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. ("OPG") 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.

ARGUMENT IN CHIEF

A. OVERVIEW

1. This motion concerns the proper application of the test to approve a variance account to record new costs unforeseen at the time OPG's payment amounts were approved. The prudence of the costs that OPG proposes to record in the account is not a matter that OPG is asking the OEB to decide at this time. If granted, OPG's motion would result only in the creation of the variance account to record these new costs. Prudence would be assessed in a future application.

2. The new costs are increased compensation costs, of approximately $188 million, that OPG has and will incur as a result of a court striking down as unconstitutional, legislation imposing a three-year wage cap on public sector employees in Ontario ("Bill 124").

3. The OEB, in its June 27, 2023 decision and order in EB-2023-0098 (the "Decision"),[1] denied OPG's application for the requested variance account, concluding that because the court challenge had been filed at the time of OPG's rate application (by entities unrelated to OPG), it was foreseeable

[1] Book of Authorities ("BOA"), Tab 1.

that the legislation might be struck down. For the reasons set out herein, the Decision should be varied and the accounting order establishing the account granted effective from the requested effective date.

4. It is a foundational principle of law that parties are entitled to organize their affairs on the basis that laws passed by the Legislature are valid. The courts have recognized that parties are not "fortunetellers." They are not required to make their own assessments of the potential unconstitutionality of duly enacted legislation. Legislation is regularly challenged in the courts. Unless and until a court declares legislation unconstitutional, parties are entitled to treat the legislation as valid.

5. By concluding that a ruling striking down the law was "foreseeable," the Decision is not consistent with this principle of law. Instead of applying the standard for approving a variance account under OPG's approved rate framework (which requires the OEB to consider whether the *occurrence* of the event in question was unforeseen), the Decision applied a different standard that is not part of OPG's approved rate framework and concluded that the *risk* of the legislation being struck down was not something that was unforeseeable. This approach is incorrect:

   a. First, as a legal matter, the "unforeseen" test under OPG's approved rate framework is determined by considering whether the event was or should have been "predicted or anticipated"—as a basic principle of law, no party can be expected to predict or anticipate duly enacted legislation being struck down as unconstitutional. Rather than apply this standard, the Decision used the incorrect standard of "unforeseeable" to focus on the *risk* of the event occurring. It should instead have focused on whether OPG could have predicted the event's actual *occurrence* (no party could have predicted that duly enacted legislation would be declared unconstitutional). 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 the legislation being declared unconstitutional.

b. Second and in any event, as a factual matter, OPG could not have foreseen that the legislation would be struck down:

i. OPG was not a party to the litigation and had no special knowledge of the strengths and weaknesses of the case;

ii. the government vigorously defended the litigation and stated publicly that it was confident the law would be upheld;

iii. OPG could not know if the government would choose to reinstate the law using the notwithstanding clause in the Constitution if it was declared unconstitutional; and

iv. the matter is currently before the Court of Appeal.

6. As a further error, the Decision is based on a misapplication of the materiality test under OPG's approved rate framework. The Decision accepted that the potential cost to OPG of the legislation being struck down was likely more than $130 million (well above OPG's approved $10 million threshold). The Decision also accepted that OPG's actual return on equity for 2022 is not indicative of its potential future financial results. However, the Decision concluded that, on the basis of OPG's 2022 return on equity only, the increased labour costs were not material because they would not cause OPG "operational hardship" in the future. 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 rate period and then to disregard that finding and apply a fact found to be irrelevant to the materiality question. It is also important to note that OPG was not seeking to record costs incurred in 2022, only those costs incurred on or after the proposed effective date of the variance account, March 1, 2023.

7. Moreover, the Decision created a new and virtually impossible standard, an "operational hardship" threshold, which effectively renders OPG's $10 million approved materiality threshold meaningless. Rather than apply the OEB's established test, which considers 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 applied this newly created and undefined standard. An "operational hardship" standard represents 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 hardship.

8. Furthermore, the Materiality criterion requires two components that are to be applied together: 1) does the financial impact of an event meet the materiality threshold and 2) will it have a significant influence on utility operations. The Decision incorrectly considers each separately, first concluding that the materiality threshold is exceeded and then concluding that the potential costs of at least $130 million will not cause OPG "operational hardship" given OPG's approved annual nuclear revenue requirement ranging between $2.4 billion and $3.5 billion. Because the OEB typically sets material thresholds at 0.5% or less of base revenue requirement, it is difficult to fathom how OPG or any applicant could meet the "operational hardship" standard applied in the Decision.

9. The Decision sets a precedent that will have wide ranging negative impacts. Under the Decision's "unforeseeable" standard, OPG and other applicants in a comparable circumstance would have to forecast, and request as part of rate applications, accounts for all possible material risks it faces or might potentially face, no matter how remote. This would require an applicant to adduce evidence regarding all such possible risks, even if the event to which the risk relates is not expected and would not form part of the basis on which the revenue requirement is established. Beyond applicants, adopting this precedent would affect other parties and the OEB itself. OEB staff and intervenors would devote resources to assessing accounts requested for events that may never occur and the OEB would be required to rule on these requests. This would be inefficient and run counter to OEB initiatives to enhance adjudicative efficiency. The application of the Decision's new "foreseeable" standard and "operational hardship" materiality threshold would make it nearly impossible to obtain authorization to establish a variance account as part of OPG's approved rate framework in particular and, more generally, for any applicant following a rebasing decision.

10. This is a clear case where a variance account should have been approved. This motion provides an opportunity for the Board to vary the Decision, reinstate the requested variance account effective from the requested effective date, and confirm OPG's approved rate framework.

B. BACKGROUND

11. To provide context for OPG's submissions, this section summarizes (a) Bill 124, including its impacts on OPG, legal challenges and treatment by the courts, (b) OPG's current rate framework in relation to the matters at issue in this Motion, and (c) OPG's underlying application to the OEB which was the subject of the OEB's Decision.

a. *Bill 124*

12. The *Protecting a Sustainable Public Sector for Future Generations Act, 2019* ("Bill 124") was introduced on June 5, 2019 and came into force on November 8, 2019. Bill 124 established limits on compensation increases for unionized and non-unionized employees in the Ontario public sector, including OPG. Bill 124 limited the maximum annual increase in both wages and total compensation to 1% for a three-year period, referred to as the "moderation period", subject to certain exceptions.

13. A broad range of unions and organizations challenged the constitutionality of Bill 124. In a decision dated November 29, 2022, Justice Koehnen of the Ontario Superior Court found that Bill 124 substantially interfered with the applicant unions' section 2(d) freedom of association rights under the *Canadian Charter of Rights and Freedoms* (the "Bill 124 Decision"). After determining that the violation could not be saved under section 1 of the Charter, Justice Koehnen declared Bill 124 to be "void and of no effect".

14. Factually it is important to recognize that:

    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 were also subject to Bill 124 were not parties to the constitutional challenge. The unforeseen overturning of Bill 124

has resulted in significant unplanned and unbudgeted financial impacts to OPG. OPG is unaware whether others foresaw the results of the litigation to overturn Bill 124 or have been similarly affected.

b. At the time of the court challenge to Bill 124, there was ample support for 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';[2] 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 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".[3]

15. 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 could overturn the Superior Court of Justice's decision and uphold the legislation, and such a decision could itself be further appealed to the Supreme Court of Canada.

16. OPG estimated that the cumulative operating (OM&A) costs impact for only its Power Workers' Union ("PWU") represented employees was $130 million with additional, but undetermined, amounts for employees represented by the Society of United Professionals ("Society"). In OPG Reply Submissions in EB-2023-0098, at Paragraph 4, Page 28, footnote 22, OPG confirmed that it

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[2] 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) [BOA, Tab 2].

[3] Unions say wage-cap law violates rights (Globe & Mail) (September 13, 2022) [BOA, Tab 3].

had since then received the arbitration decision related to the Society collective agreement, with an estimated incremental cost impact of $58 million due to the Bill 124 Decision, resulting in a combined OM&A cost impact for both the PWU and Society represented employees of approximately $188 million.

b. *OPG's Current Rate Framework*

17. On December 31, 2020, OPG filed an application (EB-2020-0290) under section 78.1 of the *Ontario Energy Board Act, 1998* seeking approval for payment amounts for its generating facilities that are prescribed under *Ontario Regulation 53/05*. The OEB issued its Decision and Order on the application on November 15, 2021. The EB-2020-0290 Payment Amounts Order was issued on January 27, 2022 and established, among other things, payment amounts effective January 1, 2022 that are expected to continue until OPG's next application for payment amounts to be effective January 1, 2027.

18. OPG's evidence in EB-2020-0290 explained that its compensation cost forecasts for the 2022-2026 period were premised on the requirements of Bill 124.

19. To address unforeseen events affecting the nuclear business, OPG's application in EB-2020-0290 proposed the following:

> 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]

20. 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

[4] EB-2020-0290, Exhibit A1-3-2, p. 13 [BOA, Tab 4].

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 nuclear rate-setting framework evidence that included OPG's proposed treatment for unforeseen events was incorporated into and accepted by the parties as part of the settlement.[5]

21. On August 6, 2021, the OEB approved the settlement proposal orally, with written reasons to follow ("Settlement Agreement"). 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."[6]

c. *OPG's Variance Account Request*

22. On March 1, 2023, OPG filed its application with the OEB requesting approval to establish a variance account to record the nuclear revenue requirement impacts resulting from the Ontario Superior Court overturning Bill 124 (EB-2023-0098). OPG also requested, and the OEB approved, establishing the proposed variance account effective March 1, 2023 on an interim basis, pending the outcome of that application, to enable OPG to record the impacts effective from such date subject to the OEB's final decision on the application.

23. OPG explained that its application was being filed pursuant to the accounting order process established as part of OPG's rate framework that was approved in EB-2020-0290. In this respect, OPG explained that the cost impacts of Bill 124 being overturned were not reflected in the payment amounts established in EB-2020-0290; that the Bill 124 Decision would result in an annualized nuclear revenue requirement impact expected to be higher than the $10 million materiality threshold; and that it would be appropriate to record the cost impacts in a variance account, with consideration of the prudence of those costs to be determined in a future process

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5 OEB, Decision and Order, EB-2020-0290, November 15, 2021, Schedule A (Approved Settlement Proposal), pp. 32-33 of 51 [BOA, Tab 5].

6 OEB, Decision and Order, EB-2020-0290, November 15, 2021, pp. 1-5 [BOA, Tab 6].

at such time that OPG seeks disposition of the amounts recorded in the account, because the incremental costs resulting from the Bill 124 Decision reflect compensation costs necessary for the continued operation of OPG's nuclear facilities.[7]

24. The OEB issued the Decision on June 27, 2023. The OEB denied OPG's request to establish the proposed variance account and revoked its March 22, 2023 order establishing the account on an interim basis. OPG filed its Notice of Motion in the current proceeding on July 17, 2023. In Procedural Order No. 1, issued on July 25, 2023, the OEB determined that the motion raises relevant issues material enough to warrant a review of the Decision on its merits, thereby satisfying the threshold question under Rule 43 of the OEB's *Rules of Practice and Procedure*.

C. SUBMISSIONS

25. The following submissions are organized based upon the grounds set out in OPG's Notice of Motion. Specifically, as discussed below, OPG submits that the Decision contains material and clearly identifiable errors of fact and law, or mixed fact and law:

    a. misapplying the established 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.

a. The Decision misapplied the established basis for creating accounting orders under OPG's approved rate framework

26. In the Decision, the OEB references the treatment of unforeseen events under OPG's approved rate framework, 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

[7] OPG, Application, EB-2023-0098, Section 3.1, pp. 10-11 [BOA, Tab 7].

the rate framework was approved, and that the three criteria from the Filing Requirements be met." Those criteria are Causation, Materiality and Prudence.[8]

27. 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. It did so by applying the wrong standard and by effectively creating a new requirement that if a risk was not explicitly identified in the underlying payment amounts proceeding, then an accounting order would not subsequently be granted if the risk materializes.

(i) The Decision applies the wrong standard: "unforeseeable," when it should have applied "unforeseen"

28. 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.

29. It is a fundamental principle of law that statutes enacted by the legislature are presumed to be constitutional.[9] For this reason, courts have consistently held that parties cannot be expected to foresee that legislation might be struck down, unless and until the law is actually declared unconstitutional. As stated by the court, "Constitutional law is a variable, debatable and frequently uncertain thing."[10] Parties "are not fortune tellers. They can hardly be expected to predict the course of constitutional change in Canada's courts."[11]

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8 See Decision, pp. 3-4.

9 MacNeil v. Nova Scotia (Board of Censors), [1978] 2 S.C.R. 662, para. 38 [BOA, Tab 8].

10 Schmidt v. Canada (Attorney General), 2018 FCA 55, para. 90 [BOA, Tab 9].

11 R. v. Weir, 1999 ABCA 275, para. 10 [BOA, Tab 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) [BOA, Tab 11].

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

31. 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>.[12]

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.[13]

32. An unforeseen event is one that was not expected. In the context of OPG's approved rate framework, "unforeseen" means the event was not 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 not 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, and the resulting cost implications are therefore clearly outside of the base upon which the payment amounts were derived.

33. 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

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[12] Decision, p. 5 (emphasis added).
[13] Decision, p. 9 (emphasis added).

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.

34. The OEB itself has previously 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. ("Enbridge") 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.[14] 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.

35. The OEB considered whether the event was foreseeable, and thereby 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. By considering foreseeability rather than applying a factual consideration of whether the event was actually foreseen or predicted at the time, the OEB, incorrectly, has applied a fundamentally different standard of foreseeability to retrospectively consider whether there was a possibility of Bill 124 being declared unconstitutional.

[14] OEB, Partial Decision with Reasons, RP-2003-0203, August 31, 2004, para 141-148 [BOA, Tab 12].

36. Furthermore, in applying a foreseeability standard, the Decision included consideration of the risk of the event occurring, thereby expanding the scope of the review beyond a consideration of 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 establishing variance or deferral accounts 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. In contrast, costs that are outside of the basis upon which rates were derived, since they were not expected and could not be accurately forecasted, satisfy the Causation criteria.

37. 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."[15] 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;"[16]

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 . . .;"[17] and

[15] Decision, p. 5 (emphasis added).
[16] Decision, p. 6 (emphasis added).
[17] Decision, p. 6 (emphasis added).

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."[18]

(ii) The effect of the Decision is that every potential risk must now be addressed

38. 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 would 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."[19] The effect of the Decision is to require OPG, as part of its payment amount applications to identify every possible material risk and to request a deferral or variance account for every such risk or potential risk.

39. This is not a reasonable interpretation of the approved rate framework and is indicative of its misapplication. It would render meaningless the OEB's prior approval of the mechanism for the treatment of unforeseen events as part of OPG's rate framework. Moreover, it is not a practical outcome to inform future applications by OPG, and other utilities in comparable circumstances.

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 arising from that risk, no matter how remote the risk may have been. Based on this outcome, in a future application OPG would need to seek accounts for all foreseeable material risk events that could occur, regardless of how remote. In addition, OPG would need to adduce evidence regarding all such 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 the revenue requirement is established. In turn, OEB staff and intervenors would devote resources to assessing the potential risks and the OEB would be required to consider and rule

[18] Decision, p. 7 (emphasis added).
[19] Decision, p. 7 (emphasis added).

upon the appropriate treatment of all such risks in setting rates. According to the Decision, OPG would need to take the foregoing steps to be able to address the potential occurrence of a risk event occurring during the rate period. This would be impractical and is inconsistent with the objective of regulatory efficiency and with prior practice at the OEB.

b. The Decision reached conclusions on a speculative and non-factual basis

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

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

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

c. that the risk and its potential OM&A 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.[20]

41. 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 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, which

[20] Decision, p. 6.

is based on unforeseen events that are outside of the base upon which rates are derived, to the consideration of the potential impacts on settlement.

42. 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."[21] This finding was erroneous because it is speculative and not based on evidence.

43. 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."[22] 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.

44. 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.[23] 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 sought to file evidence from this period (redacted or otherwise to protect any settlement privilege) illustrates that potential future variance accounts were not important factors to the settlement negotiation.

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[21] Decision, p. 6 (emphasis added).
[22] Decision, p. 5 (emphasis added).
[23] Shewchuk v. Blackmont Capital Inc., 2016 ONCA 912, paras. 42-46 [BOA, Tab 13].

c. The Decision incorrectly applied the Materiality criterion for variance account eligibility

45. The OEB's "Materiality" criterion for variance account eligibility 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.[24] 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.[25] The Decision incorrectly applied the Materiality criterion by making findings that are internally inconsistent, and by applying a different and stricter test than that which is called for under OPG's approved rate framework.

(i) The Decision misapplied the materiality test

46. 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>[26]

47. 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

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[24] 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 [BOA, Tab 14].

[25] Decision, p. 9.

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

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 rate period and then to disregard that finding and apply a fact found to be irrelevant to the materiality question. It is also important to note that OPG was not seeking to record costs incurred in 2022, only those costs incurred on or after the proposed effective date of the variance account, March 1, 2023.

(ii) The Decision applied a different materiality test

48. 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.

49. There is no indication provided in the Decision as to what impacts would constitute "operational hardships." Moreover, this represents 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. During the course of the application for the variance account, OPG estimated that the cumulative OM&A impact for only its PWU represented employees was $130 million with additional, but undetermined, amounts for Society employees. As noted, OPG subsequently confirmed that it had since then received the arbitration decision related to the Society collective agreement, with an estimated incremental cost impact of $58 million due to the Bill 124 Decision, resulting in a combined OM&A cost impact for both the PWU and Society represented employees of approximately $188 million.[27] 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.

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

50. Furthermore, the Decision erroneously applies the Materiality criterion in a way that effectively renders OPG's established materiality threshold meaningless. Application of the Materiality criterion requires consideration of two questions: (i) Does the financial impact of an event meet the materiality threshold (which for OPG is $10 million)? and (ii) 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. Exceeding the materiality threshold must have substantive meaning – of material financial consequence – otherwise it would not be applied as part of the Materiality criterion. The significance of the resulting consequence on operations through the second part of the test must also be considered in this context. The Decision, however, ignores the first branch of the Materiality criterion and applies a second materiality test in the form of the new standard of "operational hardship." In doing so, the Decision opines that costs of at least $130 million will not cause OPG "operational hardship" given OPG's approved annual nuclear revenue requirement ranging between $2.4 billion and $3.5 billion. Recognizing that materiality thresholds typically set by the OEB are 0.5% or less of base revenue requirement, it is difficult to fathom what would be required to meet the "operational hardship" standard applied in the Decision and how any applicant could meet it. The Decision has therefore established a new Materiality criterion that is inconsistent with established OEB practice and which creates an unrealistically high bar that is an unfair basis to evaluate a request for an account.

D. CONCLUSION

51. The OEB erred in its findings in three fundamental respects. First, it misapplied the approved basis for establishing accounting orders under OPG's approved rate framework by incorrectly applying a standard of "unforeseeable" rather than the standard of "unforeseen." In addition to impacting the outcome of OPG's application, going forward this would have the impractical and inefficient effect of requiring OPG and other similarly situated utilities to address every possible material risk in their rate-setting applications, regardless of how remote it may be and to request a deferral or variance account for each one. Second, the OEB made conclusions on a speculative and non-factual basis, and without evidence, regarding potential impacts on the settlement related to OPG's payment amounts application. Third, the OEB incorrectly applied the Materiality criterion

for variance account eligibility by making internally inconsistent findings with respect to the materiality test and by applying a new, stricter test that differs both from the OEB's established materiality test (i.e., by considering "operational hardships" rather than "significant influence on operations") and from OPG's established materiality threshold of $10 million.

52. Accordingly, the reviewing panel should grant the motion and correct the errors by providing the requested relief. Specifically, the OEB should vary the Decision by (a) re-establishing the interim variance account originally established on March 22, 2023 and effective as of March 1, 2023 to record the impact of Bill 124 being declared unconstitutional on OPG's nuclear revenue requirement, and (b) approving the requested 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 for OPG.

All of which is respectfully submitted this 11th day of August, 2023.

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