established earlier. The balance of fairness favours granting OPG's request and allowing a subsequent panel of the OEB to assess the appropriate disposition of those amounts.

Given that there is no harm to ratepayers of the current timing of OPG's request for an account, that an insufficient factual basis and significant uncertainties existed related to the potential outcome, timing and impacts of the legal challenges prior to the issuance of the Bill 124 Decision, and that the accounting order process specifically addresses such unforeseen events, it was not necessary for OPG to pursue a variance account during the EB-2020-0290 proceeding. Once the factual basis for the account became much clearer following the Bill 124 Decision and before any associated impacts were incurred, OPG began to prepare and ultimately filed this application. OPG submits that in doing so it acted reasonably in the circumstances and that the timing of the application should not affect its outcome.

2.0 OPG HAS MET THE OEB CRITERIA TO ESTABLISH A DEFERRAL OR VARIANCE ACCOUNT

Parties have pointed to the three eligibility criteria to establish a deferral or variance account set out in s. 2.9.2 of the Filing Requirements. These eligibility criteria are:

1. **Causation**: the forecast amount to be recorded in the proposed account must be clearly outside of the base upon which rates were derived.

2. **Materiality**: the annual forecast amounts to be recorded in the proposed account must exceed the OEB-defined materiality threshold and have a significant influence on the operation of the distributor, otherwise they must be expensed or capitalized in the normal course and addressed through organizational productivity improvements.[8]

8. As discussed in section 2.2 below, the OEB-approved settlement in EB-2020-0290 defines a materiality threshold of $10M annually for applications brought to establish accounts to record the impact of unforeseen events affecting OPG's nuclear business.

3. **Prudence**: the nature of the amounts and forecast quantum to be recorded in the proposed account must be based on a plan that sets out how the amounts will be reasonably incurred, although the final determination of prudence will be made at the time of disposition. For any costs incurred, in terms of the quantum, this means that the distributor must provide evidence demonstrating that the option selected represented a cost-effective option (not necessarily least initial cost) for ratepayers.

(*Filing Requirements for Electricity Distribution Rate Applications*, December 15, 2022, s. 2.9.2, p. 66)

In addition to meeting the criteria expressed in OPG's accounting order process, OPG's application meets each of the three criteria above. OPG's submissions on each of these three criteria are set out below.

2.1 Causation

The compensation amounts to be recorded in the proposed variance account are clearly outside the base upon which OPG's payment amounts were derived in EB-2020-0290.

Four parties support OPG's position that the amounts to be recorded in the proposed account would be incremental to the base upon which OPG's nuclear payments amounts are set (OEB Staff Submissions, p. 5; AMPCO Submissions, p. 3; PWU Submissions, para 10, SUP Submissions, p. 2;).[9] SEC, VECC and CCC argue that the causation criterion is not met due to the fact that the cost levels reflected in the payment amounts were a result of a binding settlement between the parties, with CME making similar submissions (SEC Submissions, p. 3-4; CCC Submissions, p. 3; VECC Submissions, p. 3-5; CME Submissions, pp. 9-10). OPG responds to these arguments below.

9. OEB Staff agree that the costs related to the overturning of Bill 124 would be incremental to the compensation amounts in OPG's payment amounts, but suggest that the "foreseeability" requirement discussed above is related to causation and the requested account should be rejected on that basis.

2.1.1 Response to SEC Submissions on Risk Allocation of the Bill 124 Decision

SEC argues that, since OPG did not identify specific risks due to the pending legal challenges to Bill 124 during the EB-2020-0290 proceeding, its request to establish the variance account proposed in this application "implicitly" claims that intervenors accepted the risk of increased compensation costs that could result from the potential overturning of Bill 124 as part of the Approved Settlement Agreement (SEC Submissions, p. 4). In fact, SEC argues, the opposite is true – the terms of the settlement should be considered to mean that OPG accepted the risk of any cost increases resulting from the Bill 124 challenges by agreeing to a "fixed level of OM&A". (SEC Submissions, p. 4).

OPG submits that SEC mischaracterizes OPG's position as well as the Approved Settlement Agreement and their arguments should be rejected by the OEB. Despite SEC's assertion to the contrary, OPG does not claim that intervenors agreed that ratepayers should accept some undisclosed risk in relation to the operations, maintenance and administration ("OM&A") costs in OPG's 2022-2026 nuclear revenue requirements. OPG's position is simple: intervenors accepted a mechanism by which the company may seek to record the impacts of material unforeseen events affecting the nuclear business during the 2022-2026 rate period, and OPG's proposed variance account clearly abides by these settlement terms. However, SEC and other parties are now effectively seeking to ignore that aspect of the Approved Settlement Agreement by attempting to "choose" the unforeseen events to which these provisions should and should not apply.

OPG does not dispute that it accepted the risk that its actual costs during the rate period could deviate from the levels agreed to in the Approved Settlement Agreement. However, at the same time, the approved rate-setting framework accepted by SEC and other parties included a mechanism by which the company could seek to record, and potentially recover, the impacts of material unforeseen events, without any specific exclusions. As OPG has shown in its evidence and supported throughout these submissions, the overturning of Bill 124 is a material unforeseen event that is eligible for the accounting order process and OPG did not have any additional information to disclose regarding the likelihood or potential impact of the event during the course of the EB-2020-0290 proceeding. SEC's position to allocate all risk from this change of law to

OPG is contrary to the Approved Settlement Agreement and would effectively deny OPG use of the agreed mechanism when it is appropriately needed.

2.1.2 Response to SEC, VECC and CCC Submissions on the Impact of EB-2020-0290 Settlement

SEC, VECC and CCC argue that the OEB cannot ascertain whether the amounts to be recorded in the proposed variance account are incremental to the base upon which rates were derived, since settlement negotiations were confidential and, even if they were not, the OEB cannot be certain what was in the parties' minds during settlement (SEC Submissions, p. 3-4, CCC Submissions, p. 3; VECC Submissions, p. 3-5). In effect, these intervenors argue that, since the commencement of legal proceedings was public and equally known by OPG and other parties and a party may have been *thinking* about a possible future compensation cost impact resulting from the outcome of the legal proceedings, the OEB should presume that the settled compensation costs were derived based on a potential overturning of Bill 124. SEC and CME overreach further by arguing that the parties entered into the agreement on the expectation that a future overturning of Bill 124 would not be treated as an unforeseen event (SEC Submission, p. 3; CME Submissions p. 10).

The implication of the parties' position is that in order for OPG to request an account under the unforeseen event mechanism in the approved rate framework, it must prove the negative proposition that the parties were not thinking about the particular circumstance giving rise to the requested account. If this argument succeeds, neither OPG nor the OEB could ever know with certainty whether intervenors were contemplating a particular risk when negotiating the settlement. Using the confidential nature of settlement negotiations as a shield, these parties are attempting to prevent OPG from exercising its approved right to seek an account to record costs arising from unforeseen events.

In OPG's submission, the OEB should not apply a subjective standard based upon what intervenors thought or did not think. The OEB should resolve this issue by applying an objective standard and assess whether it is likely from the facts on record to conclude whether the settled revenue requirement components were based on a given cost (in this case, the cost impacts of

the overturning of Bill 124), or whether the circumstance and related cost impacts were unforeseeable (i.e., not probable) and excluded from the revenue requirement. The standard that the intervenors propose – certain knowledge of the parties' thoughts during settlement – is impossible to satisfy and is logically inconsistent with the existence of the approved accounting order mechanism that permits the creation of an account to record cost impacts where material unforeseen events occur.

As noted above, something unforeseeable is something that is not reasonably predictable or is speculative, such that the related costs cannot properly form part of the base costs included in the revenue requirement. For the reasons set out in OPG's evidence and this submission, the overturning of Bill 124 is an unforeseen event, and there are no facts whatsoever on the record of the proceeding, including the Approved Settlement Agreement itself, that the potential impacts of this event were contemplated in the approved revenue requirement or otherwise excluded from the scope of the agreed unforeseen event mechanism.[10]

2.2 Materiality

The accounting order process for unforeseen events that is incorporated in the Approved Settlement Agreement is set out in s. 2.3.3 of EB-2020-0290, Ex. A1-3-2. This includes a defined annualized materiality threshold of $10M for applications made under the process.

The amounts that OPG expects to record in the account far exceed both the defined $10M materiality threshold and amounts the OEB has previously found to be material in the context of OPG accounting order applications. As shown in Ex. L-Staff-01, Table 1, OPG forecasts that for PWU-represented employees, it would record approximately $130M to the proposed account in the period from 2023 to 2026, exceeding $10M in each year. Although amounts for Society-represented employees were not available due to the pending arbitration outcome when the

10. At p. 41 of the OEB-approved settlement proposal (EB-2020-0290, Decision and Order, Schedule A), the parties documented a complete settlement of issues 9 and 10, which encompassed OPG's compensation costs. The parties agreed to reduce total OM&A costs proposed in OPG's application on the basis of Bill 124 by 3% per year, excluding Darlington Refurbishment and Darlington New Nuclear OM&A and Centrally-Held Costs.

above interrogatory response was filed, those amounts will further increase the total amounts to be recorded.[11]

With the exception of OEB Staff, CCC and VECC, most parties either support the conclusion that OPG's forecasts are material or make no submissions on the issue. Although they do not raise it in the context of materiality, a number of parties also argue that OPG does not need additional funding to cover the impacts that would be recorded in the proposed account based on OPG's estimated achieved 2022 ROE for the regulated business. OPG responds to these submissions below.

2.2.1 Response to OEB Staff and CCC Submissions on Materiality and Parties' Submissions on Achieved ROE

OEB Staff argue that, while OPG may have met the defined materiality threshold of $10M, the amounts forecast to be recorded to the account will not have a significant influence on the operation of OPG. To support this position, OEB Staff observe that the $130M cost amount for PWU-represented employees is less than 1% of OPG's total approved revenue requirement over the rate period (OEB Staff Submissions, p. 5) and assert that OPG should manage the incremental costs within its approved funding (OEB Staff Submissions, p. 2). The only fact cited in support of this conclusion is OPG's estimated 2022 achieved ROE for the regulated business (OEB Staff Submissions, pp. 5-6). Using similar arguments, CCC also questions whether the materiality criterion should be considered met (CCC Submissions, p. 3).

OEB Staff's comparison is not an accurate reflection of the impact.[12] First, OEB Staff's calculation does not include the impact of increased compensation for Society-represented employees. Second, the more appropriate and consistent comparison is relative to OPG's total nuclear OM&A costs that are subject to the stretch factor, being the costs that the rate framework intended to be managed to achieve incremental efficiencies.[13] Such total OM&A costs reflected

11. OPG confirms that it has since then received the arbitration decision, which is currently estimated to result in an incremental cost impact of $58M due to the Bill 124 Decision.
12. CCC makes a similar comparison of the estimated cost impact of overturning of Bill 124 to the total approved annual nuclear revenue requirement.
13. As noted in Ex. L-SUP-04, part 2), capital related amounts within the total $130M cost impact related to PWU-represented employees comprise less than $1M.

in the approved revenue requirements over the 2022-2026 period, before the application of the stretch factor, are $6,737M.[14] Compared against that baseline, a $130M impact of the Bill 124 Decision represents approximately 2%. Third, a $130M impact is greater than the total stretch factor reductions of $112M over the 2022-2026 period applied under the Approved Settlement Agreement[15] and, for additional context, exceeds or approaches the total outage OM&A budget for an OPG nuclear station in certain years.[16] The more than doubling of the approved stretch factor reductions would be equivalent to a stretch factor of over 1.2% in each of the years 2023-2025, punitively exceeding the highest stretch factor of 0.60% under the OEB's framework, and over 0.60% in year 2026.

For these reasons, it is inconceivable to OPG that a reduction to the company's nuclear compensation funding of such extent (and in fact of greater magnitude, once the impacts for Society-represented employees are included) would be considered not material. Such a determination would also be notably inconsistent with the OEB's prior decisions, including EB-2018-0002 where the OEB found that a $137.7M impact was material in that it exceeded the $10M materiality threshold (EB-2018-0002, Decision and Order, p. 4) and EB-2016-0152 where the OEB found that the $10M threshold was appropriate (EB-2016-0152, Decision and Order, pp. 134, 142). It would also defeat the purpose of the materiality threshold being agreed to by the parties under the Approved Settlement Agreement.

OPG submits that the $10M materiality threshold set out for accounting order applications pursuant to the Approved Settlement Agreement is the applicable measure of materiality. To the extent the OEB determines that a secondary threshold applies based on the language in the Filing Requirements, OPG submits that it has demonstrated that the amount forecasted to be recorded in the account is material by virtue of it significantly influencing the company's operations.

In the context of materiality or generally, a number of parties argue that the OEB should consider the need, or outright deny OPG's request, for the variance account due to the fact that OPG's

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14. EB-2020-0290 Payment Amounts Order, App. A, sum of Table 7, lines 6, 12 and 13, cols. (b)-(e).
15. EB-2020-0290 Payment Amounts Order, App. A, sum of Tables 1-5: line 25, cols. (b)-(e).
16. EB-2020-0290 Payment Amounts Order, App. A, lines 3 and 9 show outage OM&A for each of Darlington and Pickering stations.

achieved ROE for 2022 exceeds the ROE reflected in the approved payment amounts.[17] The OEB should reject these arguments. There is no requirement that the OEB consider the implications, if any, of OPG's achieved ROE to provide the relief sought by OPG in this proceeding, whether in the context of the materiality criterion or otherwise. OPG's request is solely for the establishment of an account and the ability to prospectively record costs in that account. Actual financial results for a past year are not relevant to the prospective costs incurred and proposed to be recorded in the account.

To the extent the OEB finds that achieved ROE is relevant to the establishment of the account proposed in this application, which OPG submits it is not, 2022 is a single year in a five-year rate term. As OEB Staff acknowledge, there can be no certainty that the level of financial performance achieved in 2022 will continue in subsequent years and therefore what the overall earnings position will be over the full span of the rate term (OEB Staff Submissions, pp. 5-6). Accordingly, OPG's 2022 ROE cannot give an accurate impression of the earnings that would result in 2023 and beyond (i.e., the years in which OPG will incur the costs due to the overturning of Bill 124). OPG also notes that the Approved Settlement Agreement already provides for an asymmetrical earnings sharing mechanism whereby 50% of earnings, including any variance account impacts, that exceed 100 basis points above the ROE reflected in the approved payment amounts over the 2022-2026 period would be returned to customers.

2.2.2 Response to VECC Submissions on Materiality

VECC submits that OPG has not satisfied the materiality criterion because (i) it declined to produce an updated "Appendix 2-K", (ii) because it disagrees with the methodology OPG intends to use to determine the entries into the proposed account, and (iii) because OPG initially declined to provide the actual 2022 achieved ROE. While VECC may not be satisfied with OPG's responses on these issues, none of the objections relate to materiality, as set out below.

17. SEC and CCC suggest that the OEB should consider OPG's 2022 ROE in the context of the eligibility for a Z-factor claim (SEC Submissions, p. 8; CCC Submissions, p. 3). For the reasons discussed in section 1.1.2 of these submissions, the analogy to the filing requirements for Z-factor claims is not applicable to the relief sought in this proceeding.

“Appendix 2-K” in EB-2020-0290 refers to an exhibit that provides actual and planned staffing, compensation, and benefit information with respect to OPG’s nuclear facilities. As noted, the methodology OPG would use to record entries into the account, unless directed otherwise, is to escalate applicable compensation amounts forecasted for each of operating and capital costs in EB-2020-0290 without modifying other underlying assumptions, such as number of employees (Application, p. 12; Ex. L-SUP-01). OPG believes that this methodology is most consistent with the purpose of the proposed account to isolate the impacts of the overturning of Bill 124. However, as noted in Ex. L-SEC-07, OPG is not seeking the approval of this methodology in this proceeding and, as noted in the application, acknowledges that establishment of the proposed account does not constitute approval of the balance that will be recorded and that the parties will have the opportunity to review and test the evidence filed in a future application regarding the actual entries and account balance (Application, p. 13).

Based on the above, to the extent VECC believes that an alternate methodology that would use the actual number of employees based on an updated Appendix 2-K is more appropriate, it would be able to review the necessary information and advance that position in a future proceeding (VECC Submissions, p. 6, para 22). To the extent VECC is suggesting that the impact of the overturning of Bill 124 under their proposed alternate methodology could be less than $10M annually, OPG submits that this is not a credible argument, as it would imply that OPG’s current unionized workforce levels associated with nuclear operations would be between one-quarter to one-half of the EB-2020-0290 forecasts, representing a reduction of thousands of employees. Clearly, this is not a credible scenario and is not the case.

On VECC’s third objection, OPG ultimately provided the company’s current estimate of the achieved 2022 ROE for the regulated business in its letter of May 12, 2023.

For the above reasons, the OEB should reject VECC’s submissions on materiality.

2.3 Prudence

The Filing Requirements set out a two-phase test for prudence in respect of deferral and variance accounts (Chapter 2, s. 2.9.2, p. 66). The first phase relates to the establishment of the account,

at which time the party seeking the account must demonstrate that "the nature of the amounts and forecast quantum to be recorded in the proposed account must be based on a plan that sets out how the amounts will be reasonably incurred." The second phase occurs when the applicant seeks to dispose of any balance in the account, at which time the OEB can make a final determination on whether the costs actually incurred were prudent, based on a full evidentiary record. Only the first phase applies to this application for an accounting order, and this is the basis upon which OPG prepared and submitted evidence as part of the application. The second phase would apply in a future proceeding to dispose of the account balance. OPG submits that any aspects of prudence to be considered in that future proceeding should not affect the OEB's consideration of whether to approve the account requested in the current application.

OPG has satisfied the first phase of the test by demonstrating that the cost impacts of the Bill 124 Decision would be recorded to the account based on a reasonable plan, reflecting collective agreements covering its workforce that were duly reached through collective bargaining processes with the PWU and the Society as described in the application (Application, pp. 6-7). OPG has also confirmed that it will provide detailed information to support the amounts recorded in the account when it seeks to dispose of any balance, including an audit of the account balance, and that such disposition would be subject to a prudence review of the amounts at that time (Application, pp. 12-13; Ex. L-Staff-06). OPG has further acknowledged that the Ontario Government's ongoing appeal of the Bill 124 Decision may affect OPG's ultimate obligations under the collective agreements and confirmed its view that any such impacts may be addressed when OPG seeks to dispose of the account balance (Application, p. 13).

OEB Staff, PWU and Society agree that OPG has satisfied the first aspect of the prudence test as required to establish an account (OEB Staff Submissions, p. 6; PWU Submissions, para. 10; SUP Submissions, p. 2).

The parties that oppose a finding of prudence all advance essentially the same argument: the compensation evidence filed in EB-2020-0290 indicates that OPG's compensation costs were above market median under Bill 124 and the OEB should determine in this proceeding that no further cost increases resulting from the overturning of Bill 124 could possibly be prudent (CCC

Submissions, p. 3; AMPCO Submissions, p. 4; SEC Submissions, p. 8). VECC also appears to argue that the OEB cannot approve the prudence of incremental compensation costs without making a comprehensive determination on all of OPG's compensation evidence in EB-2020-0290 (VECC Submissions, pp. 6-7).

In effect, the opposing parties are inappropriately asking the OEB to prejudge the outcome of the substantive future prudence proceeding by pre-emptively ruling on the outcome of such application. This is not a reasonable request and it is not consistent with the two-phase prudence test articulated in the Filing Requirements. On this basis, the OEB should not rule on the substantive prudence of such prospective, incremental costs that would be recorded in the proposed variance account as part of this first phase. As OPG has proposed, and as OEB Staff reinforce in their submissions, the application in which OPG seeks to recover amounts recorded to the proposed account is when the detailed evidence on the prudence of the amounts would be required and appropriate (OEB Staff Submissions, p. 6).

Furthermore, the opposing parties' submissions that the OEB should pre-emptively disallow the incremental costs resulting from the overturning of Bill 124 are based on EB-2020-0290 benchmarking evidence on which the OEB never ruled. In addition to ignoring the interaction of that evidence with reductions to OPG's proposed OM&A costs under the Approved Settlement Agreement,[18] OPG submits that this amounts to an attempt to improperly litigate the prudence of the full EB-2020-0290 compensation costs in this proceeding, incorrectly creating the impression that those compensation amounts were demonstrably imprudent. By asserting that any costs to be recorded in the requested account must be imprudent, the opposing parties are in effect attempting to re-evaluate the OM&A costs already found to be reasonable for purposes of establishing just and reasonable payment amounts based on the Approved Settlement Agreement and then to extrapolate that evaluation to costs not yet incurred. However, given that the circumstance giving rise to the cost impacts to be recorded was unforeseen and those costs were not included in the original forecast, their prudence should instead be properly considered in their own right in a future application.

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18. The reductions to OPG's proposed 2022-2026 OM&A costs totaled $315M under the Approved Settlement Agreement (EB-2020-0290, Decision with Reasons, Schedule A, p. 26).

OPG acknowledges that the OEB has expressed criticisms and made disallowances with respect to OPG's compensation costs in prior payment amount proceedings and understands its burden of proof with respect to the prudence of the costs in question. However, the OEB made those past determinations based on a full examination of the applicable evidence and submissions before it. As stated above, the criteria for establishing a deferral or variance account do not require the OEB to consider these types of prudence arguments in this proceeding, nor is the record in either this proceeding or EB-2020-0290 sufficient to support such consideration, in OPG's submission. A pre-emptive determination of imprudence sought by the opposing parties as part of this application would effectively deny OPG the opportunity to provide future evidence in support of these costs.[19]

3.0 OPG'S PROPOSED EFFECTIVE DATE FOR THE VARIANCE ACCOUNT IS APPROPRIATE

OPG submits that its proposed effective date for the variance account as of the interim effective date of March 1, 2023 is reasonable and should be granted. It represents a date after the Bill 124 Decision that gave rise to the current factual basis for the requested account and precedes the establishment of the collective agreements giving rise to the costs associated with the Bill 124 Decision. It is also the date of OPG's application, which OPG submitted within a reasonable timeframe once the factual basis for the account became clear following the Bill 124 Decision. The requested effective date would allow OPG to record the full impacts of the Bill 124 Decision in line with the purpose of the account without giving rise to rate retroactivity concerns as discussed in section 4.0 of these submissions.

OEB Staff submit that, if the proposed variance account is approved, it should be effective as of the date granting final approval of the account (OEB Staff Submissions, p. 7). OEB Staff base this proposal on their view that OPG could have sought such an account during the EB-2020-0290 proceeding and a statement that it is "[t]he OEB's ordinary practice is to make variance accounts effective on the date of the final approval" (OEB Staff Submissions, p. 7).

19. For example, such evidence may include updated compensation benchmarking based on actual results for the years in question and information on trade-offs achieved in recent collective bargaining, among others.

No harm results to ratepayers from OPG's request for the account being made on March 1, 2023. As set out in OPG's evidence, the PWU collective agreement giving rise to the impacts of the Bill 124 Decision was agreed by the parties subsequent to March 1, 2023 and was not ratified by union members until April 11, 2023, while the arbitration award amending the governing Society collective agreement to reflect the Bill 124 Decision had not yet been issued as of the date of OPG's interrogatory responses in this proceeding of May 4, 2023 (Application, p. 7; Ex. L-SUP-02). Unlike OPG's proposal, OEB Staff's proposal would have the effect of precluding the recording of those costs resulting from the Bill 124 Decision that will be accrued under these collective agreements prior to the date of the OEB's final decision in this proceeding. This would significantly prejudice OPG by denying it an opportunity to seek recovery of the full costs of the Bill 124 Decision and causing it a financial loss of several times greater than the $10M materiality threshold confirmed by the OEB[20] and reflected in the accounting order process incorporated into Approved Settlement Agreement.

There is ample precedent for OEB approving accounts effective as of their interim dates, when the facts support such an approach.[21] The facts in this instance support a final effective date of March 1, 2023, as they did OPG's request to establish the account on an interim basis. OPG can confirm that it is recording entries to the account as authorized by the OEB's Interim Order in this proceeding, as of the dates the collective agreements were established. OPG submits that the effective date proposed by OEB Staff would in this case be arbitrary and punitive.

4.0 THERE ARE NO RETROACTIVE RATEMAKING CONCERNS WITH ANY OF THE COSTS PROPOSED TO BE RECORDED IN THE ACCOUNT

OPG proposes that the requested account record the incremental nuclear revenue requirement impact of all amounts accrued (i.e., incurred) under OPG's collective agreements as a result of the overturning of Bill 124 on or after the final effective date of the account, which OPG requests to be March 1, 2023 as discussed above (Application p. 12). This approach is consistent with

20. EB-2016-0152 Decision and Order, pp. 134, 142.
21. For example, the OEB recently approved accounts with effective dates earlier than the decision dates in EB-2022-0184 (EPCOR request for a Customer Volume Variance Account) and EB-2022-0145 (Hydro One request for Account 1508). The OEB also approved the same effective dates on an interim basis and final basis for OPG deferral accounts established in EB-2015-0374, EB-2018-0002, and EB-2020-0290 related to changes in Pickering station end-of-life dates.

OEB Staff submissions, which state that, "only amounts that are accrued after that [effective] date should be eligible for the account and for potential recovery" (OEB Staff Submissions, p. 7).

However, OEB Staff go on to say:

> "To the extent any new contract with PWU or SUP provides for a "catch-up" payment for any period prior to this date, these amounts should not be placed in the account, irrespective of the date when any "catch-up" payment is actually made. To allow for entries into the account for periods prior to the creation of the account would amount to impermissible retroactive ratemaking. In addition, OPG had the opportunity to request such a deferral account in the EB-2020-0290 proceeding and did not do so." (OEB Staff Submissions, p. 7)

OPG submits that the two statements by OEB Staff are internally inconsistent. While OPG agrees that amounts accrued after the effective date should be eligible to be recorded in the account, it cannot simultaneously be true that some amounts accrued after the effective date of the account are ineligible. OPG submits that all amounts accrued after the effective date of the account should be eligible to be recorded. To deny recovery of such amounts accrued in the current period is to make them, in effect, un-recoverable in any period. This would be an illogical outcome. It would also be unfair and contrary to the purpose of the account, as the timing of these costs being incurred reflects the timing of the exogenous Bill 124 Decision and its consequences to the company's collective bargaining processes.

To be clear, as set out on the record of this proceeding, no compensation costs related to the impact of the Bill 124 Decision on OPG's collective agreements were incurred or paid by the company prior to March 1, 2023 (Ex. L-Staff-02). For further clarity, no such impacts were recorded in the company's financial records prior to that date, including OPG's 2022 financial statements published on March 9, 2023. Any and all incremental PWU- and Society-represented employee related costs resulting from the overturning of Bill 124 are accrued by the company after March 1, 2023, resulting in no retroactive ratemaking.

OPG's application and interrogatory responses are explicit on the point of there being no rate retroactivity concerns with the company's request. The application explains that no impacts had arisen related to the Bill 124 Decision at the timing of filing as the "processes to establish the

compensation provisions of collective agreement that were or would have been covered by a moderation period are currently ongoing" (Application, p. 12). For PWU-represented employees, this refers to the negotiations for a new collective agreement, which had been ongoing since the expiry of the governing agreement on March 31, 2022 (Application, p. 7). As noted above, such new agreement covering the period April 1, 2022 to March 31, 2024 was reached after March 1, 2023 and was subsequently ratified by the union membership on April 11, 2023 (Ex. L-SUP-02). With respect to the Reopener Provision of the governing collective agreement with the Society for the period January 1, 2022 to December 31, 2023, as noted, an arbitration hearing was held on April 19, 2023, having been adjourned from the original date of March 15, 2023, and the arbitrator's decision was pending as of the interrogatory responses' date of May 4, 2023 (Application, p. 7; Ex. L-SUP-02).[22]

Based on the above facts and the status of collective bargaining processes, the company did not have a legal obligation and could not definitively quantify the costs arising from the Bill 124 Decision under a yet-to-be-determined PWU collective agreement and amended Society collective agreement prior to these agreements being in place (Ex. L-Staff-02; Ex. L-SUP-02). This includes costs in connection with periods prior to March 1, 2023 that would be covered by these agreements (i.e., "true-up" payments, also referred by OEB Staff as "catch-up" payments).

True-up payments in general are a common occurrence in business and it is not unusual for such payments in respect of a given period that arise or become determinable in a future period to be accounted or forecasted as an expense of that future period. Under OEB Staff's approach, such costs would either have to be retroactively reported in a prior period for regulatory purposes, leading to restatements of prior period information, or would be included in no period at all. This could drive numerous differences between financial accounting and regulatory reporting that do not exist currently, leading to more complex rate filings and pervasive reconciliation requirements. Moreover, similar to the opposing parties' view of what constitutes an unforeseen event as discussed above, this would have significant implications to applicants' rebasing applications. To avoid the risk of true-up payments that are not known until a future period being treated as out-of-period costs, applicants would need to address risks of such potentially

22. OPG confirms that it has since then received the arbitration decision, which is currently estimated to result in an incremental cost impact of $58M due to the Bill 124 Decision.

unknown but possible future payments in cost forecasts or speculative requests for deferral or variance accounts. For the reasons discussed above, OPG submits that this would not serve the goal of regulatory efficiency and would not be appropriate to the setting of just and reasonable payment amounts.

Based on the above, OPG submits that there is no reason for the OEB to deviate from the manner in which the costs associated with the Bill 124 Decision are being accounted by OPG in the normal course. The entirety of these costs is incurred post March 1, 2023 and should be eligible for the requested account effective as of that date.

5.0 CUSTOMER ENGAGEMENT IS NOT REQUIRED FOR AN APPLICATION TO ESTABLISH THE PROPOSED VARIANCE SCCOUNT

CCC submits that the lack of customer engagement is a gap in OPG's application, arguing that customers may not support an application to recover compensation costs in light of OPG's historic compensation costs and recent earnings (CCC Submissions, p. 3).

OPG disagrees with CCC's submission. There is no obligation to conduct customer engagement research in respect of an application to establish a deferral or variance account, nor does OPG believe that customer engagement would be appropriate in such applications. The issue before the OEB in this application is ultimately a narrow question as to whether OPG has satisfied the criteria for the establishment of a variance account pursuant to an unforeseen event mechanism established as part of OPG's rate framework and accepted under the Approved Settlement Agreement. There is no "trade-off" that could be presented to customers between the services they receive in return for their payments, as the costs in question arise under OPG's legally binding collective agreements. Accordingly, OPG does not believe that any evidence on customer engagement is required or meaningful in support of this application.

6.0 CONCLUSION

The unforeseen event that gives rise to the amounts to be recorded in the proposed account was the issuance of the Bill 124 Decision on November 29, 2022. It was only after the court's decision was issued that it became foreseeable that OPG would be materially affected by the legal challenges, well after the time when OPG could provide those costs for the EB-2020-0290 Payment Amounts Order. Following the Bill 124 Decision but before the associated costs were incurred, OPG prepared and filed this application. While establishing the account as proposed in the application would not result in any prejudice or costs to ratepayers, refusing to establish it could impede OPG's ability to achieve the goals underlying the 2022-2026 payment amounts and would deny the company an ability to demonstrate the prudence of the incremental compensation costs that it has begun to accrue in 2023.

All of which is respectfully submitted.