EB-2023-0209

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**.**

SUBMISSIONS OF

CANADIAN MANUFACTURERS & EXPORTERS ("CME")

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1. INTRODUCTION & BACKGROUND

1. On March 1, 2023, OPG filed an application seeking the Ontario Energy Board's (the "**OEB**" or the "**Board**") approval for an accounting order to establish a variance account to record the nuclear revenue requirement impacts resulting from the Ontario Superior Court's decision to overturn the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* ("**Bill 124**" or the "***Act***") effective March 1, 2023, until OPG's next payment amounts order.

2. OPG argued that pursuant to the settlement agreement in EB-2020-0290, OPG was entitled to receive an accounting order and related approval to record the impacts related to "material, unforeseen" events in a variance account.[1]

3. OPG argued that it met the Board's threshold test for the creation of a new variance account pursuant to the settlement agreement framework on the basis that the amounts proposed to be recorded were greater than $10 million, OPG had no knowledge of and did not foresee the Court's decision overturning Bill 124, and the prudence of the costs would be determined in a separate process.[2] OPG stated that it therefore met the requirements of causation, materiality, prudence, and the requirement that the event be "unforeseen".

4. The parties engaged in an interrogatory process. CME delivered its interrogatories on April 20, 2023. OPG's responses to interrogatories were provided on May 4, 2023. CME and the School Energy Coalition ("**SEC**") wrote a follow up letter for further and better responses to certain interrogatories regarding the timing of OPG's knowledge of the legal challenge to Bill 124, as well as OPG's actual achieved ROE for 2022.[3] In response to SEC and CME's letter on May 12, 2023, OPG provided additional

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1 EB-2023-0098, Ontario Power Generation, Application for an Accounting Order Establishing a Variance Account, pp. 10-11.

2 EB-2023-0098, Ontario Power Generation, Application for an Accounting Order Establishing a Variance Account, p. 11.

3 EB-2023-0098, Shepherd Rubenstein Letter, *Re: EB-2023-0098 – OPG Bill 124 Accounting Order – Request For Further IR Responses,* May 9, 2023.

responses to interrogatories, including disclosing that OPG was forecasting to earn 12.5-13.0% ROE in 2022.[4]

5. Consistent with the Board's procedural order in EB-2023-0098, CME and other interested parties made submissions on OPG's application on May 23, 2023, and OPG was allowed to provide its responding argument on May 30, 2023.

6. The Board issued its Decision and Order on June 27, 2023 (the "**Decision**"). In the Decision, the Board found that the overturning of Bill 124 was not an "unforeseen" event, and that "the exercise of reasonable and prudent foresight on OPG's part could have prevented OPG's request for a variance account…".[5] Additionally, the Board determined that the costs that OPG forecast it would incur as a result of the Court's decision were not material, as they did not have a significant influence on the utility's operations. As a result, the Board denied OPG's request to establish a new account.

7. On July 17, 2023, OPG filed its notice of motion to review and vary the Decision. This was followed shortly by OPG's argument in chief, filed on August 11, 2023. OPG argued that the Decision contained the following errors:[6]

(a) The Board incorrectly required OPG to demonstrate that the overturning of Bill 124 was "unforeseeable" rather than "unforeseen";

(b) The Board misapplied its test for materiality by applying the monetary materiality threshold and the "significant influence" test as two separate tests, rather than together;

(c) The Board created a new standard for "operational hardship" which is impossible to meet; and

(d) The Board wrongly considered OPG's 2022 ROE as part of its materiality analysis.

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4 EB-2023-0098, OPG Letter, *Reply to SEC Request for Further IR Responses*, May 12, 2023.
5 EB-2023-0098, Decision and Order, June 27, 2023, p. 6.
6 EB-2023-0209, OPG Argument-In-Chief, paras. 5-8.

8. OPG's arguments are without merit. The Decision is both correct as well as reasonable and was supported by the evidence that was before it. For the reasons that follow, CME submits that the Board should deny OPG's motion.

2. THE STANDARD OF REVIEW

9. OPG did not explicitly address the standard of review in its Argument-in-Chief. However, as CME apprehends it, OPG implicitly argued that the standard of review for the Decision is the "correctness" standard.[7]

10. When conducting a reasonableness review, the reviewing body is concerned with whether the decision is supported by underlying rationale and it transparent, intelligible, and justified.[8] If it is, the reviewing body will leave the earlier decision undisturbed. A review on the correctness standard empowers the reviewing body to determine whether or not it would come to the same conclusion as the original decision maker.[9] If the reviewing body determines it would have come to a different conclusion, it can substitute its determination for the one made by the original panel.

11. The appropriate standard of review for the Decision is the 'reasonableness' standard articulated by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("***Vavilov***"). In *Vavilov*, the Supreme Court determined that decisions by administrative tribunals should generally be reviewed on the reasonableness standard unless the matters at issue fell into one of a few narrow categories. While OPG has attempted to craft its arguments to fit an exception to the general reasonableness review, the matters at issue on this motion are simply OPG's disagreements about the application of the law to the facts, and therefore should be reviewed on a 'reasonableness' standard.

2.2 The Board Has Determined that It Will Apply a Reasonableness Standard when Analysing a Motion to Review and Vary

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7 For instance, see EB-2023-0209, OPG Argument-In-Chief, para. 5.
8 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 15.
9 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 15.

12. In previous decisions such as *Brantford Power Inc., Re* ("*Brantford*"), the Board determined that when entertaining a motion to review and vary, the Board's standards of review are no different than the standards that a court would use in reviewing a decision of the Board.[10]

13. The Board also cited the Ontario Court of Appeal's decision in *Toronto Hydro-Electric System Ltd v. Ontario Energy Board*, 2010 ONCA 284 for the appropriate standard of review. The Court of Appeal in *Toronto Hydro* found that the Board had a broad and open-ended grant of power that lent itself to reasonableness reviews.[11]

14. CME submits that OPG's application for an accounting order and a variance account, which would track costs that OPG intends to pass on to ratepayers in the form of higher payment amounts, is squarely within the Board's decision-making expertise. Accordingly, the Decision should be reviewed on a reasonableness standard, rather than the correctness standard.

2.3 The Supreme Court Determined that 'Correctness' Reviews are only Appropriate in Limited Circumstances

15. The Supreme Court in *Vavilov* confirmed that there is a presumption that reasonableness is the appropriate standard when reviewing decisions from administrative tribunals.[12] The presumption is only rebutted in two situations: where the legislature has signalled there is a more stringent standard of review requiring correctness, and when the rule of law requires the correctness standard.[13]

16. The rule of law requires the correctness standard to be applied for constitutional questions, general questions of law of central importance to the legal system as a whole, and questions about jurisdictional boundaries between two or more administrative bodies.[14]

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10 *Brantford Power Inc., Re*, 2010 CarswellOnt 19346 at para. 38.
11 *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)*, 2010 ONCA 284 at paras. 25-26.
12 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 17.
13 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 17.
14 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 17.

17. As outlined previously in these submissions, the Courts have found that the legislature's intention was to grant the OEB a broad and subjective grant of power and have determined that the Board's decisions should be reviewed on the reasonableness standard. Accordingly, the legislature did not signal that correctness was the appropriate standard of review.

18. OPG's motion does not purport to raise constitutional questions, nor the jurisdictional boundaries between administrative bodies. OPG has framed the Board's alleged errors as being contrary to "fundamental principles of law". However, OPG's motion raises no true issues of central importance to the legal system.

19. The Supreme Court in *Vavilov* cautioned that issues that are of "wider public concern" are not sufficient for a question to be of central importance to the whole legal system, nor is it sufficient for an entity to frame its issue in a general or abstract way.[15] The types of issues that are of central importance to the legal system are issues such as the scope of solicitor/client privilege, the application of *res judicata*, the scope of a state's duty towards religious neutrality, and the scope of parliamentary privilege.[16] OPG's grounds for this motion are instead disagreements with how it feels the Board should have applied the law to the facts.

20. Accordingly, OPG's issues on its motion do not meet the requirements for a 'correctness' standard to be applied pursuant to the Court's framework in *Vavilov*, and the Board should apply the reasonableness standard of review to the Decision.

21. Notwithstanding that CME's position is that the appropriate standard of review is reasonableness, CME's remaining submissions will argue that the Decision is correct, and by extension should be upheld regardless of whether or not the Board finds that the correctness or the reasonableness standard applies.

3. THE BOARD CORRECTLY APPLIED THE TEST FOR UNFORESEEN CIRCUMSTANCES

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15 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 60-61.
16 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 60.

3.1 OPG's Foreseeability Argument

22. OPG argues that the Board's test requires that an event be "unforeseen" not that it be "unforeseeable". As CME apprehends it, OPG's view is that for an event to be "unforeseen", OPG must not have had actual foresight such that it anticipated the event.[17] OPG argues that the Decision was concerned with whether OPG predicted that there was a *risk* Bill 124 could be overturned, not whether OPG foresaw the *occurrence* of Bill 124. As a result, OPG argues that the Board's standard would require the utility to predict every possible risk, no matter how remote.

23. OPG's argument misunderstands the Decision. The Board did not determine that OPG was required to anticipate every possible risk to be entitled to a variance account. Instead, the Board determined that the risk of a court overturning Bill 124, in the context of the factual record before them, was likely enough to occur such that a reasonable and prudent utility would have foreseen it. This is clear from the Decision:

> ***"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…"***[18]

24. The use of an objective standard of 'reasonable and prudent foresight' makes it clear that utilities would not have to predict every possible material risk and request a variance account for each. The Decision provided that a utility is only barred from accessing a subsequent variance account when a utility fails to exercise "reasonable and prudent foresight". Risks with a minimal chance of occurrence would not be anticipated through reasonable and prudent foresight. Only risks which have a sufficient chance of occurrence would be reasonably foreseeable.

25. Moreover, the application of 'reasonableness' in this analysis provides a justified distinction where a subsequent account will not be available. If the Board found as a fact that other utilities were aware of a material risk that was reasonably probably to occur and chose to ignore it or failed to address it in any way during its rate hearing,

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17 For instance, see OPG Argument-in-Chief at paras. 2, 11, 12.
18 EB-2023-0098, Decision and Order, June 27, 2023, p. 6.

the Board is correct bar those utilities from accessing a subsequent variance account. This would not lead to a negative precedent but would underscore the need for utilities to exercise reasonable and prudent foresight when managing their affairs.

3.2 OPG's Argument is Inconsistent with its Argument in EB-2023-0098

26. OPG's argument on the causation criterion stands in direct contradiction to its submissions in its reply argument in EB-2023-0098, where OPG argued that the Board should use an objective standard to determine whether an event was *reasonably predictable*. OPG stated in its reply submissions:

> ***"The compensation amounts to be recorded in the proposed variance account are clearly outside the base upon which OPG's payment amounts were derived in EB-2020-0290. Something unforeseeable is something that is not reasonably predictable or is speculative, such that the related costs cannot properly form part of the base costs included in the revenue requirement."[19] (emphasis added)***
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> ***"As noted above, something unforeseeable is something that is not reasonably predictable or is speculative, such that the related costs cannot properly form part of the base costs included in the revenue requirement."[20] (emphasis added)***
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> ***"The OEB should resolve this issue by applying an objective standard and assess whether it is likely from the facts on record to conclude … whether the circumstance and related cost impacts were unforeseeable (i.e., not probable)…"[21] (emphasis added)***

27. The Board applied the test that OPG suggested. The Board turned its mind to the evidence on the record before it and made several relevant findings of fact, including that OPG was aware of the legal challenges to Bill 124 before it filed its application in EB-2020-0290, and at the time of the settlement discussions. Critically, the Board found that the exercise of "reasonable and prudent foresight" on OPG's part could have prevented OPG's need to request a variance account.[22]

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19 EB-2023-0098, Ontario Power Generation, Reply Submissions, p. 3.
20 EB-2023-0098, Ontario Power Generation, Reply Submissions, p. 3.
21 EB-2023-0098, Ontario Power Generation, Reply Submissions, p. 18.
22 EB-2023-0098, Decision and Order, June 27, 2023, p. 6.

28. Therefore, on the basis of the record and its findings of fact, the Board applied an objective standard (that of reasonable and prudent foresight) and determined that the overturning of Bill 124 was "reasonably predictable", and was therefore a risk that OPG should have addressed. This is exactly what OPG invited them to do in their submissions in EB-2023-0098. It is not appropriate for OPG to now take the position that the Decision was incorrect for applying the test OPG argued it should apply.

3.3 OPG is Required to Prudently and Reasonably Manage Risks

29. OPG argued that it was entitled, as a fundamental principle of law, to assume that validly enacted legislation will remain valid, despite any legal challenges before the Court. However, this position is not supported by the authorities cited by OPG in their argument, which were all decided in significantly different contexts, and are therefore distinguishable. In this regard:

(a) *MacNeil v. Nova Scotia (Board of Censors),* [1978] 2 S.C.R. 662 was about whether sections of the *Theatres and Amusements Act*, R.S.N. 1967, c.304 and related regulations were *ultra vires* of the Government of Nova Scotia. The Court determined that when a court undertakes a constitutional analysis to determine whether or not a piece of legislation was within the powers granted to that level of government, it will apply a presumption that the legislation is *intra vires*. Subsequent Supreme Court decisions have clarified that this presumption arises when a Court must choose between two different "competing plausible characterizations of the law".[23]

MacNeil was decided in a specific context: what reviewing courts should account for in a constitutional analysis. This does not suggest that there is a broader principle where all entities are at liberty to ignore reasonable risks of a law being overturned regardless of their circumstances. *MacNeil*

[23] *Rogers Communication v. Chateauguay (Ville)*, 2016 SCC 23 at para. 82.

also does not suggest that its holding is applicable in the context of a regulatory decision regarding reasonable utility risk management.

(b) *R v. Weir*, 1999 ABCA 275 was about whether the appellant could amend their leave to appeal to the Alberta Court of Appeal to include a new constitutionality argument. The Court agreed that it could. However, its decision makes it clear that the basis its finding was rooted in an accused's criminal rights:

> ***"Defence counsel are not fortune tellers…Where there is no suggestion of misconduct or mischief on the part of trial counsel, the failure to anticipate a fundamental change in the law should not operate to deprive an accused/appellant of that which the Supreme Court of Canada has characterized as an entitlement" to have his or her culpability determined on the basis of what is held to be the proper and accurate interpretation of the Criminal Code." (emphasis added)***

The present matter before the Board is not a criminal proceeding, and the Decision does not deprive OPG is of entitlements under the *Criminal Code*. The Decision is a regulatory decision which determined that OPG, a highly sophisticated utility, was not entitled to an accounting order and a supplementary variance account. *Weir* does not apply to the matters at issue on this motion.

(c) *Schmidt v. Canada (Attorney General)*, 2018 FCA 55, cited by OPG, underscores why reasonable and prudent utility managers would have acted to bring the risk of Bill 124 being overturned to the parties' and the Board's attention in EB-2020-0290.

The Federal Court of Appeal found that when the legislature enacts laws, it is not limited to proposing measures that are certain to be constitutionally valid, or even likely to be valid, only that they be defendable in Court.[24]

[24] *Schmidt v. Canada (Attorney General)*, 2018 FCA 55 at para 87.

> Since the government is free to propose measures that are more likely than not to be found *unconstitutional*, CME submits that its utility managers who are relying on those laws in calculating their revenue requirement should apply reasonable and prudent foresight to proactively manage the risk of a challenge by bringing matters forward to parties' and the Board's attention. OPG failed to do so, and the Decision was correct to deny it access to a subsequent variance account.

30. OPG's authorities fail to support the proposition that a sophisticated regulated entity is entitled, as a matter of law, to assume that legislation will remain constitutional, even in the face of widespread, notorious, and widely published challenges to that legislation. CME submits that OPG was required to exercise reasonable and prudent foresight in order to manage its risks if it wanted access to an extra-ordinary variance account. If it had, it would have understood that the challenges to Bill 124 had a reasonable prospect of success. The Decision was correct and OPG has no basis upon which to argue that it should be varied.

3.4 OPG's Foreseeability Argument is Inconsistent with the Board's Objectives in Incentive Ratemaking

31. As outlined earlier in these submissions, OPG argues that the test for an accounting order and a new variance account is to determine whether OPG actually foresaw the event as a matter of fact. Accepting this argument would lead to absurd results and would undermine the Board's goals in leveraging performance-based ratemaking.

32. The Board's objectives for performance-based regulation are contained in the Board's report "Renewed Regulatory Framework for Electricity Distributors: A Performance Based Approach" (the "**RRFE**"). While CME acknowledges that the RRFE states that it is for distributors, it submits that the Board's overarching goals with respect to performance-based regulation, which the Board applies to payment amounts

for OPG's nuclear facilities,[25] is the same regardless of the regulated entity. Consequently, the reviewing panel's decision on this motion should be consistent with the Board's objectives in regulating OPG through performance-based regulation.

33. The RRFE provides the following overview of the Board's intended objectives as a result of performance-based regulation:

> ***"The renewed regulatory framework is a comprehensive performance-based approach to regulation that promotes the achievement of performance outcomes that will benefit existing and future customers. The framework will align customer and utility interests, continue to support the achievement of important public policy objectives, and place a greater focus on delivering value for money."[26]***

34. CME submits that the Board's objectives are two-fold. First, the Board seeks to achieve outcomes that will benefit customers. Second the Board will achieve those improved outcomes by aligning customer and utility interests and delivering value for money.

35. OPG's argument, if accepted, would lead to the opposite. In OPG's conception of the 'unforeseen' test, a utility could always be insulated from any future risks during an incentive rate-making term if it fails to foresee them. This would lead to worse outcomes for ratepayers. Vigilant utility managers foresee risks and proactively manage. Early intervention allows managers to avoid or mitigate risks before they escalate. As those risks are avoided or mitigated, customers achieve better outcomes through lower rates, as they are not burdened with avoidable or excessive costs.

36. If the Board were to accept OPG's argument and determine that OPG was eligible to record amounts related to any risk that it did not actually foresee, the incentive for a utility would be clear: it would be protected against adverse future occurrences and would be eligible to pass the costs on to ratepayers if management of a utility fails to foresee those risks in advance. This would split customer and utility

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[25] For instance, the Payment Amounts Order in EB-2020-0290 applied a stretch factor to OPG's nuclear revenue requirement. See EB-2020-0290, Payment Amounts Order, January 27, 2022, p. 4.

[26] Report of the Ontario Energy Board, Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach, October 18, 2012, p. 55.

interests, with customers' interest firmly being in support of proactive risk management and foresight, while the utility's interest would be to protect its shareholder by refusing to foresee any potential risks and collecting the incremental costs from customers.

37. However, the Decision correctly sought to align utility and customer interests. By determining that OPG was not eligible for a variance account because it failed to exercise "reasonable and prudent foresight" the Board incentivized OPG to manage risk vigilantly and proactively. As outlined, this will lower the overall costs born by customers thereby aligning utility and customer interests and delivering value for money. Accordingly, the Decision was reasonable and correct and should be upheld.

3.5 The Decision is Consistent with Z-Factor Precedents Regarding Causation

38. The Decision was also consistent with the Board's treatment applications for a z-factor. As outlined in CME's original submissions in EB-2023-0098, the test the Board applies on a Z-Factor application is nearly identical to the one it applies for a new variance and variance account. Pursuant to the *Filing Requirements for Electricity Distribution Rate Applications*, in order to be eligible for a new variance account, the utility is required to demonstrate that it meets the requirements of "causation", "materiality" and "prudence".[27]

39. Similarly, in order to be eligible for a Z-Factor mechanism, the utility must demonstrate that the costs incurred "meet the three eligibility criteria of causation, materiality, and prudence".[28] However, because a Z-Factor deals with 'unforeseen' events, a utility is also required to demonstrate that the management of the distributor could not have bene able to plan and budget for the event and that the harm is incremental, among other things, to the utilities' 'reasonable expectations'.[29]

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27 Ontario Energy Board, *Filing Requirements for Electricity Distribution Rate Applications – 2023 Edition for 2024 Rate Applications, Chapter 2 – Cost of Service*, December 15, 2022, p. 66. The Decision outlined that these requirements were adopted for OPG in EB-2018-0002.

28 Ontario Energy Board, *Filing Requirements for Electricity Distribution Rate Applications – 2023 Edition for 2024 Rate Applications, Chapter 3 – Incentive Rate Setting Applications*, June 15, 2023, p. 23.

29 Ontario Energy Board, *Filing Requirements for Electricity Distribution Rate Applications – 2023 Edition for 2024 Rate Applications, Chapter 3 – Incentive Rate Setting Applications*, June 15, 2023, p. 23.

40. Accordingly, as part of the Z-Factor criteria, the Board analyzes eligibility through an objective lens using a utilities' reasonable expectations. The Decision, which found that OPG was not eligible for a new variance account because it failed to exercise reasonable and prudent foresight, is therefore consistent with the Board's treatment with very similar Z-Factor applications.

41. If OPG's argument were to be accepted, and the Board allow new variance accounts for events or risks that OPG subjectively did not foresee, the Board would have created two very different tests for similar situations with similar remedies. One test would evaluate a utility on the basis of whether the harm was within the reasonable expectations of a utility, and whether a utility "could" reasonably have planned for it, and the other test would ignore an objective standard in favor of a factual determination about whether or not a utility actually foresaw the relevant risks.

3.6 The Decision was Based on the Evidentiary Record

42. OPG argued that the Decision incorrectly reached conclusions based on speculation rather than fact. Specifically, OPG stated that the Board's findings about the impact of OPG's failure to disclose on the settlement agreement are irrelevant to its eligibility for an accounting order/variance account. When properly interpreted however, the Board's findings were correct and amply supported by the evidence.

43. The Supreme Court has confirmed that a decision maker's findings of fact are owed deference on review, even if the resulting legal question is reviewed on a correctness standard.[30]

44. The Board made the following findings of fact based on record before it:[31]

> ***"that OPG was clearly aware of the legal challenges to Bill 124 before filing the EB-2020-0290 application…"***
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> ***"that the risk of Bill 124 being overturned was certainly present prior to the Settlement Agreement and the Decision and thus a***

[30] *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53 at para. 26.
[31] EB-2023-0098, Decision and Order, June 27, 2023, pp. 5-6.

> ***known variable that OPG should have taken into consideration and governed themselves accordingly"***
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> ***"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."***
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> ***"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."***

45. In evidence before the Board was the filing dates of the application challenging Bill 124, the earliest of which was on February 11, 2020.[32] Moreover, the unions representing OPG's employees filed applications challenging Bill 124 on November 24, 2020.[33] These filings occurred prior to the filing of OPG's application, and well before the settlement agreement in EB-2023-0098. Moreover, the evidence before the Board demonstrated that there was significant and pervasive media coverage about the challenges.[34]

46. The Board was therefore entitled to make findings about the state of OPG's knowledge relative to the procedural timeline in EB-2023-0098. The reviewing panel should defer to the original panel's findings of fact and leave them undisturbed.

4. THE DECISION CORRECTLY APPLIED THE 'SIGNIFICENT INFLUENCE' TEST

47. OPG argued that the Decision was incorrect because it misapplied the "materiality" component of the test for an accounting order/variance account. As CME understands it, OPG based this assertion on two grounds: the Decision applied both branches of the materiality test separately, rather than together, and the Decision used an "operational hardship" threshold rather than "significant influence" to determine materiality.

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[32] EB-2023-0098, Decision and Order, June 27, 2023, p. 5.
[33] EB-2023-0098, Decision and Order, June 27, 2023, p. 4.
[34] EB-2023-0098, Decision and Order, June 27, 2023, p. 5. See also EB-2023-0098, Exhibit L, CME-01.

48. The Board's application of the materiality test was correct. In its Argument-in-Chief, OPG asserts that the two components of the test (whether the amount is greater than the materiality threshold, and whether the amount has a significant influence on the operations of the utility) should be applied together. OPG cited no authority for this proposition, and it runs contrary to the structure of the test itself. The 'materiality' test is a conjunctive test which requires the utility to meet both branches in order to be eligible for an accounting order.

49. The Courts have held that tests which are joined with the word "and" are conjunctive tests rather than disjunctive tests.[35] Conjunctive tests are test that require that each branch of the test to be met in order for the test as a whole to be met. Each branch of the test in a conjunctive test "adds something important" and "none of the branches can be seen as an optional extra".[36]

50. The materiality test has two separate branches that must be satisfied. Pursuant to the Board's filing guideline, amounts to be recorded in a proposed variance account must:

(a) Exceed the OEB-defined materiality threshold; and

(b) Have a significant influence on the operation of the distributor.[37]

51. The use of the word "and" in the filing guidelines indicates that the materiality threshold test is conjunctive, and that both branches of the test "adds something important" and cannot be seen as an "optional extra".

52. In the Decision, the Board determined that the amounts proposed to be recorded would exceed OPG's materiality threshold. However, the Board determined

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35 For instance, see the Federal Court's determination regarding the test for an injunction in *Ahousaht First Nation v. Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116 at para. 50, citing the Federal Court of Appeal's decision in *Janssen Inc v. Abbvie Corporation*, 2014 FCA 112, or the Ontario Court of Appeal's description of the test for dismissal for delay in *Faris v. Eftimovski*, 2013 ONCA 360 at para. 11.

36 *Janssen Inc v. Abbvie Corporation*, 2014 FCA 112 at para 19.

37 Ontario Energy Board, *Filing Requirements for Electricity Distribution Rate Applications – 2023 Edition for 2024 Rate Applications, Chapter 2 – Cost of Service*, December 15, 2022, p. 66.

that the amounts at issue would not have a significant influence on OPG's operations. This was supported by the evidence at issue, including OPG's approved revenue requirement, as well as OPG's achieved ROE in 2022.[38]

53. OPG argued that meeting the OEB approved materiality threshold must be understood to have implicit in it a material financial impact, and that the "significant influence" portion of the test must be understood in that context. OPG's interpretation runs contrary to the proper interpretation of a conjunctive test and should be rejected. If a utility that met the OEB's approved materiality threshold necessarily had a material impact on OPG's operations, there would be no need for the second component of the test. It would become an "optional extra" that no longer added anything to the test.

54. CME submits that the fact that the Board employs a conjunctive test means that each branch brings a different lens to the Board's analysis. The first branch, the OEB materiality threshold measures a pure dollar value of the costs. The 'significant influence' branch of the test, in contrast, reviews whether or not the proposed amounts will have a practical impact on the utility such that it necessitates an accounting order for a new account. A failure of either one of these branches is sufficient for the utility to fail the material criteria.

55. The Board correctly applied the test as two separate components and found that the amounts to be recorded would not have a significant impact on OPG's operations. Since OPG did not meet the second branch of the test, the Decision correctly found that OPG failed the materiality test for an accounting order/variance account.

56. OPG also argued that the Board applied a "operational hardship" threshold rather than a "significant influence" threshold. However, a proper reading of the Decision discloses that the Board applied the correct "significant influence" threshold. The Decision outlined the two branches of the test, including that the amount proposed must have a 'significant influence' on the operations of the utility. In the sentence that followed, the Board found that OPG should manage the amounts incurred within their

[38] EB-2023-0098, Decision and Order, June 27, 2023, p. 9.

approved revenue requirement. In other words, the Board found that the amounts would not have a significant influence on the utility and should be managed "in the normal course and addressed through productivity improvements".[39]

57. In the subsequent paragraph, in direct response to a potential suggestion that OPG may experience 'operational hardship', the Board indicated that OPG's exemplary performance would counteract that suggestion. The Decision therefore does not apply the 'operational hardship' as the threshold test, but only as an answer to a possible objection from OPG. Moreover, this conclusion was supported by the evidence, which demonstrated that OPG was going to earn an ROE of 12.5-13%, more than 4% above its allowed ROE for 2022.

5. CONCLUSION

58. For all the foregoing reasons, CME submits that OPG's Motion to Vary should be denied.

6. COSTS

59. We request that CME be awarded 100% of its reasonably incurred costs in connection with this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of August 2023.

Scott Pollock
Counsel for CME

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[39] Ontario Energy Board, *Filing Requirements for Electricity Distribution Rate Applications – 2023 Edition for 2024 Rate Applications, Chapter 2 – Cost of Service,* December 15, 2022, p. 66.