ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, as amended (the "**OEB Act**");

AND IN THE MATTER OF Application EB-2023-0098 by Ontario Power Generation Inc. for an Order or Orders pursuant to section 78.1 of the OEB Act for a variance account to capture the nuclear revenue requirement impact of the overturning of the Ontario *Protecting a Sustainable Public Sector for Future Generations Act, 2019*;

AND IN THE MATTER OF a Motion pursuant to Rule 42 of the Ontario Energy Board's *Rules of Practice and Procedure* to Review and Vary the June 27, 2023 Decision and Order in EB-2023-0098.

NOTICE OF MOTION

Ontario Power Generation Inc. ("**OPG**") will make a motion to the Ontario Energy Board (the "**OEB**") at its offices at 2300 Yonge Street, Toronto, on a date and at a time to be fixed by the OEB.

THE MOTION IS FOR AN ORDER:

1. that OPG has met the threshold test in Rule 43.01 of the OEB *Rules of Practice and Procedure*;

2. for a hearing of the Motion on its merits in a manner the OEB deems appropriate, having regard for OPG's preference that the Motion be heard in writing; and

3. varying the June 27, 2023 Decision and Order in EB-2023-0098 (the "**Decision**") to: (a) reestablish the interim variance account originally established on March 22, 2023 and effective as of March 1, 2023 to record the impact of Ontario's *Protecting a Sustainable Public Sector for Future Generations Act, 2019* ("**Bill 124**") being declared unconstitutional on OPG's nuclear revenue requirement, and (b) grant approval for an accounting order establishing a new variance account to record the aforesaid impact, effective March 1, 2023 until the effective date of the OEB's next nuclear payment amounts order.

THE GROUNDS FOR THE MOTION ARE:

4. The Decision contains material and clearly identifiable errors of fact and law, or mixed fact and law:

   a. misapplying the approved basis for establishing accounting orders under OPG's approved rate framework;

   b. making conclusions on a speculative and non-factual basis, without evidence; and

   c. incorrectly applying the materiality criterion for variance account eligibility.

Ground 1: The Decision misapplied the approved basis for establishing accounting orders under OPG's approved rate framework

5. OPG's current rate framework was established through approval of its application for 2022-2026 payment amounts for its prescribed generating facilities (EB-2020-0290). In that proceeding, OPG proposed:

> 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.[1]

6. On July 16, 2021, OPG filed a settlement proposal covering nearly all of the issues in the EB-2020-0290 proceeding. Among the settled issues was Issue 2.1, which concerned the question of whether OPG's approach to incentive rate-setting for establishing the nuclear payment amounts was appropriate. On that issue, the parties reached a complete settlement, noting that "the Parties accept OPG's proposed rate framework to the five-year IR term from 2022 to 2026". The

[1] EB-2020-0290, Exhibit A1-3-2, p. 13.

nuclear rate-setting framework evidence that included OPG's proposed treatment for unforeseen events was incorporated into the settlement.[2]

7. On August 6, 2021, the OEB approved the settlement proposal orally, with written reasons to follow. On November 15, 2021, the OEB issued its Decision and Order in EB-2020-0290 in which it stated its findings that the settlement proposal "represents a reasonable outcome for ratepayers and will result in just and reasonable payment amounts", that it "will serve to protect customers and provide OPG with the funding it requires to operate its prescribed generation facilities safely and effectively during the 2022-2026 period" and that the "OEB is satisfied with the results of the approved settlement proposal".[3]

8. The Decision references the foregoing, observing that "(t)he 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." Those criteria are Causation, Materiality and Prudence.[4]

9. While the Decision correctly articulates the criteria for approving accounting orders under OPG's approved rate framework, it is respectfully submitted that the OEB Panel that rendered the Decision incorrectly applied those criteria in considering OPG's proposed variance account to capture the nuclear revenue requirement impacts of Bill 124 being declared unconstitutional.

Decision applies wrong standard: "unforeseeable," when it should have applied "unforeseen"

10. The Decision incorrectly considers whether the event (Bill 124 being declared unconstitutional) was *unforeseeable* rather than whether it was *unforeseen*. This led to a further error of incorrectly considering the *risk* of the event occurring rather than whether the actual *occurrence* of the event was foreseen.

11. It is a fundamental principle of law that statutes enacted by the legislature are presumed to be constitutional.[5] For this reason, courts have consistently held that parties cannot be expected to

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[2] OEB, Decision and Order, EB-2020-0290, November 15, 2021, Schedule A (Approved Settlement Proposal), pp. 32-33 of 51.

[3] OEB, Decision and Order, EB-2020-0290, November 15, 2021, pp. 1-5.

[4] See Decision, pp. 3-4.

[5] MacNeil v. Nova Scotia (Board of Censors), [1978] 2 S.C.R. 662, para. 38.

foresee that legislation might be struck down, unless and until the law is actually declared unconstitutional. As stated by the court, parties "are not fortune tellers. They can hardly be expected to predict the course of constitutional change in Canada's courts."[6]

12. It was beyond OPG's ability to foresee that Bill 124 would be struck down as unconstitutional.

13. When considering whether to approve an accounting order under OPG's approved rate framework, the OEB is required to consider whether the event giving rise to a requested accounting order was an "unforeseen" event affecting the nuclear business at the time the rate framework was approved. However, the Decision applied a fundamentally different standard of whether the overturning of Bill 124 was a "foreseeable" event. The Decision specifically states:

> 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, <u>only that it was a foreseeable and material risk to their forecast employee compensation costs</u>.[7]

and

> While OPG may be insulated by other measures from the financial consequences of <u>events that are truly unforeseeable, such protection was not intended to apply to the fallout from risks that were known</u> and the potential costs estimable or, if uncertain, possibly tracked through a variance account established when the rate framework was approved.[8]

14. An unforeseen event is one that is unexpected or not anticipated. In the context of OPG's approved rate framework, "unforeseen" means the event was not previously predicted or anticipated and does not form part of the revenue requirement recovered in rates. This is a factual consideration that is consistent with the OEB's standard "Causation" criterion for establishing a deferral or variance account since the cost implications of an unforeseen event would be outside of the base upon which rates are derived. The overturning of Bill 124 was neither predicted nor

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6 R. v. Weir, 1999 ABCA 275, para. 10. See also Air Can. v. B.C., [1989] 1 S.C.R. 1161, para. 11 (Wilson J. noting in dissent: "the appellants were entitled in making their payments to rely on the presumption of validity of the legislation and that, if the presumption was not by itself enough, they were entitled to rely on the representation as to its validity by the legislature enacting and administering it." The majority of the Court did not strike down the law and therefore did not need to consider the impact of its invalidity on the appellants' conduct.)

7 Decision, p. 5 (emphasis added).

8 Decision, p. 9 (emphasis added).

anticipated at the time the rate framework was approved nor was there a basis on which it could be foreseen. As such, the consequences of Bill 124 being declared unconstitutional were not reflected in the revenue requirement or payment amounts that were approved at that time. As such, the cost implications arising from Bill 124 being declared unconstitutional are clearly outside of the base upon which OPG's rates were derived.

15. As noted above, it is a fundamental principle of law that statutes enacted by legislatures are presumed constitutional and parties cannot be expected to foresee that legislation might be struck down. It was a legal error to assume that OPG should have foreseen that Bill 124, a validly enacted statute, would be declared unconstitutional.

16. This was also true factually:

a. OPG was not a party to the constitutional challenge to Bill 124—it had no special insight into the strengths and weakness of the case challenging the legislation. Furthermore, as far as OPG is aware, other electricity sector entities which are also subject to Bill 124, were not parties to the constitutional challenge. The unforeseen overturning of Bill 124 has resulted in significant financial impacts to OPG. OPG is unaware whether others have been similarly affected.

b. Contemporary news coverage of the court challenge to Bill 124 reflected a view that the legislation might survive the court challenge:

i. in December 2019, when the unions announced their intention to challenge the legislation, the Toronto Star reported that the government said it was confident its law can withstand a constitutional challenge, and added 'Our government conducted a series of good-faith consultations with public-sector employers and bargaining agents on managing compensation growth responsibly'";[9] and

ii. in September 2022, after the case had been argued and was under reserve with the court, the Globe and Mail highlighted the fact that the government retained

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9 Unions rally against wage-cap law; Ten more groups to file court challenge against Bill 124 in the new year (Toronto Star) (December 18, 2019).

> the ability to restore the law even if it was declared unconstitutional by Canada's top court: "No decision is expected soon, and the matter could end up before the Ontario Court of Appeal and then the Supreme Court of Canada. The Ontario government has not said if it would consider using the Constitution's notwithstanding clause to restore the legislation if it lost in the court."[10]

17. Even today, the constitutional validity of Bill 124 is not settled. A four-day appeal was argued in June 2023 and the Court of Appeal's decision is under reserve. The Court of Appeal may overturn the Superior Court of Justice's decision and uphold the legislation.

18. The OEB itself has in prior cases recognized that parties cannot foresee the outcome of pending litigation in the courts. In RP-2003-0203, the OEB found that it would be premature to establish an account to capture the impacts of the outcome of litigation that a utility was directly involved in—these amounts were to be recorded only after the outcome of the litigation was known. In RP-2003-0203, Enbridge Gas Distribution Inc. requested a Class Action Suit Deferral Account to record costs relating to litigation involving Enbridge over a late payment policy. The OEB approved an account to cover the applicant's legal costs, costs for analysis and expert advice, but not costs for any judgment against Enbridge or amounts resulting from any costs award against Enbridge. The OEB held that the inclusion of such amounts would be premature due to uncertainty as to whether such costs might arise during the rate period, uncertainty as to the timing of the judgment and related orders and their implementation, and uncertainty respecting quantum, if any. Moreover, the OEB clarified that: (i) the question of ratepayer recovery would remain open, (ii) the OEB may allow for the costs to be recovered from ratepayers if and when they arise, and (iii) as the ongoing court proceedings proceeded, there would be developments that provide a clearer understanding of any amounts and the reasons for them.[11] OPG notes that the OEB reached this conclusion in circumstances where Enbridge was directly involved in the litigation process, whereas in the current circumstances OPG was not a party to the constitutional challenge to Bill 124.

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10 Unions say wage-cap law violates rights (Globe & Mail) (September 13, 2022).

11 OEB, Partial Decision with Reasons, RP-2003-0203, August 31, 2004, para 141-148.

19. By considering the broader question of whether the event was foreseeable, the OEB embarked on an assessment of whether there was any possibility of predicting or anticipating that Bill 124 could potentially be declared unconstitutional at the time the rate framework was approved. Rather than applying a factual consideration of whether the event was actually foreseen or predicted at the time, the OEB has incorrectly applied a fundamentally different standard of foreseeability to retrospectively consider whether there was any possibility of Bill 124 being declared unconstitutional.

20. Furthermore, in applying the foreseeability standard, the Decision included the consideration of the risk of the event occurring, expanding the scope of its review beyond the occurrence of the event itself. Being able to foresee (i.e., expect or anticipate) the occurrence of an event is very different than being able to perceive a risk of an event. The former results in a conclusion that an event will or very likely will occur, whereas the latter results in a conclusion that there is a possibility that an event could occur, no matter how remote the possibility may be. In departing from the established "foreseen" standard, the Decision misapplied the approved basis for approving accounting orders under OPG's rate framework, which is exclusively concerned with the expected occurrence of the event. In doing so, the Decision also deviated from the OEB's traditional eligibility criteria with respect to causation, which is concerned with whether the costs the applicant seeks to record in the account were expected to occur and therefore ineligible because they should have formed part of forecasted revenue requirement or whether the costs are outside of the basis upon which rates are derived since they were not expected and could not be accurately forecasted and thereby satisfying the causation criteria.

21. The inappropriate reliance on risk and the application of the broader foreseeability criteria is evident in the Decision where it states that Bill 124 being declared unconstitutional "was a foreseeable and material risk to (OPG's) forecast employee compensation costs". It is also evident from the following statements in the Decision:

a. "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";[12]

b. "OPG was aware of the risk entailed with the legal challenge at the time of the Settlement Agreement . . . the disclosure of the risk and its potential O&M budgetary implications by OPG should have been disclosed . . .";[13] and

c. "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."[14]

Effect of the Decision: Every potential risk must now be addressed

The Decision's misapplication of the approved basis to establish an account and its deviation from the Causation criteria creates a new requirement that if a risk was not addressed in a proceeding, then an accounting order will not be granted if the risk materializes. In finding that the Causation criterion has not been met, the Decision states: "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".[15] The effect of the Decision is to require OPG, as part of its payment amount applications to identify every possible risk and to request a deferral or variance account for every such risk or potential risk.

22. This is not a reasonable interpretation of the approved rate framework and is indicative of its misapplication. It is also not a practical outcome to inform future applications by OPG, and other utilities in comparable circumstances.

23. The consequence of the Decision is that, if there is a risk that was not explicitly addressed at the time the rate framework was approved, then it would not be possible for OPG to obtain an accounting order for costs related to that risk, no matter how remote the risk may have been.

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[12] Decision, p. 6 (emphasis added).

[13] Decision, p. 6 (emphasis added).

[14] Decision, p. 7 (emphasis added).

[15] Decision, p. 7 (emphasis added).

Based on this outcome, in a future application OPG would need to seek accounts for all foreseeable risk events that could occur, regardless of how remote. In addition, OPG would need to adduce evidence regarding all possible risks it faces or might potentially face, even if the event to which the risk relates is not expected and would not form part of the basis on which revenue requirement is established. In turn, the OEB would be required to consider and rule upon the appropriate treatment of all such risks in setting rates. According to the Decision, OPG would need to take the foregoing steps so that if a risk event occurs during the rate period then it would not be precluded from seeking an accounting order to address the occurrence of that risk. This is inconsistent with the objective of regulatory efficiency and with prior practice at the OEB.

Ground 2: The Decision reached conclusions on a speculative and non-factual basis

24. The Decision contains several findings regarding potential impacts on settlement, including:

    a. the presence of the risk of Bill 124 being declared unconstitutional in relation to the timing of the Settlement Agreement;

    b. OPG's awareness of the risk associated with the legal challenge at the time of the Settlement Agreement;

    c. that the disclosure of the risk and its potential O&M budgetary implications should have been disclosed by OPG to inform the settlement negotiations; and

    d. that the exercise of reasonable and prudent foresight on OPG's part might have significantly altered the agreed-upon budget and subsequent OEB decision approving the Settlement Agreement.[16]

25. The process for seeking an accounting order for unforeseen events under the rate framework that the OEB approved for OPG is clear. It is focused on whether the event was foreseen, as well as the OEB's standard eligibility criteria – in particular Causation. If an event is found to have been unforeseen and to meet the three eligibility criteria, the implications of the event for settlement negotiations or a settlement agreement are not relevant to the determination of whether the accounting order should be granted. This is because the event and the related costs are separate

[16] Decision, p. 6.

and apart from the basis on which the approved revenue requirement, and thereby the settlement agreement, are established. It is incorrect to apply an accounting order process based on unforeseen events that are outside of the base upon which rates are derived and to consider the potential impacts on settlement.

26. Furthermore, the Decision found 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." This finding was erroneous because it was speculative and not based on evidence.

27. No party filed evidence that a request for a variance account could have or would have affected the terms of the Settlement Agreement. In reaching this conclusion, the Panel relied on one assertion in one party's submissions—the assertion was a general statement and not based on evidence on which the Panel could rely. The Decision acknowledges that its conclusion was based on arguments, not evidence: "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".[17] Speculation by a party to the settlement as to how the negotiations might have unfolded based on the information at issue is not evidence upon which the Decision can properly be based.

28. It is, in any event, an established rule of evidence that statements made by a party after a contract is formed are not reliable and do not form part of the default factual matrix that is admissible to determine what the parties intended.[18] If any evidence had been filed (and none was), it would have had to be evidence from the time the settlement was negotiated. The fact that no party filed any evidence from this period illustrates that potential future variance accounts were not important factors to the settlement negotiation.

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[17] Decision, p. 5 (emphasis added).

[18] Shewchuk v. Blackmont Capital Inc., 2016 ONCA 912, paras. 42-46.

Ground 3: The Decision incorrectly applied the materiality criterion for variance account eligibility

29. The "Materiality" criteria provides that the amounts that may be recorded in the proposed account must exceed the OEB-defined materiality threshold and have a significant influence on the operation of OPG's regulated business, otherwise they must be expensed or capitalized in the normal course and addressed through organizational productivity improvements.[19] The Decision acknowledged that "the quantum of costs related to the overturning of Bill 124 likely exceeds OPG's $10 million materiality threshold", but went on to conclude that there would be no significant influence on the operation of OPG's regulated business and that OPG is therefore expected to be able to manage the costs within its approved revenue requirement over the 2022 to 2026 period.[20]

Decision misapplied the materiality test

30. In support of the conclusion that there would be no significant influence on the operation of OPG's regulated business, the only explanation provided in the Decision was:

> (T)he 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%. <u>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.</u>[21]

31. This conclusion is internally inconsistent. Having accepted that OPG's actual returns on equity in a given year are not indicative of OPG's future returns, the Decision erred in concluding that OPG's performance in 2022 counteracts the suggestion that OPG would experience operational hardships in the future without the requested account. It is incorrect on the one hand to make a finding that the evidence of OPG's 2022 performance is not applicable to the remainder of the

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[19] See the Decision, p. 3, and the 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.

[20] Decision, p. 9.

[21] Decision, p. 9 (emphasis added).

rate period and then to disregard that finding and apply a fact found to be irrelevant to the materiality question.

Decision applied different materiality test

32. The Decision's conclusion on materiality is also in error because, instead of applying the OEB's established test by considering whether the forecast amounts to be recorded in the proposed account would have a "significant influence" on the operation of the regulated business, the Decision instead considered whether OPG would be expected to experience "operational hardships" if the requested variance account is not approved. There is no indication provided in the Decision as to what impacts would constitute "operational hardships."

33. This is a different test than significant influence on the operation of the business. It is possible for there to be a significant influence on the operation of the business without going so far as to cause the business operational hardships. OPG estimated that the cumulative OM&A impact for only its PWU employees was $130 million with additional, but undetermined, amounts for Society employees[22]. By applying the stricter "operational hardships" test instead of the "significant influence" test that was approved as part of OPG's rate framework, the Decision misapplied the Materiality criterion for variance account eligibility.

34. Furthermore, the Decision erroneously applies the Materiality criteria in a way that renders the OPG's established materiality threshold meaningless. Application of the Materiality criteria requires consideration of two things: 1) does the financial impact of an event meet the materiality threshold (which for OPG is $10 million) and 2) will it have a significant influence on the operation of the utility. These components are to be considered together and not separately. The Decision, however, considers each separately. It first concludes that the materiality threshold is exceeded and then opines that the potential costs of $130 million plus will not cause OPG "operational hardship" given OPG's total revenue requirement. In effect, the Decision imposes a second materiality threshold, which renders the established materiality threshold meaningless.

[22] As stated in OPG Reply Submissions EB-2023-0098, Paragraph 4, Page 28, footnote 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.

Recognizing that utility materiality thresholds set by the OEB are 0.5% or less of base revenue requirement, virtually no utility would be able to meet the Materiality criteria under the approach taken in the Decision.

THE THRESHOLD TEST IS MET

35. This motion raises material issues that warrant a review of the Decision on its merits:

    a. the Decision contains material and clearly identifiable errors of fact and law, or of mixed fact and law, in its application of the criteria under OPG's approved rate framework, including:

        i. considering the foreseeability of Bill 124 being declared unconstitutional and then applying its consideration to the risk of that event occurring, rather than considering whether the overturning of Bill 124 was an "unforeseen event";

        ii. considering additional criteria that are not part of OPG's approved rate framework;

        iii. having the unreasonable effect of requiring OPG in its payment amount applications to address every possible risk it faces or could potentially face and request an account for every such risk or potential risk;

        iv. making conclusions on a speculative basis without evidence regarding possible impacts on the settlement negotiations; and

        v. incorrectly applying the Materiality criteria for variance account eligibility by making findings that are based on irrelevant facts and by applying a novel and undefined "operational hardships" test that does not form part of OPG's approved rate framework.

36. These errors, if rectified, will result in material changes to the Decision—i.e., the approval of the proposed variance account.

37. OPG's interests are materially harmed by the Decision. A full hearing of the motion on the merits is warranted. Otherwise, OPG will be required to bear material incremental compensation costs, arising from Bill 124 having been declared unconstitutional, for the duration of its payment period without having any opportunity to prove that those costs should be recovered.

RULES AND OTHER GROUNDS

38. Rules 8, 40, 42 and 43 of the OEB's Rules of Practice and Procedure.

39. Such further grounds and material as counsel may advise and the OEB may permit.

DOCUMENTARY EVIDENCE

40. The following documentary evidence will be used at the hearing of the motion:

    a. N/A

July 17, 2023

TORYS LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2
Fax: 416.865.7380

Charles Keizer
Tel: 416.865.7152

Jonathan Myers
Tel: 416.865.7532

Counsel for the Applicant,
Ontario Power Generation Inc.

TO: **ONTARIO ENERGY BOARD**
2300 Yonge Street, 27th Floor
P.O. Box 2319
Toronto, Ontario M4P 1E4

AND TO: All Intervenors in EB-2023-0098