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August 30, 2023
Our File: EB20230209

Attn: Nancy Marconi, Registrar

Dear Ms. Marconi:

Re: EB-2023-0209 – OPG Motion to Review – SEC Submissions

We are counsel to the School Energy Coalition ("SEC"). Pursuant to the Notice of Hearing and Procedural Order No.1, attached, please find SEC's submissions in the above-captioned matter.

Yours very truly,
Shepherd Rubenstein P.C.

Mark Rubenstein

cc: Brian McKay, SEC (by email)
Applicant and intervenors (by email)

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. 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
SCHOOL ENERGY COALITION

Overview

1. Ontario Power Generation Inc. ("OPG") filed a motion to review and vary the Ontario Energy Board's ("OEB") Decision and Order, dated June 27, 2023 (the "Decision"), denying the company's request for a variance account to capture the nuclear revenue requirement impact of the overturning Bill 124.

2. Pursuant to the Notice of Hearing and Procedural Order No.1, these are the School Energy Coalition's ("SEC") submissions.

3. The motion to review should be denied. The OEB has broad discretion in assessing the appropriateness of approving a new variance account under OPG's rate framework. The OEB correctly found that the overturning of Bill 124 was a foreseeable risk when OPG's most recent payment amounts were set. At the time, not only did OPG not seek a variance account to capture any incremental costs, but it also did not mention to the OEB or to the other parties the legal challenges of which it was aware. The OEB was correct to conclude that neither the causation or materiality criteria were met. The foreseeability of the risk of the outcome of the Bill 124 challenge

was an entirely appropriate matter for the OEB to assess, as the incremental amounts themselves would not significantly influence the operations of the company.

4. OPG had an affirmative duty to present information regarding a material risk that it knew about as part of its payment amounts application. It did not do so, and the OEB was right to determine that seeking, after the fact, a new variance to capture these costs was inappropriate.

Background

5. On December 31, 2020, OPG filed an application for approval of nuclear payment amounts effective January 1, 2022, through December 31, 2026 (EB-2020-0290). As part of its forecast nuclear revenue requirement, it included the impact of Bill 124 (*Protecting a Sustainable Public Sector for Future Generations Act*, 2019), which limited public sector wage increases to 1% annually for a three-year period. OPG was covered by Bill 124, and in EB-2020-0290 included the 1% annual wage increase cap in the forecast compensation costs in its 2022-2026 nuclear revenue requirement.[1]

6. By the time OPG filed the EB-2020-0290 application on December 31, 2020, its two major bargaining units, the Power Workers' Union ("PWU") and the Society of United Professionals ("SUP"), as well as almost every other major labour organization in the province, had formally filed legal challenges to Bill 124.[2] In the EB-2020-0290 application, OPG did not seek a deferral or variance account to record incremental compensation costs that might be incurred if the court challenge was successful. OPG was well aware of those challenges at the time[3] and yet made no reference to them in any of its evidence, including its application, interrogatory responses, or technical conference testimony.[4]

7. The OEB approved a Settlement Proposal filed on July 16, 2021[5], which, among other things, approved a modified rate framework and reduced the proposed OM&A and capital-related revenue requirement through to the end of 2026.[6]

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[1] EB-2023-0098, Application, p.1-2
[2] OPG Letter to OEB, dated May 12, 2023, p.2; EB-2023-0098, SEC Submissions, p.2, ft 12
[3] *Decision and Order* (EB-2023-0098), June 27, 2023, p.5,6; EB-2023-0098, SEC Interrogatory #2; EB-2023-0098, OPG Letter to OEB, dated May 12, 2023, p.2.
[4] EB-2023-0098, SEC Interrogatory #3
[5] *Decision and Order* (EB-2020-0290), November 15, 2021, p.1
[6] *Decision and Order* (EB-2020-0290), November 15, 2021, p.1, Schedule A, Approved Settlement Proposal

8. In November 2021, the Ontario Superior Court struck down Bill 124 as being unconstitutional.[7] OPG filed an application on March 1, 2023, for an accounting order to establish a variance account to capture the nuclear revenue requirement impact of the decision overturning Bill 124.[8] This is despite being fully aware of the risk at the time of the EB-2020-0290 application and settlement negotiations, yet never mentioning it to the OEB or the signatories to the approved Settlement Proposal.

9. Under OPG's rate framework, the subject of a binding agreement between the parties and approved by the OEB, it is permitted to bring forward an application for an accounting order to establish a deferral or variance account for "unforeseen events" that affect its nuclear business, subject to a $10M materiality threshold.[9] The requirement that the events be "unforeseen" is in addition to the normal requirements for a deferral or variance account. This is part of a binding agreement between the parties[10], and OPG has not obtained the consent or agreement of those parties for an amendment to remove this requirement.

10. The request would then be addressed through an accounting order process.[11] As part of the contemplated accounting order process, while there is no specific test applicable to the company, the typical criteria for establishing a new deferral or variance account - causation, materiality, and prudence - need to be met.[12] This has been previously recognized by both the OEB and OPG.[13]

11. In its Decision, the OEB assessed the request pursuant to OPG's approved rate framework and denied approval to establish the proposed variance account. The Board found that, in addition to the issue of foreseeability, the request did not meet at least two of the three standard criteria: causation and materiality.[14]

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[7] EB-2023-0098, CME Interrogatory #1
[8] EB-2023-0098, Application, p.1-2
[9] *Decision and Order* (EB-2023-0098), June 27, 2023, p.3, citing EB-2020-0290, A1, Tab 3, Schedule 2, p.13
[10] *Decision and Order* (EB-2020-0290), November 15, 2021, p.1, Schedule A, Approved Settlement Proposal, p.4-5
[11] *Decision and Order* (EB-2023-0098), June 27, 2023, p.3, citing EB-2020-0290, A1, Tab 3, Schedule 2, p.13
[12] *Decision and Order* (EB-2023-0098), June 27, 2023, p.3
[13] *Decision and Order* (EB-2018-0002), May 31, 2018, p.3; EB-2023-0098, Interrogatory Response Staff #4
[14] *Decision and Order* (EB-2023-0098), June 27, 2023, p.10

The Role of a Reviewing Panel

12. While OPG has attempted to frame the basis of its motion as errors of fact or law, they are just disagreements over how the OEB exercised its discretion in how to interpret and apply the various criteria for establishing a variance account within the context of OPG's specific situation. The revised Rules of Practice and Procedure explicitly preclude as grounds for a motion to review, "disagreement as to how the OEB exercised its discretion…unless the exercise of discretion involves an extricable error of law." [15]

13. Furthermore, in substance, OPG raised many of the same arguments in its reply submissions in the underlying proceeding that were ultimately not accepted.[16] The OEB is required to exercise judgment and balance various considerations, and thus deference should be provided to the original decision-maker. The OEB has previously said that a motion to review is not a hearing *de novo* or an opportunity for a party to re-argue its case.[17] It has also cautioned a reviewing panel that it "should not set aside a finding of fact by the original panel unless there is no evidence to support the decision and [it] is clearly wrong." [18]

Foreseeability & Causation Criteria Not Met

14. The focus of OPG's argument in this motion is the OEB's consideration in the Decision that a finding of the constitutionality of Bill 124 was not an unforeseeable risk, as opposed to an unforeseen event. OPG's view is that the test for establishing a variance or deferral account under its approved rate framework is "exclusively concerned with the expected occurrence of the event."[19] SEC disagrees with OPG's interpretation of both the scope of the test and the OEB's approach when approving a deferral or variance account within the company's rate framework.

15. First, as it relates to the requirement that there must be an unforeseen event before OPG can even bring forward an application for an accounting order, it surely cannot be that a known, particularized, and material risk, if it occurs, is deemed an unforeseen event. If so, then any material risk would be eligible for the establishment of a variance account through an accounting

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[15] *Rules of Practice and Procedure*, Rule 42.01(a)(i)
[16] See OPG Reply Submissions, p.17-21
[17] *Decision and Order* (EB-2019-0180), December 5, 2019, p.10; *Decision with Reasons* (EB-2006-0322/338/340), May 22, 2007, p.18
[18] *Decision and Order* (EB-2009-0063), August 10, 2010, para. 35
[19] Argument-in-Chief, para. 36

order during the rate term. The evidence shows that OPG was aware of the legal challenges before it filed its application and understood the potential consequences if they were successful.

16. While no party claims that OPG was required to know with any certainty that the challenge would be successful, it very well knew there was a significant risk that would have considerable cost consequences if realized. The point of a variance account is to deal with significant risks that could have a material impact. OPG knew at the time of the it negotiated the Settlement Proposal that there was a significant risk that, if it materialized, could have a material impact. This does not appear to be disputed.

17. Second, while OPG primarily frames the issue as it relates to the criteria needed to bring the application for an accounting order forward, the OEB explicitly found that the issue was also "related to, and may be considered a subset to, the causation criterion."[20] It further noted that "[i]n addition to assessing the foreseeability of these costs, the OEB is of the view that the proposed account does not meet two of the OEB's three standard tests of causation and materiality."[21]

18. The causation criteria requires OPG to demonstrate that, "[t]he forecasted expense must be clearly outside of the base upon which rates were derived."[22] This is a broader inquiry than merely determining if the incremental costs relate to an event that was unforeseen.

19. Although OPG's compensation cost forecasts included in its EB-2020-0290 application were based on the restrictions required by Bill 124, that is not the same as saying that any incremental costs that might be incurred due to the risk of a successful legal challenge were outside the base from which rates were derived. The foreseeability of risk is an important component of the causation inquiry, especially in the context of a multi-year rate framework which involves the allocation of that risk.

20. The legal challenge to Bill 124, and the possibility that it might be overturned, was known to OPG at the time of its last payment amounts application. The company did not seek a deferral or variance account. The OEB was correct in finding it inappropriate for the company to later

[20] *Decision and Order* (EB-2023-0098), June 27, 2023, p.4, p.6
[21] *Decision and Order* (EB-2023-0098), June 27, 2023, p.10
[22] *Decision and Order* (EB-2023-0098), June 27, 2023, p.3,4; *Decision and Order* (EB-2018-0002), May 31, 2018, p.3

request approval to record for the disposition of any incremental costs from a risk that was well known to OPG, but was never disclosed to the parties when base rates were set.

21. This is especially significant in the context where rates are determined by an approved Settlement Proposal, which inherently involves trade-offs between parties, including the allocation of risks. The legal challenge to Bill 124, and the potential for its overturning, was a known fact at the time of OPG's last payment application in which no deferral or variance account was sought. As the OEB noted, "[w]here a cost or revenue can reasonably be foreseen (even if it is not certain), the best forum in which to address this is in the main rates case, and not through a later request for a deferral or variance account." [23]

22. OPG's reliance on the OEB's decision in RP-2003-0203 is misplaced.[24] While it is correct that the OEB in that case did not approve Enbridge Gas Distribution's request to include possible costs of an adverse ruling in a class action lawsuit as it was premature, that was in the context of a single-year cost of service application. Among other findings, the OEB was "not convinced of the Applicant's assertion of the likelihood that such costs will arise in 2005."[25] In contrast, OPG was seeking approval for a 5-year rate framework. One does not need familiarity with the intricacies of Bill 124 litigation to expect that a legal proceeding, launched by notices of application in 2020, would almost likely result in a decision by the end of OPG's rate term in 2026.

23. OPG cannot be allowed to remain silent regarding a specific material risk when base rates are being set, only to approach the OEB for relief after the risk materializes. It had a duty to affirmatively disclose the legal challenges in its EB-2020-0290 proceeding, as well as its understanding of the regulatory implications if the risk materialized.

OPG Grossly Overstates Implications of the Decision

24. OPG grossly overstates the implication of the OEB's Decision when it claims that now, if a risk is "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

[23] *Decision and Order* (EB-2023-0098), June 27, 2023, p.4
[24] Argument-in-Chief, para. 34
[25] *Partial Decision with Reasons (*RP-2003-0203), August 31, 2004, para. 144

remote the risk may have been."[26] It claims that it will now be required to "adduce evidence regarding all such possible risks it faces or might potentially face". [27]

25. The disclosure of all material risks is not a new requirement. OPG, like all regulated utilities, is already subject to a positive obligation to disclose all material risks as they are material facts that parties and the OEB require to assess an application. The OEB has previously commented that the "regulatory compact is an obligation to disclose material facts on a timely basis."[28] It noted that a "publicly regulated corporation is under a general duty to disclose all relevant information relating to Board proceedings" and that "a utility should err on the side of inclusion."[29] It is the "utility [that] bears the burden of establishing that there is no reasonable possibility that withholding the information would impair a fair outcome in the proceeding."[30]

26. Here, faced with a serious legal challenge brought by the company's two major unions, as well as most other affected labour organizations in Ontario that could materially affect its costs if successful, OPG said nothing. The risk was neither remote nor immaterial. It was precisely the type of material risk relevant to the proceeding, concerning a component of OPG's costs that had historically been contentious. Therefore, it should have been actively disclosed as part of its EB-2020-0290 application.

27. While the outcome of the legal challenge was undoubtedly uncertain, assessing the risk and its regulatory implications is a task for all parties to consider, not just OPG, especially as parties entered into settlement discussions. As the Alberta Utilities Commission aptly stated, "the existence of information asymmetry between utilities and the regulator necessarily and critically requires honesty, candour, and full and adequate disclosure of material facts by the utility in the course of rates proceedings." [31]

28. The claim that the Decision would now require "OEB staff and intervenors to devote resources to assessing potential risks, and the OEB would be required to consider and rule upon

[26] Argument-in-Chief, para. 39
[27] Argument-in-Chief, para. 39
[28] *Decision and Order* (EB-2008-0304), November 19, 2008, p.11
[29] *Decision and Order* (EB-2008-0304), November 19, 2008, p.11
[30] *Decision and Order* (EB-2008-0304), November 19, 2008, p.11
[31] Alberta Utilities Commission, Decision (27013-D01-2022), July 29, 2022, p.18

the appropriate treatment of all such risks in setting rates" has it backwards.[32] If anything, the implication of what will happen if the OEB agrees with OPG's position is that there will now be a new level of scrutiny applied to rate applications. Intervenors, and ultimately the OEB, will now need to seek discovery to identify all known material risks, as OPG believes they do not need to be proactively disclosed. This is to ensure that they can consider how these risks should be addressed.

29. OPG has also misconstrued the OEB's comments in the Decision regarding the company's ability to have sought a variance account as part of the EB-2020-0290 application. The Decision did not say that OPG was required to deal with all risks in that manner. Instead, it indicated that this was the appropriate method for determining how a known, material risk could be allocated to ratepayers. What the OEB found inappropriate was the attempt, after the rate framework had been established, to seek a new variance account to capture costs for a foreseen risk. [33]

Implications Of Disclosure on Settlement Negotiations Are Self-Evident

30. OPG takes umbrage at the comment in the Decision that a request for a variance account in the payment amounts application proceeding might have "significantly alter the agreed-upon budget and the subsequent OEB Decision that approved those Settlement Agreement terms."[34] It argues that this is speculative and not based on any evidence. The OEB's comments in the Decision suggest that if the risk had been disclosed or a variance account sought it could have potentially altered the settlement, this simply reflects common sense.

31. It should be noted that the OEB did not state that it would have altered the agreed-upon budgets, but rather that it was a "possible result."[35] Regardless, it cannot seriously be disputed that if OPG had disclosed the risk in the EB-2020-0290 application, the settlement negotiations would have unfolded differently, as SEC noted in its initial submissions.

32. If OPG had disclosed to parties at the time that it would seek approval to record the impacts in a variance account, intervenors would have understood that the risk of a successful legal challenge to Bill 124 was being borne entirely by ratepayers. They would also realize that the

[32] Argument-in-Chief, para. 39
[33] *Decision and Order* (EB-2023-0098), June 27, 2023, p.8
[34] Argument-in-Chief, para. 42
[35] *Decision and Order* (EB-2023-0098), June 27, 2023, p.6

capital and OM&A costs being proposed in the application might not reflect what would ultimately be sought from ratepayers over the rate term. For those parties who were aware of the legal challenge, they likely interpreted the fact that OPG did not request a variance account as a sign that the risk of a successful legal challenge was being borne by the company. From the company's point of view, that is entirely what was happening. Having not attempted to get the ratepayers to share all or part of that risk, or it implicitly accepting responsibility for that risk.

33. Had OPG included a proposal for a variance and deferral account due to a risk of a successful challenge to Bill 124 as part of EB-2020-0290, parties might not have accepted the same terms in the rest of the Settlement Proposal. For example, parties could have pushed for a more significant reduction in capital or OM&A spending to offset those potential increases.

34. All of this forms part of the complex negotiation matrix. While it is impossible to know what the exact impact would have been if proper disclosure had been made, it would undoubtedly have had an effect.

35. Moreover, the OEB did not rely solely on SEC's comments in its argument, as OPG alleges.[36] In the Decision, the OEB stated that "several intervenors in their submissions" argued that "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."[37] In addition to SEC, those intervenors included CME[38], CCC[39], and AMPCO.[40]

36. Contrary to OPG's suggestion, the OEB was legally permitted to consider comments from intervenors' arguments regarding the fact that, had the information been disclosed, it would have impacted the settlement negotiations. The OEB is not a court, and the rules of evidence are not

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[36] Argument-in-Chief, para. 43

[37] *Decision and Order* (EB-2023-0098), June 27, 2023, p.7

[38] CME Submissions, para 30: "If OPG had included a proposal for an additional variance and deferral account, or provided a potentially higher revenue requirement as a result of a successful challenge to Bill 124 as part of EB-2020-0290, parties would not necessarily have accepted the same terms in the rest of the settlement agreement."

[39] CCC Submissions, p. 3 "The OEB has no knowledge of how Bill 124 could have impacted the Settlement Proposal as those negotiations are confidential. Opening a Settlement Proposal on one issue is not appropriate as the negotiations were likely the subject of many compromises on the part of all parties."

[40] AMPCO Submissions, p.4, "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."

strictly applied.[41] Intervenors were not given the opportunity, nor required to file evidence of what was contemplated during the settlement negotiations to demonstrate something that is plainly obvious. OPG's compensation costs have been an issue of considerable focus for both intervenors and the OEB for over a decade.[42] OPG's claim that no parties sought to file evidence, suggesting that the impact of this issue would not have been a significant factor in settlement negotiations, cannot reasonably be believed.

Materiality Criteria Not Met

37. OPG also takes issue with the OEB's finding that it had not met the materiality criteria. The company claims that the OEB misapplied the criteria by making inconsistent findings and that it applied a stricter test — that of "operational hardship" as opposed to "significant influence"— which was contemplated under its approved rate framework.[43] OPG has misread the Decision.

38. The OEB recognized that the quantum of costs likely exceeds OPG's specific materiality threshold, but then correctly noted that the OEB's materiality test was "two-pronged" and included "whether these costs will significantly influence the utility's operations."[44] In the very next sentence, it found that "[i]n this instance, the 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."[45] This was clearly in reference to the amount at issue not being a significant influence on the company's operations. The OEB applied the correct test.

39. In contrast, the comment about operational hardship was made in the context of addressing OPG's assertion that its significant over-earning (12.5-13%) in 2022 above its approved ROE (8.66%) was not indicative of future returns. The OEB agreed but noted, "OPG's exemplary

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[41] *Statutory Powers Procedures Act*, section 15(1). Similar language is found in the *Ontario Labour Relations Act*, where the Court of Appeal, adopting language from a Divisional Court decision, has commented that "it is a long-standing principle that these provisions mean exactly what they say. Boards and arbitrators are not bound by the rules of evidence and thus have a broad discretion regarding the admissibility of evidence". (See *EllisDon Corporation v. Ontario Sheet Metal Workers' and Roofers' Conference and International Brotherhood of Electrical Workers, Local 586*, 2014 ONCA 801, para 33.

[42] See *Decision with Reasons* (EB-2010-0008), March 10, 2011, p.80-81, 86-87 (disallowance upheld by the Supreme Court of Canada in *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44) ; *Decision with Reasons* (EB-2013-0321), November 20, 2014, p.78; *Decision with Reasons* (EB-2016-0152), December 28, 2017, p. 79

[43] *Decision and Order* (EB-2023-0098), June 27, 2023, p.8-.9

[44] *Decision and Order* (EB-2023-0098), June 27, 2023, p.9

[45] *Decision and Order* (EB-2023-0098), June 27, 2023, p.9

performance in 2022 counteracts the suggestion that operational hardships at OPG would be forthcoming without the requested variance account."[46]

40. The statement is also not internally inconsistent as alleged.[47] The OEB can, on one hand, accept OPG's position that the returns in 2022 may not reflect the returns for each year, but also consider that such "exemplary" earnings in that year demonstrate that the inability to recover the forecast incremental costs through a deferral account will not cause it harm.

41. In any case, OPG's 2022 actual ROE, which is more than 300 basis points above its approved ROE, demonstrates that the company does not meet the materiality threshold and does not require incremental funding during the rate term. Since the OEB's Decision, OPG has publicly posted its finalized 2022 regulatory ROE that is filed with its RRR. Its 2022 nuclear ROE of 12.94%[48] represents a total of $169M more than its approved ROE[49], equating to approximately $48.9M in excess earnings above the 300-basis point threshold.[50] Under any analysis, the forecast incremental costs of $188M over the 5-year rate plan (2022-2026) cannot seriously be considered to have a significant influence on OPG's operations. [51]

42. Additionally, those forecast incremental costs are significantly inflated because of the methodology OPG proposes to use. OPG's forecast is based on the difference between the forecast compensation amounts used in the EB-2020-0290 application and then substituting the previously assumed compensation parameters with the actual parameters agreed upon or awarded.[52] This approach makes sense if the purpose of the account is to act as a true-up between forecast and actual compensation parameters. However, that reflects the impact of not just overturning Bill 124, but also other negotiated or awarded factors, such as higher than historical inflation. The latter has nothing to do with providing an adjustment to reflect what OPG would have forecast in the EB-2022-0290 application had Bill 124 had never existed.

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[46] *Decision and Order* (EB-2023-0098), June 27, 2023, p.9

[47] Argument-in-Chief, para. 45

[48] OPG 2022 Actual Regulatory Return RRR, p.5, Ln 5

[49] OPG 2022 Actual Regulatory Return RRR, p.4, Ln 18

[50] Earnings Above 300 basis Threshold = 2022 Actual ROE/2022 ROE % x (2022 ROE % - 2022 Approved ROE % + 300 basis points).$ 48.9M = $494.8/12.94*(12.94-8.66+3) Data from OPG 2022 Actual Regulatory Return RRR, p.5

[51] Argument-in-Chief, para. 16

[52] EB-2023-0098, Application, p.12; EB-2023-0098, Interrogatory Response SUP #1

43. The 300-basis point threshold mirrors that of other incremental funding mechanisms, including the OEB's Z-Factor criteria, which closely resembles the test for an OPG accounting order under its rate framework. To be eligible for a Z-Factor recovery, a utility must show that its most recent actual ROE "does not exceed 300 basis points above its deemed ROE embedded in its base rates".[53] Similarly, for approval of Advanced/Incremental Capital Module ("ACM/ICM") funding, "[i]f the achieved regulated ROE for the most recently completed fiscal year exceeds 300 basis points above the deemed ROE embedded in the distributor's rates, that distributor does not qualify for funding for an incremental capital project."[54] In each case, returns in excess of this amount indicate that a utility has the means and does not need additional funding, presumably as it would not have a significant influence on its operations.

44. Ultimately, neither in its Argument-in-Chief, nor the underlying application, does OPG actually argue that the amounts at issue have a significant influence on its operations. It spends considerable time trying to downplay the significance of the second part of the materiality criterion and asks the OEB to focus only on the $10M materiality threshold. Unfortunately for OPG, the test is conjunctive and requires the company, which bears the burden of proof, to demonstrate that it has met both aspects.[55]

Incremental Amounts Are Not Prudent

45. Understandably, the Decision dealt only briefly with the issue of prudence criteria, on the basis that "such a finding is moot as the OEB has determined that the other criteria set out in the approved Settlement Proposal and the Filing Requirements have not been met." [56] However, the OEB in the Decision did not properly assess the prudence criteria in the Decision.

46. The OEB found that OPG had met the prudence criteria, stating that "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".[57] This is based on the requirements to demonstrate that "the nature of the amounts and forecast quantum to be recorded in the proposed account must be based on a plan that sets out

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[53] *Filing Requirements For Electricity Distribution Rate Applications - 2022 Edition for 2023 Rate Applications, Chapter 3*, p.21

[54] *Filing Requirements For Electricity Distribution Rate Applications - 2022 Edition for 2023 Rate Applications, Chapter 3*, p.24

[55] *Ontario Energy Board Act*, section 78.1(5)

[56] *Decision and Order* (EB-2023-0098), June 27, 2023, p.10

[57] *Decision and Order* (EB-2023-0098), June 27, 2023, p.10

how the amounts will be reasonably incurred".[58] In essence, the OEB requires that a utility provide evidence that the costs, at a high-level, are reasonable to be passed on to ratepayers and has a plan to incur them reasonably. SEC submits that it cannot mean that all it has to do is show that it has a plan to incur costs. If so, then the prudence criteria for the establishment of an account have no practical meaning. OPG never provided the OEB with how the nature or the quantum, even at a high level, was reasonable.

47. SEC, as well as other parties, argued that any incremental amounts could not be considered reasonable or prudent, as OPG's own evidence in its EB-2020-0290 application showed that its compensation costs for unionized workers, who were subject to Bill 124, were already above the benchmark.[59] The OEB has consistently opined that OPG's compensation costs, when above the market median, are unreasonable and has made reductions to those costs. [60] As any amounts paid as a result of the overturning of Bill 124 can only be a premium over benchmark levels, those amounts should not be passed on to customers, as they are, on their face, imprudent. SEC made detailed arguments regarding the prudence requirements in its original submission, a copy of which has been appended to this submission on the motion to review.

48. If this Review Panel intends to review the aspects of the Decision as requested by OPG, then it should also examine the findings regarding the prudence criteria. The Decision to deny approval of the variance account can be upheld on that basis.[61]

Summary

49. SEC submits that the OEB should deny the motion to review. The OEB did not err in its conclusion that the proposed accounting order, related to the overturning of Bill 124, did not meet

[58] *Decision and Order* (EB-2023-0098), June 27, 2023, p.10, citing 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

[59] EB-2023-0098, SEC Submissions, p.2; *Decision and Order* (EB-2023-0098), June 27, 2023, p.10

[60] *Decision with Reasons* (EB-2010-0008), March 10, 2011, p.80-81, 86-87 (disallowance upheld by the Supreme Court of Canada in *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44) ; *Decision with Reasons* (EB-2013-0321), November 20, 2014, p.74-78; *Decision with Reasons* (EB-2016-0152), December 28, 2017, p. 79-81

[61] Similar to an appeal, the Motion to Review can be dismissed for reasons different than those given by the original panel. A party who challenges a part of the reasons as the basis for upholding the decision does not need to bring its own motion to review. (See *Dywidag Systems International, Canada, Ltd. v. Garford PTY Ltd.,* 2010 FCA 194, para 8; *Oldcastle Building Products Canada, Inc. v. Ontario (Minister of Finance),* 2006 CanLII 3971, para. 23)

the requirements for the establishment of a new variance account under OPG's rate framework.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Mark Rubenstein
Counsel for the School Energy Coalition

Appendix

and the OEB. The OEB has previously commented that the "regulatory compact is an obligation to disclose material facts on a timely basis."[18] It noted that a "publicly regulated corporation is under a general duty to disclose all relevant information relating to Board proceedings" and that "a utility should err on the side of inclusion."[19] As the Alberta Utility Commission aptly put it, "the existence of information asymmetry between utilities and the regulator necessarily and critically requires honesty, candour, and full and adequate disclosure of material facts by the utility in the course of rates proceedings."[20]

A legal challenge brought by the company's two major labour unions, as well as most other affected labour organizations in the province, that could materially affect costs, is exactly the type of information that was relevant and should have been disclosed. While the outcome was uncertain, how to assess the risk, and regulatory implications, is for all parties to consider, not just OPG. It cannot enter settlement discussions, as it did here[21], without providing full disclosure of all material facts to parties.

OPG cannot be allowed to do what it has done here, i.e. stay quiet on a material risk when base rates are being set, and then after the fact come to the OEB for relief when the risk materialized. It had a duty to affirmatively disclose the legal challenges in its EB-2020-0290 proceeding, as well as its understanding of the regulatory implications if the risk materialized.

Thus, for at least two reasons the risk of these additional costs should be treated as included in the base rates agreed, and thus failing to meet the causation criterion:

First, OPG agreed to a fixed level of OM&A, even though it knew that there was a risk it would be required to increase its compensation levels. Without more, OPG should be assumed to have accepted the risk that it would have to pay more, just as it would take the benefit if it would be able to pay less. The base rates therefore included a risk of an increase in compensation, including from the overturning of Bill 124.

Second, OPG did not disclose the facts underlying this risk of increase, and absent full disclosure the company cannot now claim, as they do implicitly in this application, that the agreement by the intervenors on OM&A included the assumption of that undisclosed risk by ratepayers. The parties should not be treated as having assumed a risk that was not disclosed to them.

Materiality

SEC agrees that the amounts that may be recorded in the proposed variance account are likely to meet OPG's specific materiality threshold.

Prudence

OPG bears the burden to demonstrate *in this application* that "the nature of the costs and quantum are reasonably incurred, although the final determination of prudence will be made at the time of disposition". [22] While the actual amounts are not known at this time, SEC submits that recovery of

[18] *Decision and Order* (EB-2008-0304), November 19, 2008, p.11

[19] *Decision and Order* (EB-2008-0304), November 19, 2008, p.11

[20] Alberta Utilities Commission, Decision (27013-D01-2022), July 29, 2022, p.18

[21] CME Interrogatory #1b; OPG Letter to OEB, dated May 12, 2023, p.2.

[22] *Decision and Order* (EB-2018-0002), May 31 2018, p.3

any incremental costs from ratepayers that may be paid to OPG's employees because of the overturning of Bill 124, be it for unionized employees or otherwise, are imprudent.

OPG's own evidence in the EB-2020-0290 proceeding was that the company's compensation costs were already higher than the benchmark, and even with the forecast 1% increase through the moderation period embedded in the company's budget, would remain so through the end of 2026. The OEB has consistently disallowed compensation costs in excess of the benchmark amounts, and so any additional amounts paid as a result of the overturning of Bill 124 would only exacerbate the gap. This makes any balance that would be included in the proposed variance account unreasonable on its face.

If there was no Bill 124, and OPG as part of its EB-2020-0290 application had forecast compensation costs higher than those required by the legislative restrictions during the moderation period, the intervenors (through a settlement) or the OEB (through an adjudicated decision) would not have accepted the higher amounts, as they are clearly unreasonable.

EB-2020-0290 Benchmarking Evidence[23]***.*** As part of its EB-2020-0290 pre-filed evidence, OPG filed a compensation benchmarking study prepared by Willis Towers Watson ("WTW")[24]. The results showed that relative to the market (defined as the 50th percentile or P50), OPG's compensation was 5.2% higher on a total direct compensation basis, and 7.7% higher on a total remuneration basis (10.2%, if excluding Paid Time-Off which is WTW's standard approach[25]).[26]

Segment	# of OPG Matched Incumbents	Base Salary	Total Direct Compensation	Total Remuneration Excluding PTO	Total Remuneration
		% above / below	% above / below	% above / below	% above / below
PWU	4236	13.8%	10.4%	15.0%	11.0%
Total Exc. Nuc. Auth	3992	15.1%	11.1%	15.6%	11.4%
Nuclear Authorized	244	1.4%	5.1%	9.3%	7.2%
Society	2659	19.9%	8.6%	15.8%	14.1%
Total Exc. Nuc. Auth	2593	21.3%	9.9%	17.2%	15.4%
Nuclear Authorized	66	-9.9%	-14.3%	-10.0%	-11.0%
Management	857	-8.0%	-13.1%	-11.0%	-11.8%
Total Exc. Nuc. Auth	808	-7.2%	-12.8%	-10.5%	-11.3%
Nuclear Authorized	49	-15.3%	-15.5%	-14.5%	-15.4%
OPG Overall	7752	12.3%	5.2%	10.2%	7.7%

When OPG's Hydro One share grants are included, OPG's compensation benchmarking results are even worse. OPG's total direct compensation is 6.8% higher than market, and 9% higher on a total remuneration basis (11.6 %, if excluding Paid Time-Off).[27]

[23] In SEC Interrogatory No.1 in this proceeding, OPG was asked to agree to place on the record all compensation related evidence from EB-2020-0290. In its response, OPG stated that it does not believe all compensation related evidence is relevant but also noted that "SEC may refer to any publicly available evidence posted on the OEB's website and assert relevance as necessary." SEC submits the evidence discussed in these submissions from EB-2020-0290 is relevant to the question of prudence of any incremental compensation costs that may be incurred as a result of the overturning of Bill 124.

[24] EB-2020-0290, Exhibit F4-3-1, Attach 2 (See Appendix A)

[25] EB-2020-0290, Exhibit F4-3-1, Attach 2, p.7 (See Appendix A)

[26] EB-2020-0290, Exhibit F4-3-1, Attach 2, p.13 (See Appendix A)

[27] EB-2020-0290, Exhibit F4-3-1, Attach 2, p.14 (See Appendix A)

Segment	# of OPG Matched Incumbents	Base Salary	Total Direct Compensation	Total Remuneration Excluding PTO	Total Remuneration
		% above / below	% above / below	% above / below	% above / below
PWU	4236	13.8%	12.8%	17.0%	12.7%
Total Exc. Nuc. Auth	3992	15.1%	13.4%	17.6%	13.1%
Nuclear Authorized	244	1.4%	7.5%	11.3%	9.0%
Society	2659	19.9%	10.2%	17.1%	15.3%
Total Exc. Nuc. Auth	2593	21.3%	11.5%	18.6%	16.7%
Nuclear Authorized	66	-9.9%	-12.9%	-8.8%	-9.9%
Management	857	-8.0%	-13.1%	-11.0%	-11.8%
Total Exc. Nuc. Auth	808	-7.2%	-12.8%	-10.5%	-11.3%
Nuclear Authorized	49	-15.3%	-15.5%	-14.5%	-15.4%
OPG Overall	7752	12.3%	6.8%	11.6%	9.0%

OPG was asked to provide the monetary difference between the total compensation for OPG's employees, allocated to the nuclear business, and the market median (P50) used in the benchmarking study for each year between 2022 and 2026.[28] WTW, through OPG, provided a response, including detailing the assumptions used, such as the changes in salary assumed in OPG's business plan (which presumably included the Bill 124 restrictions during the moderation period), as well as those for the market median.[29]

The results show that over the 2022 to 2026 period, both the total compensation amounts allocated to the nuclear business (which is the subject of this application), and those then further allocated to nuclear OM&A, remained above market, as shown below.[30]

Table 2: Estimated Dollar Difference between Total Remuneration – Amounts allocated to Nuclear Facilities and attributable to OM&A portion of Total Compensation

	PWU ($Millions)		Society ($Millions)		Management ($Millions)		Overall ($Millions)	
	Nuclear $ Allocated Variance	OM&A Attributed	Nuclear $ Allocated Variance	OM&A Attributed	Nuclear $ Allocated Variance	OM&A Attributed	Nuclear $ Allocated Variance	OM&A Attributed
2019	--	--	--	--	--	--	--	--
2022	$13.1	$4.8	$43.1	$32.5	($28.5)	($22.6)	$27.7	$14.7
2023	$4.6	($3.0)	$36.8	$27.5	($32.2)	($25.5)	$9.1	($1.1)
2024	($2.2)	($10.1)	$30.5	$22.5	($34.7)	($27.1)	($6.3)	($14.7)
2025	$4.9	($3.8)	$24.6	$17.1	($32.2)	($24.4)	($2.7)	($11.2)
2026	$29.4	$19.9	$17.8	$11.0	($25.1)	($18.4)	$22.0	$12.6

When the Hydro One share grants are included in the calculation, the difference during the 2022 to 2026 period between OPG's forecast compensation costs including the Bill 124 restrictions, and the market, are even greater, as shown below.[31]

[28] EB-2020-0290, F4-SEC-149 (See Appendix B)

[29] EB-2020-0290, F4-SEC-149, p.2-3 (See Appendix B)

[30] EB-2020-0290, F4-SEC-149, p.2, Table 2 (See Appendix B)

[31] EB-2020-0290, JTX4.18, p.2, Table 2 (See Appendix C)

Table 2: Estimated Dollar Difference between Total Remuneration – Amounts allocated to Nuclear Facilities and attributable to OM&A portion of Total Compensation

	PWU ($Millions)		Society ($Millions)		Management ($Millions)		Overall ($Millions)	
	Nuclear $ Allocated Variance	OM&A Attributed	Nuclear $ Allocated Variance	OM&A Attributed	Nuclear $ Allocated Variance	OM&A Attributed	Nuclear $ Allocated Variance	OM&A Attributed
2019	--	--	--	--	--	--	--	--
2022	$20.7	$11.2	$47.2	$35.5	($28.5)	($22.6)	$39.4	$24.2
2023	$12.0	$3.2	$40.7	$30.4	($32.2)	($25.5)	$20.5	$8.1
2024	$4.9	($4.3)	$34.2	$25.3	($34.7)	($27.1)	$4.5	($6.1)
2025	$10.7	$0.6	$27.5	$19.1	($32.2)	($24.4)	$6.0	($4.8)
2026	$33.5	$22.3	$19.7	$12.3	($25.1)	($18.4)	$28.2	$16.2

Previous Decisions. In every OEB decision where it opined on OPG's compensation costs, it has reduced those costs as being unreasonable. In each case, the reduction was primarily based on benchmarking evidence, showing that the company's compensation per employee was above the market median.

Starting in EB-2010-0008, the OEB reduced the forecast 2011 and 2012 compensation costs by $145M, in part based on information from a filed compensation study that showed a sample of OPG's employees, there compensation costs were significantly above the market median.[32] The Supreme Court of Canada upheld the disallowance.[33]

In EB-2013-0321, the OEB disallowed a total of $200M over the 2014 and 2015 test years related to compensation costs.[34] This was based in part on the findings of a benchmarking report that demonstrated that the PWU's compensation costs were significantly higher than the 50th percentile[35], and another that showed its pension and OPEB costs also remained unreasonable.[36]

Most recently in EB-2016-0152, the OEB reduced OPG's OM&A costs by $650M ($130M per year for each of 2017 to 2021), on the basis that its total compensation costs are too high[37]. The basis for the reduction was a benchmarking study undertaken by WTW, that showed both OPG's total direct[38], and its pension and benefits compensation[39] remained above the 50th percentile.

Since the release of the OEB's decision in EB-2016-0152, there have been two decisions related to applications by Hydro One Networks Inc., which similarly have consistent problems of above market compensation costs. In both those decisions, the OEB has been more direct, saying that it will not allow recovery from ratepayers of compensation costs above the market median. EB-2017-0049,

[32] *Decision with Reasons* (EB-2010-0008), March 10, 2011, p.80-81, 86-87

[33] *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44

[34] *Decision with Reasons* (EB-2013-0321), November 20, 2014, p.78

[35] *Decision with Reasons* (EB-2013-0321), November 20, 2014, p74-75

[36] *Decision with Reasons* (EB-2013-0321), November 20, 2014, p.77-78

[37] *Decision with Reasons* (EB-2016-0152), December 28, 2017, p. 79

[38] *Decision with Reasons* (EB-2016-0152), December 28, 2017, p. 81

[39] *Decision with Reasons* (EB-2016-0152), December 28, 2017, p. 82

the OEB explicitly disallowed the full amount above the market median, commenting that there was "no compelling reason for the ratepayers to continue to be burdened with this unreasonable compensation level after many years of the OEB finding issue with Hydro One's compensation."[40] Similarly, in EB-2019-0082, the OEB disallowed $10.1 in Hydro One's OM&A entirely on the basis of compensation costs, which reflects the entire premium above the market median.[41]

Summary On Prudence. SEC submits that regardless of what specific amount OPG ultimately agrees to or is required to pay its unionized workers because of the overturning of Bill 124, those amounts should not be passed on to customers, as they are imprudent. Those amounts can only be a premium over benchmark levels, and should not be borne by ratepayers, consistent with past decisions of the OEB.

C. OEB Should Consider OPG's Need For Incremental Funding

SEC submits that, in addition to the three criteria discussed above, the OEB should consider OPG's need for a variance account whose sole purpose is to allow it to seek incremental funding from ratepayers. Based on OPG's estimated 2022 actual ROE for its regulated facilities of between 12.5% and 13%, this is funding OPG does not need.[42]

Almost all of the OEB's incremental funding mechanisms require a showing of need before a utility can recover additional amounts from customers above what is included in base rates. This requirement applies no matter the reason for the additional costs.

To be eligible for a Z-Factor claim, which this application best resembles, a utility must show that its most recent actual ROE "does not exceed 300 basis points above its deemed ROE embedded in its base rates".[43] Similarly, for approval of Advanced/Incremental Capital Module ("ACM/ICM") funding, "[i]f the achieved regulated ROE for the most recently completed fiscal year exceeds 300 basis points above the deemed ROE embedded in the distributor's rates, that distributor does not qualify for funding for an incremental capital project."[44]

Similarly, in the development of the rules regarding treatment of COVID-19 costs, the OEB established a means test for incremental funding that excluded recovery of *all* costs, including those necessary to comply with government and OEB initiated requirements, if the utility's ROE was above 300 basis points from its approved ROE.[45]

OPG's estimated ROE for its regulated facilities for its last year of actuals (2022) is 12.5% to 13%.[46] This exceeds 300 basis points above its deemed ROE embedded in its payment amounts for its

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[40] *Decision and Order* (EB-2017-0049), March 7, 2019, p.111

[41] *Decision and Order* (EB-2019-0082), April 23, 2020, p.142

[42] OPG Letter to OEB, dated May 12, 2023, p.3

[43] *Filing Requirements For Electricity Distribution Rate Applications - 2022 Edition for 2023 Rate Applications, Chapter 3*, p.21

[44] *Filing Requirements For Electricity Distribution Rate Applications - 2022 Edition for 2023 Rate Applications, Chapter 3*, p.24

[45] *Report of the Ontario Energy Board, Regulatory Treatment of Impacts Arising from the COVID-19 Emergency* (EB-2020-0133), June 17, 2021, p.3

[46] OPG Letter to OEB, dated May 12, 2023, p.3