EB-2023-0209

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S. O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF an application 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.

Submissions of the Power Workers' Union

1. On June 5, 2019, the Ontario provincial government introduced the Protecting a Sustainable Public Sector for Future Generations Act, 2019 ("Bill 124") which capped public sector wage increases to one percent annually. On November 29, 2022, Bill 124 was ruled unconstitutional by the Ontario Superior Court (the "Court Decision").

2. OPG requested approval to establish a variance account to record the nuclear revenue requirement impacts of the Court Decision (EB-2023-0098). The revenue requirement impacts arise from additional prudently incurred compensation costs above the one percent prescribed by Bill 124, which was the basis for compensation costs included in OPG's 2022-2026 payment amounts for prescribed generating facilities proceeding (EB-2020-0290).

3. On June 27, 2023, the OEB released its decision and order in EB-2023-0098 denying OPG's application for the requested variance account (the "OEB Decision"). The decision concluded that the court challenge that led to Bill 124 being unconstitutional was known during the OPG Payment Amounts proceeding so the Court Decision was foreseeable.

4. Under Rule 42 of the OEB's Rules of Practice and Procedure, a review and variance of a prior OEB order is available where the OEB "made a material and clearly identifiable error of fact, law or jurisdiction."

1. <u>The Court Decision was unforeseen</u>

5. The PWU respectfully supports the OPG's submission that the OEB Decision contains a material and clearly identifiable error of law insofar as it applied the wrong test for whether the Court Decision was "unforeseen".

6. In its reasons for decision, the OEB found that the Court Decision did not meet the "unforeseen" test because "the possibility of Bill 124 being overturned was a foreseeable outcome."

7. Respectfully, this reasoning reflects a reviewable error of law.

8. Merely because the <u>possibility</u> of Bill 124 being overturned was <u>foreseeable</u> does not make it "foreseen." Whether a risk was foreseeable is not the same inquiry as whether an outcome was in fact foreseen. The latter issue involves an analysis of whether the utility's rate framework did in fact take the relevant event into account.

9. OPG's rate framework reasonably chose not to account for that contingency. In other words, the rate framework reasonably did not "foresee" the contingency. It would not have been reasonable to include any level of compensation costs in excess of the prescribed one percent wage increases in OPG's revenue requirement. Unlike other business risks, OPG could not reasonably consider a range of potential wage increases and include a contingency for wage increase above the legislated level.

10. The outcome of the legal challenge to Bill 124 was not known during the payment amounts proceeding and would not be known for more than a year. As such, all parties worked under the assumption that the bill would remain in place at the low one percent wage increases embedded in OPG's revenue requirements. The escalation of OPG's compensation costs was not based on an inaccurate forecast – it was based on legislation that has since been overturned.

11. As such, it would be fundamentally unfair to prevent OPG from even accounting for the result of the Court Decision having previously structured its affairs on the basis of the laws in place at the time.

12. The implementation and subsequent overturning of Bill 124 made annual changes to compensation costs largely uncontrollable for OPG. Since the impacts are related to legislation, these impacts on OPG's revenue requirements are analogous in a regulatory rate-setting perspective to other legislated changes. Legislated tax changes are sufficiently common that there is a generic account for PILs and Tax variances (USoA# 1592).

13. Tax changes, like other changes in regulations, are foreseeable but they are not foreseen.

2. Causation, materiality, and prudence

14. OPG's application for the variance account satisfies the causation, materiality, and prudence criteria for the establishment of a deferral or variance account. The OEB filing requirements set out definitions of the eligibility criteria:[1]

- Causation: the forecast amount to be recorded in the proposed account must be clearly outside of the base upon which rates were derived.
- Materiality: the annual forecast 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.
- Prudence: the nature of the amounts and forecast quantum to be recorded in the proposed account must be based on a plan that sets out how the amounts will be reasonably incurred, although the final determination of prudence will be made at the time of disposition. For any costs incurred, in terms of the quantum, this means that the distributor must provide evidence

[1] 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

demonstrating that the option selected represented a cost-effective option (not necessarily least initial cost) for ratepayers.

15. The forecast amount to be recorded in OPG's proposed variance account is "clearly outside of the base upon which rates were derived". The compensation costs included in OPG's revenue requirements were determined on the assumption of 1% wage escalation as prescribed by Bill 124. The proposed variance account clearly meets the defined criteria for causation and the fact rates were derived based on a revenue requirement that does not include OPG's actual compensation costs is not disputed by the OEB in its decision or by any other party.

16. In its decision, the OEB adopted a different definition of causation based on its findings regarding the "unforeseen" test. Those findings were erroneous for the reasons set out above and in OPG's Argument-in-Chief.[2]

17. With respect to materiality, The OEB Decision also inappropriately adds new criteria to the well-established definition of materiality. OPG's materiality threshold is $10 million[3] and the annual revenue requirements of the Court Decision exceed this threshold.

18. The decision describes an "operational hardship" criterion and states "OEB expects OPG to be able to manage these costs within its approved revenue requirement (which ranges between $2.4 billion and $3.5 billion) over the 2022 to 2026 period."[4] As demonstrated throughout OPG's payment amounts application, OPG incurs significant costs to generate electricity for the province and these costs are reflected in OPG's revenue requirements. OPG's revenue requirements do not include amounts that are above and beyond what is necessary to operate its generating stations.

19. Adding an additional "operational hardship" condition to the consideration of materiality violates the principles of performance-based regulatory framework that guides the OEB. OPG's return on equity is not relevant to the materiality criteria and its ROE in the years the coincide with the proposed variance account are unknown.

[2] OPG Argument-In-Chief, August 11, 2023, pages 2-4, 10-14
[3] EB-2020-0290, Exhibit A1, Tab 3, Schedule 2, page 13 of 16
[4] EB-2023-0098 Decision, dated June 27, 2023, page 9

20. Absent any legislation that unconstitutionally suppressed the wages of public sector workers by interfering with the collective bargaining process, OPG's prudently incurred compensation costs would have been materially higher. Denying the opportunity for OPG to recover its prudently incurred compensation costs would violate the regulatory compact between regulators and regulated utilities.

21. The PWU respectfully submits that OPG has sufficiently met the causation, materiality, and prudence criteria for the purposes of establishing this variance account. Any objections to the ultimate recovery of the costs in question should be heard on the merits in a subsequent proceeding, and are not the proper subject of this application.

22. The PWU submits that the OEB should vary its decision in the manner requested by OPG.

All of which is respectfully submitted.