



August 30, 2023

Ms. Nancy Marconi  
Registrar  
Ontario Energy Board  
2300 Yonge Street  
P.O. Box 2319  
Toronto, ON M4P 1E4

Re: Ontario Power Generation Inc. Motion to Review and Vary EB-2023-0098 Decision  
AMPCO Final Submissions  
Board File No. EB-2023-0209

Dear Ms. Marconi:

Attached please find AMPCO's Final submissions in the above proceeding.

Best Regards,

A handwritten signature in blue ink, appearing to read "Colin Anderson".

Colin Anderson  
President

Copy to: OPG

## **EB-2023-0209**

### **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.

### **Final Submissions of AMPCO August 30, 2023**

Ontario Power Generation Inc. (OPG) filed an application with the Ontario Energy Board (OEB) on March 1, 2023 seeking approval to establish a variance account to record the nuclear revenue requirement impacts resulting from the Ontario Superior Court overturning the Protecting a Sustainable Public Sector for Future Generations Act, 2019 (Bill 124). The Ontario Superior Court overturned Bill 124 on November 29, 2022 and declared it to be “void and of no effect”.

#### Background

Bill 124 set a 1% limit on annual wage and total compensation increases for the Ontario public sector employees, including employees at OPG, for a three-year moderation period effective November 8, 2019. The limits on compensation set out in Bill 124 were the basis of the forecast compensation costs in OPG’s revenue requirements for the 2022-2026 period. The first legal challenge to Bill 124 was filed on February 11, 2020, 10 months prior to the filing of OPG’s 2022-2026 Payment Amounts application (EB-2020-0290) on December 31, 2020. Power Workers’ Union (PWU) and Society of United Professionals (SUP) filed legal challenges to Bill 124 on November 24, 2020.<sup>1</sup> Despite the legal challenges put forward by OPG’s bargaining units, OPG did not request a deferral or variance account to record incremental compensation costs if the legal challenges were successful. In fact, the EB-2020-0290 evidentiary record contains no references to the legal challenge to Bill 124.<sup>2</sup> The OEB approved a Settlement Agreement

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<sup>1</sup> EB-2023-0098 OPG\_Ltr\_SEC\_20230512

<sup>2</sup> EB-2023-0098 SEC-IR 3

between the parties in the proceeding on July 21, 2021 covering nearly all issues in the proceeding including compensations costs. On March 1, 2023, OPG filed an application to establish a variance account to record the nuclear revenue requirement impacts resulting from the overturning of Bill 124.

On June 27, 2023, the OEB filed its Decision and denied OPG's application for a variance account. On July 17, 2023, OPG filed a notice of motion to review and vary the OEB's decision.

For the reasons discussed below, AMPCO submits that OPG's motion should be denied, and the decision of the original panel should be upheld.

### OEB Decision

In its Decision, the OEB provided the criteria for approving an accounting order under OPG's approved rate framework: the costs in question be "unforeseen" at the time the rate framework was approved, and that the three criteria (materiality, causation and prudence) from the OEB's Filing Requirements be met.<sup>3</sup>

OPG agreed the Decision correctly articulates the criteria for approving accounting orders under OPG's approved rate framework, however as discussed below, OPG submits the OEB incorrectly applied those criteria.<sup>4</sup>

The OEB assessed the costs in question as foreseeable and found the proposed account did not meet two of the three standard tests: causation and materiality.

In its Decision, the OEB made the following key findings:

- The OEB did not accept that the overturning of Bill 124 was unforeseen, stating "That is not to say that OPG would have known with certainty that Bill 124 would be overturned, only that it was a foreseeable and material risk to their forecast employee compensation costs."<sup>5</sup> The OEB concluded OPG was clearly aware of the legal challenges to Bill 124 before filing the EB-2020-0290 application and was aware of the risk entailed with the legal challenge at the time of the Settlement Agreement.<sup>6</sup>
- The OEB found that the causation criterion is related to the foreseeability criterion. The OEB determined that while the costs related to the overturning of Bill 124 are incremental to the compensation amounts currently embedded in OPG's payment amounts, OPG could have foreseen the impact to its compensation expense from the risk of Bill 124 being overturned during or prior to the EB-2020-0290 proceeding, and it could have sought to account for

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<sup>3</sup> EB-2023-0098 Decision June 27, 2023 P. 4

<sup>4</sup> OPG AIC Paragraph 27

<sup>5</sup> EB-2023-0098 Decision June 27, 2023 P.4

<sup>6</sup> EB-2023-0098 Decision June 27, 2023 P.4, P. 6

that risk in that proceeding and it is not appropriate to create a new variance account to track amounts that could have been foreseen and addressed.<sup>7</sup>

- With respect to the Materiality criterion, that provides that the proposed account must exceed the OEB-defined materiality threshold and have a significant influence on the operation of the distributor, the OEB found that the quantum of costs related to the overturning of Bill 124 likely exceeds OPG's \$10 million materiality threshold. However, the OEB decided that OPG's exemplary performance in 2022<sup>8</sup> which is well above the OEB's 2022 ROE value of 8.66%, counteracts the suggestion that operational hardships at OPG would be forthcoming without the requested variance account.<sup>9</sup>
- With respect to prudence, the OEB determined that "While it is not unreasonable to expect that OPG may incur these costs in the event that the finding of unconstitutionality of Bill 124 is upheld, such a finding is moot as the OEB has determined that other criteria set out in the approved Settlement Proposal and the Filing Requirements have not been met."<sup>10</sup>

The Filing Requirements require that in order to meet the Prudence criterion, the nature of the amounts and forecast quantum to be recorded in the proposed account must be based on a plan that sets out how the amounts will be reasonably incurred. OPG has not provided a plan of how the nature of the amounts and forecast quantum is reasonable. In AMPCO's view, OPG's variance account request has not met the third criterion: prudence. On this basis alone, the OEB's Decision can be upheld.

### OPG Motion

OPG's motion focusses on three main issues which are discussed below.

### **The Decision applies the wrong standard: "unforeseeable," when it should have applied "unforeseen"**

OPG's motion asserts that the OEB's Decision incorrectly considers whether the event (Bill 124 being declared unconstitutional) was unforeseeable rather than whether it was unforeseen, which it believes 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.<sup>11</sup> OPG asserts the OEB has incorrectly expanded the scope of the review beyond a consideration of the occurrence of the event itself, and that in doing so sets a precedent going forward of requiring OPG and other

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<sup>7</sup> EB-2023-0098 Decision June 27, 2023 P.7

<sup>8</sup> Estimated at 12.5%-13%

<sup>9</sup> EB-2023-0098 Decision June 27, 2023 P.9

<sup>10</sup> EB-2023-0098 Decision June 27, 2023 P.10

<sup>11</sup> OPG AIC Paragraph 28,

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.<sup>12</sup>

AMPCO disagrees with OPG's exclusive reliance on the occurrence of an unforeseen event before OPG can bring forward an application for an accounting order. The notion that the known material risk of the overturning of Bill 124 at the time of OPG's EB-2020-0290 application was not sufficient in OPG's mind for OPG to seek a variance account at that time as part of its rate framework is absurd. To now deem the overturning of Bill 124 as an unforeseen event at the time its rate framework was approved, to now be eligible to request a variance account to record any incremental costs from this known significant risk, is not appropriate.

OPG is suggesting the impact of the OEB's Decision going forward means that every potential risk must now be addressed as part of the proceeding.<sup>13</sup> In this world, intervenors would be required to seek discovery to identify all known material risks, as OPG appears to believe that the Applicant is under no obligation to proactively disclose them. The potential overturning of Bill 124 was not a remote risk. OPG had an obligation to identify a risk of this magnitude during the proceeding and it did not. Utilities in general have the same obligation; this is not a new requirement of the regulatory process. The potential overturning of Bill 124 was a significant risk with significant cost implications if successful, and it should have been identified by OPG at the time the rate framework was approved. The OEB was correct in its findings that the possibility of Bill 124 being overturned was a foreseeable outcome, and that it was inappropriate for OPG to now request the account when it was clearly aware of the legal challenges to Bill 124 before filing the EB-2020-0290 application and at the time of the Settlement Agreement.

### **The Decision reached conclusions on a speculative and non-factual basis**

OPG claims the OEB's Decision reached conclusions on a speculative and non-factual basis with respect to the impacts on settlement. OPG takes issue with the OEB's conclusion "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."<sup>14</sup> OPG claims no party filed evidence that a request for a variance account could have or would have affected the terms of the Settlement Agreement and that in reaching this conclusion the Panel relied solely on the arguments, not evidence, of one party, SEC.<sup>15</sup>

AMPCO wishes to point out that it also argued in its submissions that OPG should have disclosed this compensation risk and its potential OM&A budgetary implications to inform the

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<sup>12</sup> OPG AIC Paragraph 9

<sup>13</sup> 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.

<sup>14</sup> OPG AIC Paragraph 40-44

<sup>15</sup> OPG AIC Paragraph 43

settlement negotiations. In its submissions, AMPCO states “Parties negotiated an overall OM&A budget as part of the settlement in EB-2020-0290 that was based in part on OPG’s total compensation costs relative to the P50 and OPG’s 1% assumption with respect to legislated limits on compensation. Higher increases in compensation over the period and higher overall compensation levels compared to the P50, would have been seen as excessive and would not have been accepted by the parties, consistent with previous OEB Decisions. OPG should have disclosed this compensation risk to the Board.”<sup>16</sup>

AMPCO’s view, and the view of other parties as to how the negotiations might have unfolded had this information been disclosed is not speculation. While the full impact is not known, it seems obvious to AMPCO, that disclosure of this information would have factored into settlement negotiations given the focus of Intervenor, Board Staff, and the OEB on OPG’s compensation costs historically and in the EB-2020-0290 application. Intervenor does not need to file evidence to support how the negotiations may have unfolded for the OEB to base its Decision. The OEB is correct in finding that if the risk had been disclosed a possible result was that it could have significantly altered the agreed-upon budget and settlement terms.<sup>17</sup>

#### **The Decision incorrectly applied the Materiality criterion for variance account eligibility**

OPG does not accept the OEB's finding that it has not met the materiality criteria. The OEB’s Filing Requirements indicate the Materiality criterion to be met is as follows:

“Materiality: the forecasted amounts to be recorded in the proposed account must exceed the OEB-defined materiality threshold and have a significant influence on the operation of the distributor, otherwise they must be expensed or capitalized in the normal course and addressed through organizational productivity improvements.”<sup>18</sup>

OPG claims 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.<sup>19</sup>

AMPCO submits the OEB correctly applied the Materiality criterion. The OEB acknowledged the materiality test as a two-pronged test that speaks to both the amount of additional costs that a utility expects to incur due to a change in circumstances, and also to whether these costs will significantly influence the utility’s operation. With respect to the first prong, the OEB found that the quantum of costs related to the overturning of Bill 124 likely exceeds OPG’s \$10 million materiality threshold. With respect to the second prong, the OEB indicated that it expects OPG

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<sup>16</sup> EB-2023-0098 AMPCO Submissions P.4

<sup>17</sup> EB-2022-0098 Decision June 27, 2023 P.6

<sup>18</sup> Filing Requirements For Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications, December 15, 2022, Chapter 2 P.66

<sup>19</sup> OPG AIC August 11, 2023 Paragraph 45-50

to be able to manage these costs (estimated at \$188 million<sup>20</sup>) within its approved revenue requirement (which ranges between \$2.4 billion and \$3.5 billion) over the 2022 to 2026 period.<sup>21</sup>

In EB-2023-0098, OPG indicated it expects its actual 2022 return on equity for its regulated facilities to be in the range of 12.5-13%<sup>22</sup>, which is well above the 2022 ROE value set by the Board in October 2021 of 8.66%. Most intervenor submissions referenced that OPG's expected 2022 Return on Equity exceeds the OEB 2022 ROE value.<sup>23</sup> Many intervenors further argued that OPG's 2022 ROE demonstrates OPG does not need additional funding on top of OPG's significant over-earnings.<sup>24</sup>

In its Decision the OEB noted OPG's expected ROE in 2022, and in this context found that OPG's exemplary performance in 2022 counteracts the suggestion that operational hardships at OPG would be forthcoming without the requested variance account.<sup>25</sup> The OEB did not apply a new, stricter "operational hardship" test as part of the Materiality criterion instead of the significant influence on the operation test. The OEB has not misapplied the Materiality criterion for variance account eligibility as claimed by OPG.

OPG's 2022 actual nuclear ROE is 12.94%,<sup>26</sup> which is more than 300 basis points above its approved ROE. This represents approximately \$164 million<sup>27</sup> more than its approved ROE. The OEB was correct in concluding that OPG's exemplary performance in 2022 counteracts the suggestion that operational hardships at OPG would be forthcoming without the requested variance account. AMPCO submits OPG's 2022 actual ROE shows that OPG does not require incremental funding during the rate term. OPG has not provided evidence and has not sufficiently demonstrated that the forecasted amounts of \$188 million to be recorded in the proposed variance account will have a significant influence on its operations. OPG has not met the Materiality criterion.

### Other Considerations

The OEB's Rules of Practice and Procedure sets out the grounds for a motion which specifies that disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction unless the exercise of discretion involves an extricable error of law.<sup>28</sup> OPG's motion has not shown that OEB made a material and clearly identifiable error of fact, law or

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<sup>20</sup> OPG AIC August 11, 2023 Paragraph 49

<sup>21</sup> EB-2022-0098 Decision June 27, 2023 P.9

<sup>22</sup> EB-2023-0098 OPG\_Ltr\_SEC\_20230512 P. 2

<sup>23</sup> EB-2023-0098 May 19, 2023 Submissions: AMPCO P. 4, CCC P.3, CME P. 11, SEC P.8, VECC P.7

<sup>24</sup> EB-2023-0098 May 19, 2023 Submissions: AMPCO P.4, CCC P.3, CME P. 11, SEC P.8-9

<sup>25</sup> OEB Decision June 27, 2023 P.9

<sup>26</sup> OPG Website: OPG 2022 Actual Regulatory Return RRR = \$494.8 (12.94%) (Appendix 1 Line 5) Common Equity Nuclear = \$3824.2 (Appendix 1 Line 3)

<sup>27</sup>  $\$3824.2 \times 8.66\% = \$331.2 \text{ M}$  ( $\$494.8 - \$331.2 = \$164 \text{ M}$ )

<sup>28</sup> Rules of Practice and Procedure Revised July 13, 2023 P.31

jurisdiction. Rather, it reflects disagreement over how the OEB exercised its discretion in the interpretation and application of the criteria for establishing a variance account in the context of OPG's approved rate framework.

### Conclusion

AMPCO disagrees with OPG's interpretation of the OEB's Decision with respect to foreseeability and the causation and materiality tests. Further, AMPCO submits OPG has not met the Filing Requirements' third criterion - prudence, as OPG has not provided a plan of how the nature of the amounts and forecast quantum is reasonable. The decision of the original panel should be upheld.