Ontario Energy Board | Commission de l'énergie de l'Ontario

BY EMAIL

August 30, 2023

Ms. Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4
Registrar@oeb.ca

Dear Ms. Marconi:

Re: Ontario Energy Board (OEB) Staff Submission
Ontario Power Generation Inc.
Motion to Review and Vary OEB's Decision and Order for EB-2023-0098
OEB File Number: EB-2023-0209

Please find attached OEB staff's submission in the above referenced proceeding, pursuant to Procedural Order No. 1.

Yours truly,

Vithooshan Ganesanathan

Digitally signed by Vithooshan Ganesanathan
Date: 2023.08.30 13:52:09 -04'00'

Vithooshan Ganesanathan, Advisor
Generation & Transmission

Encl.

cc: All parties in EB-2023-0209

ONTARIO ENERGY BOARD

OEB Staff Submission

Application for variance account to capture the nuclear revenue requirement impact of the overturning of Bill 124

Motion to Review

EB-2023-0209

August 30, 2023

Introduction

OEB staff opposes Ontario Power Generation Inc.'s (OPG) motion to vary the OEB's decision denying OPG's application for a variance account to record the costs that may arise from the overturning of Bill 124 (Original Decision).

OPG has alleged that the hearing panel made no fewer than three "fundamental" errors in the Original Decision.

Before responding to each of those three allegations, it is worth pulling the lens back and recalling what deferral and variance accounts are – and are not – meant to do in the context of rate regulation in Ontario. As OEB staff said in our submission on OPG's application for the accounting order, the "starting point" is that approving a deferral and variance in the middle of an approved rate term is "an unusual remedy":

> As a starting point, it should be noted that unless legislated, deferral and variance accounts that are created during the term of an approved rate framework are an unusual remedy that should be reserved for circumstances where a cost could not reasonably have been foreseen at the time the rate framework was approved. Utilities are expected to manage their costs throughout the term of the rate framework and should not expect to have access to "true ups" (for example through a deferral or variance account) every time a cost is higher than what was forecast. Variances from forecast costs are part of business risk, for which the utility is compensated through its return on equity. In addition, to allow for routine access to new deferral and variance accounts would be inefficient (in that where the cost was foreseeable, it could have been addressed in the proceeding establishing the rate term) and detract from rate certainty.[1]

There is no dispute that, before OPG agreed to the partial settlement covering several issues including its operations, maintenance and administration (OM&A) spending envelope in its most recent payment amounts case, it knew that constitutional challenges had been filed against Bill 124, including by two unions representing OPG workers.[2]

Seen in that context, there is nothing erroneous about the hearing panel's conclusion that "It is not appropriate to create a new variance account to track amounts that could have been foreseen and addressed (for example through a request for a variance account at the time of the EB-2020-0290 proceeding) when the rate framework was being established."[3]

[1] EB-2023-0098, OEB staff submission, p. 2.
[2] EB-2023-0098, OPG response to SEC-002.
[3] EB-2023-0098, Decision and Order, June 27, 2023 (Decision) p. 7.

1. The test for varying a decision

Rule 42.01(a) of the *Rules of Practice and Procedure* requires a notice of motion to review an OEB decision to:

> set out the grounds for the motion, which grounds must be one or more of the following:
>
> i. the OEB made a material and clearly identifiable error of fact, law or jurisdiction. For this purpose, (1) disagreement as to the weight that the OEB placed on any particular facts does not amount to an error of fact; and (2) 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;
> ii. new facts that have arisen since the decision or order was issued that, had they been available at the time of the proceeding to which the motion relates, could if proven reasonably be expected to have resulted in a material change to the decision or order; or
> iii. facts which existed prior to the issuance of the decision or order but were unknown during the proceeding and could not have been discovered at the time by exercising reasonable diligence, and could if proven reasonably be expected to result in a material change to the decision or order. [Emphasis added.]

Rule 43.03 provides that: "[t]he OEB will only cancel, suspend or vary a decision when it is clear that a material change to the decision or order is warranted based on one or more of the grounds set out in Rule 42.01(a)."

When Rule 42 was recently amended, the OEB explained that "the purpose of a review is not simply to reargue a case that was already presented to the original panel of Commissioners. Motions to review should be limited to instances where a party can clearly identify a material error of fact, law or jurisdiction in the decision or order, or if there is a change in circumstances or new facts that would have a material effect on the decision or order."[4]

In this motion OPG asserts that the OEB made material and clearly identifiable errors of fact and law, or mixed fact and law. For the reasons that follow, OEB staff disagrees. The Original Decision to deny the accounting order was a discretionary one. Even if this review panel would have exercised its discretion in a different way, there are no material and clearly identifiable errors on which to base an order to vary the decision.

2. The alleged errors

OPG alleges that the OEB made three clearly identifiable errors of fact and law, or mixed fact and law, in the Original Decision:

a. It misapplied the established basis for establishing accounting orders under OPG's approved rate framework;
b. It made conclusions on a speculative and non-factual basis, without evidence; and

[4] OEB Letter re Proposed Amendments to Rules 40-43, May 13, 2021.

c. It incorrectly applied the materiality criterion for variance account eligibility.

OEB staff does not agree with OPG's position that the Original Decision includes errors of fact, law, or mixed fact and law, and will address each of these arguments in turn.

3. Response to OPG's argument that the OEB incorrectly applied the established basis for establishing accounting orders under OPG's approved rate framework by applying an objective foreseeability test

OPG argues that the OEB "misapplied the established basis for creating accounting orders under OPG's approved rate framework".[5] Specifically, OPG asserts that the OEB wrongly considered "whether the event (Bill 124 being declared unconstitutional) was *unforeseeable* rather than whether it was *unforeseen*."[6] OPG points out that in its most recent payment amounts case (EB-2020-0290), the OEB accepted a settlement in which the parties accepted OPG's proposed rate framework for the 2022-2026 rate term. Included in that rate framework was a proposal "that unforeseen events affecting the nuclear business continue to be addressed through an accounting order process, subject to the $10M regulatory materiality threshold that has historically applied to OPG and which was accepted for this purpose in the EB-2016-0152 Decision."[7]

On OPG's reading, the decision in EB-2020-0290 endorsed a subjective test for mid-term accounting orders: the event affecting the nuclear business must actually have been unforeseen by OPG. OPG says the Original Decision wrongly adopted an objective test of reasonable foreseeability, i.e., whether OPG ought to have foreseen the event.

According to OPG, "It is a fundamental principle of law that statutes enacted by the legislature are presumed to be constitutional."[8] OPG is not a "fortune teller"; "It was beyond OPG's ability to foresee that Bill 124 would be struck down as unconstitutional."[9]

(a) The EB-2020-0290 payment amounts case did not establish a test of subjective foresight

OEB staff does not agree that EB-2020-0290 established subjective foresight as the standard for a mid-term accounting order. The settlement proposal and the decision approving it were both silent on this point.. The applicable paragraph of that application

[5] OPG Argument in Chief (AIC), p. 9.
[6] AIC, p. 10 (emphasis in original).
[7] EB-2020-0290, Exhibit A1-3-2, p. 13 (OPG Book of Authorities [BOA], Tab 4).
[8] AIC, p. 10.
[9] AIC, pp. 10-11.

reads in full:

> 2.3.3 Treatment of Unforeseen Events
>
> OPG proposes that unforeseen events affecting the nuclear business continue to be addressed through an accounting order process, subject to the $10M regulatory materiality threshold that has historically applied to OPG and which was accepted for this purpose in the EB-2016-0152 Decision. The approach is consistent with the accounting order application requirements currently in place for accounting changes impacting the calculation of OPG's nuclear liabilities and changes in depreciation end-of-life dates for the prescribed nuclear facilities. OPG's most recent accounting order application pursuant to these requirements was filed, and approved by the OEB, in EB-2018-0002.[10]

That paragraph does not set out a test for approving accounting orders. It does not refer to the usual requirement to demonstrate causality, materiality and prudence, other than to mention the $10 million materiality threshold. While it provides for "an accounting order process", it offers virtually no guidance to the OEB on how to assess an application for an accounting order. The term "unforeseen events" is not used to establish a legal test.

(b) OPG ought to have foreseen that Bill 124 could be struck down

OPG has cited numerous court decisions for the proposition that it could not have predicted the overturning of Bill 124. In OEB staff's view these cases do not support the conclusion that OPG is asking this review panel to draw from them.. OPG maintains that "it is a fundamental principle of law that statutes enacted by legislatures are presumed constitutional and parties cannot be expected to foresee that legislation might be struck down."[11] OEB staff disagrees. OPG cites the Supreme Cout of Canada's decision in *MacNeil v. Nova Scotia (Board of Censors)*.[12] But all that the Court meant by the "presumption of constitutionality" in that case was that, when analyzing whether a law is within the enacting legislature's authority under the constitutional division of powers, the law should be construed, if possible, in a way that would make it fit within that authority. The presumption is nothing more than a tool for statutory interpretation. The Court explained it in another case: "When faced with two plausible characterizations of a law, we should normally choose that which supports the law's constitutional validity."[13] And more recently: "According to this presumption, every legislative provision is presumed to be *intra vires* the level of government that enacted it."[14]

The presumption of constitutionality does not mean, as OPG implies, that any Charter challenge can be presumed to fail. Such an approach has been expressly rejected by

[10] EB-2020-0290, Exhibit A1-3-2, p. 13 (OPG Book of Authorities [BOA], Tab 4).
[11] AIC, p. 11-12.
[12] [1978] 2 S.C.R. 662 (BOA, Tab 9).
[13] *Siemens v. Manitoba (Attorney General),* 2003 SCC 3, para. 33.
[14] *Murray-Hall v. Quebec (Attorney General),* 2023 SCC 10, para. 79.

the Supreme Court: A "literal" understanding of the presumption "is not compatible with the innovative and evolutive character of this constitutional instrument."[15]

OPG also refers to Justice Wilson's dissent in *Air Canada v. British Columbia*, where she said, "the appellants were entitled in making their payments to rely on the presumption of validity of the legislation."[16] That case was about a disputed tax. Justice Wilson's point was simply that taxpayers are not expected to perform their own constitutional analysis of the tax code before paying their taxes. It provides no support for OPG's view that it could not have foreseen that a challenged statute would be struck down.

Neither does the observation by the Alberta Court of Appeal that "Defence counsel are not fortune tellers. They can hardly be expected to predict the course of constitutional change in Canada's courts."[17] In that case, the Court allowed the accused to argue on appeal that the provision of the Criminal Code he was convicted under was unconstitutional, even though he had not raised that argument at trial. After the trial, a court in British Columbia struck down the provision. The Alberta Court of Appeal found that the accused's counsel could not be faulted for not leading evidence on the constitutional question at trial, before the BC decision was issued. That is all the Court meant by the "fortune teller" remark. In any event, in the matter at hand, the Original Decision did not require OPG to be a fortune teller. The decision did not say that OPG should have factored in the overturning of Bill 124 in its applied-for OM&A budget; rather, it said OPG could have sought a variance account in its payment amounts application.[18] One of the very purposes of variance accounts is to deal with uncertainty.[19]

The last judicial decision OPG cites on this point is *Schmidt v. Canada (Attorney General),* where the Federal Court of Appeal observed that "Constitutional law is a variable, debatable and frequently uncertain thing."[20] That statement is uncontroversial, but it only undermines OPG's argument. Constitutional challenges sometimes succeed. Where a company is aware of a challenge that could impact its business, it can be expected to prepare contingency plans.

OPG points to a 2004 decision of the OEB which allowed Enbridge Gas Distribution Inc. to record certain expenses related to a class action lawsuit over its late payment penalty policy – but not the cost of any damages that a court might order the company to pay. OPG notes correctly that the OEB found that it was "premature" to authorize an account for such damages. The OEB explained that it was "not convinced… of the likelihood that

[15] *Manitoba (A.G.) v. Metropolitan Stores Ltd.,* [1987] 1 SCR 110, para. 24.
[16] [1989] 1. S.C.R. 1161 (BOA, Tab 11).
[17] *R. v. Weir,* 1999 ABCA 275, para. 10 (BOA, Tab 11).
[18] Decision, pp. 6 and 7.
[19] See for instance the OEB's February 11, 2021 decision in EB-2020-0212: "One purpose of a variance account is to capture rate and cost impacts that are uncertain at the time a decision is made."
[20] 2018 FCA 55 (BOA, Tab 9).

such costs will arise in 2005", and that there was a high degree of uncertainty over the quantum of damages, if any.[21] OEB staff notes that at the time, Enbridge was under an annual cost-of-service model; the application was for a single year. As such, the concerns we outlined in the Introduction about providing relief in the middle of a multi-year incentive rate term would not have arisen. The 2004 decision should be read in that context and given little weight in the present context.

(c) The Original Decision does not require OPG to seek an accounting order for every risk no matter how remote

OPG also argues that "The effect of the [Original] Decision is to require OPG, as part of its payment amount applications to identify every possible material risk and to request a deferral or variance account for every such risk or potential risk."[22] OEB staff does not share OPG's extreme interpretation of the ordinary and legal meaning of "reasonably foreseeable", the term used in the Original Decision. The foreseeability standard does not require anyone to account for every risk "no matter how remote".[23]

In the context of tort law, the Supreme Court has explained that something is reasonably foreseeable if there is a "real risk" of it materializing; "far-fetched" risks are not captured:

> Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is probable or merely possible. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendant ... and which he would not brush aside as far-fetched" (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Propriety Ltd. (1966),* [1967] 1 A.C. 617 (New South Wales P.C.), at p. 643).[24]

In that case, the Court held that the defendant supplier of water bottles was not liable for the serious psychological injuries suffered by the plaintiff after he noticed two dead flies in an unopened bottle: the defendant could not reasonably have foreseen such injuries resulting from its negligence. This common-sense approach to reasonable foreseeability should dispel OPG's fears of having to address even the remotest risks in its next payment amounts application.

There can be little doubt that once the constitutional challenges were filed, there was a real risk of Bill 124 being struck down – a risk that a reasonable person would not

[21] RP-2003-0203, Partial Decision with Reasons, August 31, 2004, para. 144 (BOA, Tab 12).
[22] AIC, p. 14.
[23] AIC, p. 14.
[24] *Mustapha v. Culligan,* 2008 SCC 27, para. 13, emphasis added.

"brush aside as far-fetched". A reasonable person – or at least, a reasonable corporation with a unionized workforce – would have known that the Supreme Court has recognized that collective bargaining and the right to strike are protected as part of the freedom of association guaranteed under the *Charter of Rights and Freedoms*.[25] A reasonable person would have known that in recent years various federal and provincial wage restraint statutes have been challenged, leaving judges divided.[26] A reasonable person would have known that the Ontario Superior Court had found a provincial law imposing collective agreements for teachers to violate the freedom of association – indeed the *Toronto Star* article OPG cites for support for the notion that "there was ample support" for the view that Bill 124 would survive quoted one union leader as saying "the Progressive Conservatives are making the same mistake the previous Liberal government did with Bill 115."[27] Some may have assessed the probability of Bill 124 being overturned as unlikely, but it would have been unreasonable to dismiss it as far-fetched.

(d) OPG itself applied a reasonable foreseeability test in its application for an accounting order

To the extent the hearing panel applied an objective test of reasonable foreseeability, or conflated the terms "foreseen" and "foreseeable", that is understandable, as OPG did exactly that in its application for the accounting order. OPG's submissions in that case are replete with what it now characterizes as a fundamental legal error. Examples include:[28]

- "The overturning of Bill 124 is a change of law that OPG could not reasonably have anticipated during the 2022-2026 payment amounts application." (Application, p. 2.)
- "The overturning of Bill 124 is a change of law that OPG could not foresee during the 2022-2026 payment amounts application." (Reply, p. 1.)

[25] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia,* 2007 SCC 27; *Saskatchewan Federation of Labour v. Saskatchewan,* 2015 SCC 4.
[26] For instance, in *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General),* 2011 FC 735, a judge of the Federal Court struck down parts of the *Expenditure Restraint Act*; the legislation was reinstated by the Federal Court of Appeal: 2013 FCA 112; then, in a split decision, the Supreme Court upheld the legislation: 2015 SCC 2. In the decision striking down Bill 124, the Ontario Superior Court of Justice distinguished that case on its facts: *Ontario English Catholic Teachers Assoc. v. His Majesty, 2022,* 2022 ONSC 6658, at para. 201.
[27] *Toronto Star,* "Unions rally against wage-cap law; Ten more groups to file court challenge against Bill 124 in the new year," December 18, 2019 (OPG Book of Authorities, Tab 2). The earlier legislation, Bill 115, was found to offend the freedom of association in *OPSEU v Ontario,* 2016 ONSC 2197. It is noteworthy that the judge in that case observed that this is "a difficult and continuously evolving area of our law" (at para. 273).
[28] Emphasis added in every case.

- "The OEB should consider the facts that were known to OPG at the time of the EB-2020-0290 proceeding, which were not sufficient to suggest that the overturning of Bill 124 was foreseeable." (Reply, p. 2.)
- "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. For the reasons set out in OPG's evidence and this submission, the overturning of Bill 124 is an unforeseen event, and there are no facts whatsoever on the record of the proceeding, including the Approved Settlement Agreement itself, that the potential impacts of this event were contemplated in the approved revenue requirement or otherwise excluded from the scope of the agreed unforeseen event mechanism." (Reply, p. 3)
- "The opposing parties' submissions ignore the substantial uncertainties that existed around the outcome of the Bill 124 legal challenges. Instead, they effectively invite the OEB to view the issue through the lens of perfect hindsight, taking the ultimate outcome of the Bill 124 Decision as a probable outcome just because the result in question occurred. The OEB should not impute hindsight as proposed by these parties. Instead, the OEB should consider the facts that were known to OPG at the time of the EB-2020-0290 proceeding, which were not sufficient to suggest that the overturning of Bill 124 was foreseeable." (Reply, p. 7.)
- "… the date of OPG's knowledge of a legal action does not imply a date that the overturning of Bill 124 became foreseeable (i.e., likely to occur)." (Reply, p. 9.)
- "… there was an insufficient basis to establish that the ultimate overturning 10 of Bill 124 was probable and foreseeable, and the constitutional remedy in the event it was 11 overturned was unknown to OPG." (Reply, p. 10.)
- "The underlying rationale for the 'unforeseen' criteria in the accounting order process incorporated into the Approved Settlement Agreement is to avoid this outcome by capturing the material cost impacts of events that were not probable or forecastable, such as the overturning of Bill 124." (Reply, p. 12.)
- "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." (Reply, p. 18.)
- "It was only after the court's decision was issued that it became foreseeable that OPG would be materially affected by the legal challenges, well after the time when OPG could provide those costs for the EB-2020-0290 Payment Amounts Order." (Reply p. 30.)

The hearing panel can hardly be faulted for applying the same standard OPG did.

(e) In the alternative, the evidence is that OPG did foresee the risk of Bill 124 being struck down

In the alternative, if this review panel were to agree with OPG that the hearing panel should have applied a subjective foresight standard, OEB staff would submit that the standard is met on the facts. As Justice L'Heureux-Dubé said (in dissent) in *R. v. Martineau*, the "tests of subjective foresight and objective foreseeability cannot be seen

as static or distinct concepts."[29] She explained, "When assessing the accused's own state of mind, certain inferences may be drawn from the circumstances surrounding the event at issue." She went on to quote a criminal law treatise:

> "[The question becomes] whether this is really an objective test or is merely a disguised evidentiary technique for determining what the accused actually foresaw. If the accused were to say that he did not anticipate events that a reasonable man, given the facts as actually appreciated by the accused, would have anticipated, one may wonder whether the jury would have any difficulty in finding that the accused 'must have' anticipated them, thus finding not only that a reasonable man would have anticipated them but that the accused actually did appreciate them in spite of what he says."

We know that OPG was aware when it submitted its payment amounts application on December 31, 2020 that various unions, including the Power Workers' Union (PWU) and the Society of United Professionals (SUP), had initiated constitutional challenges to Bill 124.[30] We do not know what OPG thought the chances of success would be – because OPG declined to provide a complete response to an interrogatory on this point.[31] We can, however, infer that it must have known there was a real risk of Bill 124 being overturned, as any reasonable company would have foreseen that risk.

4. Response to OPG's argument that the OEB made findings on a speculative basis

In OEB staff's view, it is unnecessary for the review panel to address the second and third of OPG's "fundamental" objections to the Original Decision. It would be sufficient to conclude that the hearing panel made no reversible error on the foresight question. If OPG ought to have foreseen the Superior Court decision, that on its own would be reason to deny OPG's request for the variance account, as OPG failed to meet the materiality (and the related foreseeability) criterion of the test for establishing a variance account. Nevertheless, OEB staff offers the following brief comments on OPG's other grounds.

OPG's second objection is that "the OEB made conclusions on a speculative and non-factual basis, and without evidence, regarding potential impacts on the settlement related to OPG's payment amounts application."[32] As OPG notes, the hearing panel observed on page 5 of the Original Decision that "SEC argued that the settlement negotiations for OPG's 2022-2026 Payment Amounts would have unfolded differently if OPG had disclosed to parties at the time the legal proceedings were launched that, if the challenge was successful, it would seek approval to record the impacts in a variance account." The hearing panel concluded (on page 6) that "the exercise of reasonable and

[29] [1990] 2 SCR 633.
[30] EB-2023-0098, OPG response to SEC-002, and OPG letter filed May 12, 2023.
[31] EB-2023-0098, OPG response to VECC-002.
[32] AIC, p. 19.

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."

In OEB staff's view, there was nothing wrong with that finding. OPG is correct that it was not based on any evidence. But no such evidence could have been led, as the parties to the settlement conference are precluded from disclosing the details of their confidential discussions.[33] It was entirely reasonable for the hearing panel to infer that the outcome of the settlement might have been different if the intervenors had known that OPG would seek to reopen the OM&A budget in the event Bill 124 was struck down. The OM&A budget, and the compensation component in particular, garners significant attention in every payment amounts case. A few cases ago, it went all the way to the Supreme Court.[34] The hearing panel did not need evidence to deduce that the settlement agreement on OM&A came after, what are typically in these major cases, difficult negotiations, and that the result might have been different if OPG had at the time asked for a Bill 124 variance account.

5. Response to OPG's argument that the OEB incorrectly applied the materiality criterion of the test for variance account eligibility

OPG argues that the OEB misapplied the materiality test, and in so doing, imposed "an unrealistically high bar".[35]

The OEB has established a three-part test for new deferral or variance accounts: causation, materiality and prudence. OPG is correct that the materiality stage of the test comprises two parts. As described in the *Filing Requirements for Electricity Distribution Rate Applications*, "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."[36]

The hearing panel described the materiality test correctly: "The OEB's materiality test is 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 operations."[37] On the first prong, the hearing panel found that "the quantum of costs related to the overturning of Bill 124 likely exceeds OPG's $10 million materiality threshold."[38] On the second prong, it found that, "In this

[33] *Practice Direction on Settlement Conferences*, pp. 6-7; settlement proposal, p. 5.
[34] *Ontario (Energy Board) v. Ontario Power Generation Inc.,* 2015 SCC 44.
[35] AIC, p. 19.
[36] *Filing Requirements for Electricity Distribution Rate Applications*, Chapter 2, p. 66 (footnote omitted).
[37] Decision, p. 9.
[38] Decision, p. 9.

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."[39] It went on to say:

> Further, the OEB notes that OPG expects its actual 2022 return on equity for its regulated facilities to be in the range of 12.5-13%. The expected return is well above the 2022 ROE value set by the Board in October 2021 of 8.66%. The OEB accepts OPG's assertion that actual returns on equity in a given year are not indicative of future returns, but notes that OPG's exemplary performance in 2022 counteracts the suggestion that operational hardships at OPG would be forthcoming without the requested variance account.[40]

OPG takes exception to that paragraph. It argues that the OEB erred by considering whether OPG would experience "operational hardships" if the accounting order were denied, rather than whether the amounts to be recorded in the proposed account would have a "significant influence" on the operation of the regulated business. OEB staff does not read the impugned paragraph as changing the materiality test. As noted above, the hearing panel correctly stated that the second prong of the test is whether the costs will "significantly influence" OPG's operations. In referring to "the suggestion that operational hardships at OPG would be forthcoming", the hearing panel was merely elaborating on what a significant influence would look like. Nowhere does the hearing panel say that "operational hardship" is a stricter test than "significant influence".

OPG says that the cumulative OM&A impact, for both its PWU and SUP employees, is $188 million over the five-year rate term.[41] It was not a material and clearly identifiable error for the hearing panel to conclude that, with an approved revenue requirement over the five years of over $16 billion,[42] OPG should be expected to manage those additional costs – an increase of just over one percent. As noted above, new deferral or variance accounts during an approved ratemaking framework are an unusual remedy, and utilities should be expected to manage their costs throughout the term of the ratemaking framework and should not expect to have access to "true ups" every time a cost is higher than what was forecast.

OPG also argues that the same paragraph is "internally inconsistent" because it says, on the one hand, that "The OEB accepts OPG's assertion that actual returns on equity in a given year are not indicative of future years", while on the other hand, that "OPG's exemplary performance in 2022 counteracts the suggestion that operational hardships would be forthcoming".[43] OPG's observation is correct as far as it goes. It is trite that, for any company, past performance is not indicative of future performance. But past performance is all we have. It is common for the OEB to look at a utility's most recent return on equity when determining whether the utility is eligible for adjustments to base rates. For instance, the Incremental Capital Module, the Advanced Capital Module and

[39] Decision, p. 9.
[40] Decision, p. 9. Note that OPG's actual return on equity for 2022 is now available: 12.94%.
[41] AIC, p. 18.
[42] EB-2020-0290, Decision and Order, November 15, 2021, at Table 3.
[43] AIC, p. 17.

the Covid-19 Deferral Account all include a "means test" based on a utility's reported return on equity.[44] The principle is that utilities should not receive additional ratepayer funding beyond what is provided for in the approved rate framework unless they really need it. In this case, the fact that OPG was expected to have significantly over-earned in 2022 suggests there is no imminent need for incremental funding. If OPG's earnings were to worsen drastically before the end of the term, such that they fell more than 300 basis points below its approved return, whether due to the Bill 124 impacts or any other cause, the OEB could trigger a regulatory review in accordance with the approved settlement.[45]

6. Conclusion

For the reasons above, OEB submits that the Original Decision did not include any material and clearly identifiable errors of fact, law or mixed fact law. There is therefore no reason to vary the Original Decision.

– All of which is respectfully submitted –

[44] *Filing Requirements for Electricity Distribution Applications*, Chapters 2 and 3.
[45] OPG's approved rate framework includes the same +/-300 basis point off-ramp trigger that applies to other utilities: EB-2020-0290, Exhibit A1-3-2, p. 13 (OPG Book of Authorities [BOA], Tab 4).