



Ontario
Energy
Board

Commission
de l'énergie
de l'Ontario

DECISION AND ORDER

EB-2023-0098

ONTARIO POWER GENERATION INC.

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

BEFORE: Pankaj Sardana
Presiding Commissioner

Michael Janigan
Commissioner

David Sword
Commissioner

June 27, 2023

1 OVERVIEW

Through this Decision and Order, the Ontario Energy Board (OEB) denies the accounting order application filed by Ontario Power Generation Inc. (OPG) on March 1, 2023. OPG proposed that a new variance account be approved to record the impact of the overturning of Bill 124¹ on its nuclear revenue requirement, effective March 1, 2023 until the effective date of the OEB's next nuclear payment amounts order.

Bill 124 set a 1% limit on annual wage and total compensation increases for the Ontario public sector employees, including employees at OPG, for a three-year moderation period effective November 8, 2019. The limits on compensation set out in Bill 124 were the basis of the forecast compensation costs reflected in OPG's OEB approved revenue requirements for the 2022-2026 period² (2022-2026 Payment Amounts).

The Ontario Superior Court overturned Bill 124 on November 29, 2022 and declared it to be "void and of no effect". OPG's affected unions have indicated that they will seek enhanced wages for the periods that their members' compensation has or would have been restrained due to Bill 124.

The proposed variance account would record the difference between the forecast compensation costs included in OPG's last nuclear payment amounts order³ and the compensation costs for the nuclear facilities resulting from the overturning of Bill 124.

¹ *Protecting a Sustainable Public Sector for Future Generations Act, 2019*

² EB-2020-0290, Decision and Order, November 15, 2021

³ *Ibid.*

2 CONTEXT AND PROCESS

OPG filed an application with the 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 overturning of Bill 124, effective March 1, 2023 until the effective date of the OEB's next nuclear payment amounts order.

OPG also requested that the OEB issue an interim order effective March 1, 2023, approving the establishment of the requested variance account on an interim basis. On March 22, 2023, the OEB approved the establishment of the new variance account on an interim basis effective March 1, 2023.

The OEB issued the Notice of Hearing and Procedural Order No. 1 on March 22, 2023 which adopted the intervenors from the 2022-2026 Payment Amounts proceeding as intervenors in this proceeding, including cost award eligibility.

The following intervenors notified the OEB of their intention to participate in the proceeding:

- Association of Major Power Consumers in Ontario (AMPCO)
- Canadian Manufacturers & Exporters (CME)
- Consumers Council of Canada (CCC)
- Power Workers' Union (PWU)
- School Energy Coalition (SEC)
- Society of United Professionals (SUP)
- Vulnerable Energy Consumers Coalition (VECC)

The Notice of Hearing and Procedural Order No. 1 also provided for interrogatories and written submissions by OEB staff and intervenors, and a reply submission by OPG.

After OPG filed its interrogatory responses on May 4, 2023, SEC and CME filed a letter with the OEB on May 9, 2023 requesting OPG to provide further information on two topics addressed in OPG's interrogatory responses: 1) the timing of OPG's knowledge of the legal challenge to Bill 124, and 2) OPG's 2022 actual Return on Equity (ROE).

OPG filed a reply letter on May 12, 2023, which provided further information in response to SEC and CME's requests. The OEB reviewed OPG's reply letter and found that the information provided by OPG was adequate, and that parties should file their final submissions in accordance with the schedule established by the OEB.

3 VARIANCE ACCOUNT

Accounting Order Process for the Treatment of Unforeseen Events

OPG's current rate framework includes provisions related to "unforeseen events". As described in its 2022-2026 Payment Amounts application and approved through the OEB's approval of a settlement proposal (Settlement Proposal) reached by the parties in that proceeding, the process for applying for an accounting order is as follows:

OPG proposes that unforeseen events affecting the nuclear business continue to be addressed through an accounting order process, subject to the \$10M regulatory materiality threshold that has historically applied to OPG and which was accepted for this purpose in the EB-2016-0152 Decision. The approach is consistent with the accounting order application requirements currently in place for accounting changes impacting the 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-2018-0002.⁴

In addition to the requirement that the event be "unforeseen", the application referenced EB-2018-0002, which was a proceeding in which the OEB approved a proposed OPG accounting order. In that case the OEB adopted the criteria outlined in the OEB's Filing Requirements for Electricity Distribution Rate Applications (the Filing Requirements) for the establishment of a new deferral or variance account. These Filing Requirements are not specific to OPG, but are typically applied to OEB regulated utilities. The Filing Requirements indicate that the following eligibility criteria must be met:⁵

1. Causation: the forecasted expense must be clearly outside of the base upon which rates were derived.
2. Materiality: the forecasted 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.

⁴ EB-2020-0290, Exhibit A1, Tab 3, Schedule 2, p. 13

⁵ Filing Requirements for Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications - Chapter 2 Cost of Service, December 15, 2022, Section 2.9.2 Establishment of New Deferral and Variance Accounts

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.

The criteria for approving an accounting order under OPG's approved rate framework, therefore, are that the costs in question be "unforeseen" at the time the rate framework was approved, and that the three criteria from the Filing Requirements be met.

Was the overturning of Bill 124 unforeseen?

The "unforeseen" criterion is related to, and may be considered a subset to, the causation criterion. When applying for cost-based rates, utilities are expected to present as complete a picture of their forecast test year costs and revenues as possible – this is the "base upon which rates [are] derived". Where a cost or revenue can reasonably be foreseen (even if it is not certain), the best forum in which to address this is in the main rates case, and not through a later request for a deferral or variance account. All parties filed arguments on the foreseeability issue.

Some intervenors and OEB staff argued that the overturning of Bill 124 was not an unforeseen event because OPG knew or should have known that there was a material risk that Bill 124 could be overturned. OPG's 2022-2026 Payment Amounts proceeding was filed with the OEB on December 31, 2020 while the first legal challenge to Bill 124 was filed on February 11, 2020, more than 10 months earlier. Legal challenges were filed by the PWU and the SUP – the unions whose increased compensation is proposed to go into the new variance account – on November 24, 2020, more than a month before the application was filed.⁶ Some intervenors argued that the existence of appeals from its own unions was a clear indication to OPG that Bill 124 could be overturned, and that it did not disclose this in the OPG's 2022-2026 Payment Amounts proceeding.

SEC, CCC, AMPCO and OEB staff noted that no deferral or variance account related to Bill 124 was sought by OPG during the 2022-2026 Payment Amounts proceeding. SEC further submitted that OPG cannot now, after agreeing to a settlement for 2022-2026 Payment Amounts, request approval to record for later disposition any additional costs

⁶ OPG reply to SEC Request for Further IR Responses, May 12, 2023

that were known to OPG and the parties at the time. SEC argued that the settlement negotiations for OPG's 2022-2026 Payment Amounts would have unfolded differently if OPG had disclosed to parties at the time the legal proceedings were launched that, if the challenge was successful, it would seek approval to record the impacts in a variance account.⁷

OPG submitted that the decision on Bill 124 was an unforeseen event because OPG did not have any special insight into the status or probable outcomes of the challenges against Bill 124. OPG submitted that it was therefore impossible for it to conclude whether Bill 124 would likely be overturned during OPG's 2022-2026 Payment Amounts proceeding or any other time leading up to the decision on Bill 124.⁸ OPG submitted that the existence of a mere possibility of an event does not mean that the event is not "unforeseen" and that 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).⁹

OPG further submitted that it would not have been appropriate or sensible to include the risks of Bill 124 being overturned in the cost forecasts from OPG's 2022-2026 Payment Amounts proceeding due to the high degree of uncertainty around the costs in the proceeding.¹⁰

Findings

The OEB does not accept that the overturning of Bill 124 was unforeseen. That is not to say that OPG would have known with certainty that Bill 124 would be overturned, only that it was a foreseeable and material risk to their forecast employee compensation costs. The OEB makes the following findings:

- Based on the record in this proceeding, the OEB concludes that OPG was clearly aware of the legal challenges to Bill 124 before filing the EB-2020-0290 application, as was filed by the Ontario English Catholic School Teacher's Association in the Superior Court of Justice on February 11, 2020 and the considerable attention this garnered in the media and at the Ontario Legislature.¹¹

⁷ SEC submission, p. 3

⁸ OPG reply submission, pp. 6-7

⁹ OPG reply submission, p. 2

¹⁰ OPG reply submission, p. 13

¹¹ Although not the basis of the OEB's finding, this finding is consistent with certain statements in OPG's December 2019 Management Discussion and Analysis, which is a publicly available document accompanying OPG's audited consolidated financial statements. See, for example, pages 66, 69 and 76.

- While the OEB notes OPG's position that all possible outcomes of the legal challenge to Bill 124 may not have been known at the time of OPG's EB-2020-0290 payment amounts application, the OEB finds that the risk of Bill 124 being overturned was certainly present prior to the Settlement Agreement and the Decision and thus a known variable that OPG should have taken into consideration and governed themselves accordingly, for example by identifying the issue and also by seeking a specific variance account as part of their application.
- OPG was aware of the risk entailed with the legal challenge at the time of the Settlement Agreement. As noted by several intervenors in their submissions, the disclosure of the risk and its potential O&M budgetary implications by OPG should have been disclosed by OPG to allow it to inform the settlement negotiations.
- The OEB concludes that the exercise of reasonable and prudent foresight on OPG's part could have prevented OPG's request for a variance account in this proceeding and a possible result that might significantly alter the agreed-upon budget and the subsequent OEB Decision that approved those Settlement Agreement terms. Accordingly, the OEB finds that the evidence on the record does not support the argument that the overturning of Bill 124 was unforeseen, nor therefore the need for a variance account after-the fact that is designed to allow for the recovery of increased compensation costs from ratepayers..

Causation

In the pre-filed evidence, OPG stated that the cost impacts resulting from the overturning of Bill 124 "will result in a nuclear revenue requirement impact that is not reflected in the payment amounts established by the EB-2020-0290 Payment Amounts Order".¹² OPG explained that the impacts arise "from a change in a law and could not have formed a part of the approved revenue requirement as OPG was obliged to abide by applicable laws and had no knowledge of the outcome of the Bill 124 Decision at the time of the payment amounts application".¹³

OEB staff, AMPCO, PWU and SUP supported 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. PWU submitted that the revenue requirement impacts arise from additionally incurred compensation costs above the one percent

¹² OPG Application, p. 11

¹³ *Ibid.*

prescribed by Bill 124, which was the basis for compensation costs included in OPG's 2022-2026 Payment Amounts proceeding for prescribed generating facilities.¹⁴ SUP submitted that there would have been no regulatory basis for including anything in excess of the Bill 124 wage caps that were included in OPG's 2022-2026 Payment Amounts.¹⁵

SEC, VECC and CCC disagreed and argued that the causation criterion had not been met, as the Settlement Agreement reached between the parties was intended to cover all OM&A, including employee compensation.

In response, OPG submitted that the compensation amounts to be recorded in the proposed variance account are outside the base upon which OPG's 2022-2026 Payment Amounts were derived.¹⁶ OPG submitted that the overturning of Bill 124 is an unforeseen event and explained that 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.

Findings

The OEB finds that the causation criterion is related to the foreseeability criterion. The OEB has already found that the possibility of Bill 124 being overturned was a foreseeable outcome, and while the costs related to the overturning of Bill 124 are incremental to the compensation amounts currently embedded in OPG's payment amounts, OPG could have foreseen the impact to its compensation expense from the risk of Bill 124 being overturned during or prior to the EB-2020-0290 proceeding, and it could have sought to account for that risk in that proceeding. It is not appropriate to create a new variance account to track amounts that could have been foreseen and addressed (for example through a request for a variance account at the time of the EB-2020-0290 proceeding) when the rate framework was being established.

Materiality

In the pre-filed evidence, OPG stated that the forecast amounts "will result in an annualized nuclear revenue requirement impact that is expected to be higher than the \$10M materiality threshold".¹⁷ For PWU-represented employees, OPG estimated impacts between \$14 million and \$48 million per year between 2022 and 2026, totaling

¹⁴ PWU submission, p. 1

¹⁵ SUP submission, p. 1

¹⁶ OPG reply submission, p. 3

¹⁷ OPG Application, p. 11

approximately \$130 million cumulatively.¹⁸ No compensation estimate was available for SUP-represented employees in OPG's responses to interrogatories due to the pending arbitration outcome when the interrogatory responses were filed. In its reply submission, OPG confirmed that it has since then received the arbitration decision, which is currently estimated to result in an incremental cost impact of \$58 million due to the overturning of Bill 124.¹⁹

OEB staff, CCC, AMPCO and VECC noted that the materiality criteria requires not only that a certain dollar threshold be reached, but that the absence of an account would likely "have a significant influence on the operation of the [utility]". They submitted that based on OPG's estimated achieved 2022 ROE for its regulated business, OPG does not need additional funding to cover the impacts that would be recorded in the proposed account, and that the absence of an account would not result in a significant influence on the operation of the utility. OPG estimated its 2022 actual ROE for its regulated facilities will be between 12.5% and 13.0%, which is in excess of the OEB approved 2022 ROE of 8.66%.²⁰

OEB staff submitted that variances from forecast costs are part of business risk, for which the utility is compensated through its return on equity.²¹ OEB staff submitted that utilities are expected to manage their costs throughout the term of the rate framework and should not expect to have access to "true ups" (for example through a deferral or variance account) every time a cost is higher than what was forecast.

Other parties either supported the conclusion that OPG's compensation forecasts are material or made no submissions on the issue. For example, SUP and AMPCO submitted that the impact of overturning Bill 124 is expected to exceed the OEB-defined materiality threshold for new variance account requests. PWU submitted that OPG's application for the variance account satisfies the materiality criteria for the establishment of a deferral or variance account.

In response, OPG noted that there is no requirement for the OEB to consider the implications of OPG's achieved ROE to provide the relief sought by OPG through establishing this variance account.²² OPG submitted that there can be no certainty that the level of financial performance achieved by OPG in 2022 will continue in subsequent

¹⁸ Exhibit L, OPG response to OEB staff interrogatory 1

¹⁹ OPG reply submission, p. 7

²⁰ OPG reply to SEC Request for Further IR Responses, May 12, 2023

²¹ OEB staff submission, p. 2

²² OPG reply submission, p. 4

years. OPG further submitted that, in any event, the OEB approved Settlement Proposal already provides for an asymmetrical earnings sharing mechanism to address any over-earnings.

Findings

The OEB finds that the quantum of costs related to the overturning of Bill 124 likely exceeds OPG's \$10 million materiality threshold. OPG has estimated that the impact of overturning Bill 124 will lead to increased compensation costs of between \$14 and \$48 million per year from its PWU-represented employees; no compensation estimate was submitted for SUP-represented employees. The OEB's materiality test is a two-pronged test that speaks to both the amount of additional costs that a utility expects to incur due to a change in circumstances, and also to whether these costs will significantly influence the utility's operations. In this instance, the OEB expects OPG to be able to manage these costs within its approved revenue requirement (which ranges between \$2.4 billion and \$3.5 billion) over the 2022 to 2026 period.

Further, the OEB notes that OPG expects its actual 2022 return on equity for its regulated facilities to be in the range of 12.5-13%. The expected return is well above the 2022 ROE value set by the Board in October 2021 of 8.66%. The OEB accepts OPG's assertion that actual returns on equity in a given year are not indicative of future returns, but notes that OPG's exemplary performance in 2022 counteracts the suggestion that operational hardships at OPG would be forthcoming without the requested variance account.

OPG's cost of capital has a component for regulatory risk. This includes an allowance for external factors that could have an impact on OPG. While OPG may be insulated by other measures from the financial consequences of events that are truly unforeseeable, such protection was not intended to apply to the fallout from risks that were known and the potential costs estimable or, if uncertain, possibly tracked through a variance account established when the rate framework was approved.

Prudence

In the pre-filed evidence, OPG stated that the cost impacts resulting from the overturning of Bill 124 "are appropriate to be recorded in a variance account pending

the consideration of prudence since these compensation costs reflect costs necessary for the continued operation of OPG's nuclear facilities".²³

For purposes of establishing an account, 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 final determination of prudence of any costs recorded is determined when a utility seeks to clear a deferral or variance account.²⁴

OEB staff, CCC, AMPCO, and SEC submitted that because the evidence filed in OPG's 2022-2026 Payment Amounts proceeding indicated that OPG's compensation costs were already above market median under Bill 124, further cost increases resulting from the overturning of Bill 124 are imprudent.

In response, OPG submitted that 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.²⁵ OPG submitted that it has demonstrated that the cost impacts of the overturning of Bill 124 would be recorded to the account based on a reasonable plan, reflecting the renewed collective agreements with the PWU and the SUP.

Findings

The OEB notes that the Filing Requirements provide that the proposed account must be based on a plan that sets out how the amounts will be reasonably incurred in order to meet the prudence criteria. While it is not unreasonable to expect that OPG may incur these costs in the event that the finding of unconstitutionality of Bill 124 is upheld, such a finding is moot as the OEB has determined that other criteria set out in the approved Settlement Proposal and the Filing Requirements have not been met. In addition to assessing the foreseeability of these costs, the OEB is of the view that the proposed account does not meet two of the OEB's three standard tests of causation and materiality.

As such, the OEB denies OPG's request to establish a variance account for the purpose of recording the budgetary implications of Bill 24 litigation results for OPG.

²³ OPG Application, p. 11

²⁴ Filing Requirements for Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications - Chapter 2 Cost of Service, December 15, 2022, Section 2.9.2 Establishment of New Deferral and Variance Accounts

²⁵ OPG reply submission, p. 23

Effective Date of Variance Account

In the pre-filed evidence, OPG proposed that the variance account be eligible to record the nuclear revenue requirement impacts of the overturning of Bill 124, effective March 1, 2023. As the OEB is denying the application to create the account, it is not necessary to consider the effective date.

On March 22, 2023, the OEB approved the establishment of a new variance account on an interim basis effective March 1, 2023. The purpose of this interim order was to allow for an effective date as early as March 1, 2023 in the event that the OEB ultimately approved the creation of the variance account. As a result of this decision, this interim order is no longer in effect.

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The interim order issued on March 22, 2023 is rescinded.
2. Cost eligible intervenors shall submit to the OEB and copy Ontario Power Generation Inc. any cost claims no later than July 4, 2023.
3. Ontario Power Generation Inc. may file with the OEB and forward to the applicable intervenor any objections to the claimed costs of that intervenor by July 11, 2023.
4. An intervenor whose cost claims were objected to may file with the OEB and forward to Ontario Power Generation Inc. any responses to the objections by July 18, 2023.
5. Ontario Power Generation Inc. shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

Parties are responsible for ensuring that any documents they file with the OEB, such as applicant and intervenor evidence, interrogatories and responses to interrogatories or any other type of document, **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's [Rules of Practice and Procedure](#).

Please quote file number, **EB-2023-0098** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the [OEB's online filing portal](#).

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address.
- Please use the document naming conventions and document submission standards outlined in the [Regulatory Electronic Submission System \(RESS\) Document Guidelines](#) found at the [File documents online page](#) on the OEB's website.
- Parties are encouraged to use RESS. Those who have not yet [set up an account](#), or require assistance using the online filing portal can contact registrar@oeb.ca for assistance.

- Cost claims are filed through the OEB's online filing portal. Please visit the [File documents online page](#) of the OEB's website for more information. All participants shall download a copy of their submitted cost claim and serve it on all required parties as per the [Practice Direction on Cost Awards](#).

All communications should be directed to the attention of the Registrar and be received by end of business, 4:45 p.m., on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Vithooshan Ganesanathan at Vithooshan.Ganesanathan@oeb.ca, and OEB Counsel, Michael Millar at Michael.Millar@oeb.ca.

DATED at Toronto June 27, 2023

ONTARIO ENERGY BOARD

Nancy Marconi
Registrar