



**SOCIETY of
UNITED PROFESSIONALS**
IFPTE 160

30th August, 2023

Michelle Johnston
President
Society of United Professionals, IFPTE 160
2239 Yonge St
Toronto, ON M4S 2B5

VIA Email and RESS Filing

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

**Re: EB-2023-0209
Ontario Power Generation Inc. (OPG)
Motion to Review and Vary the OEB's June 27, 2023 Decision and Order in
EB-2023-0098**

Submissions of the Society of United Professionals

Dear Ms. Marconi,

Please find attached the Society of United Professionals' (SUP) Submissions in the matter of Ontario Power Generation Inc.'s (OPG) "Motion to Review and Vary the OEB's June 27, 2023 Decision and Order in EB-2023-0098" (EB-2023-0209).

Sincerely,

[Original signed by]

Michelle Johnston
President
Society of United Professionals, IFPTE 160
regulatory@thesociety.ca
(416) 979-2709

Copy by email: interested parties



SOCIETY *of*
UNITED PROFESSIONALS
IFPTE 160

Society of United Professionals'
SUBMISSIONS

Re: EB-2023-0209
Ontario Power Generation Inc. (OPG)
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EB-2023-0098

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EB-2023-0209 - Society of United Professionals' Submissions

General Comment

SUP has reviewed OPG's Argument in Chief and strongly concurs with it.

Many of the points OPG makes were previously raised by SUP in its submission for EB-2023-0098. OPG has strengthened its arguments significantly by positioning its submission firmly within a legal context, arguing that the OEB has made several and significant errors in law. Without going into each of the extensive attachments OPG has provided in support of its argument, SUP finds that the attachments taken as a whole, and in context, provide very strong support for the arguments included in OPG's motion.

The OPG motion should be approved.

Fluid And Expanding Scope of EB-2023-0098 Proceeding

SUP's position, while supporting OPG's legal one, is based more on regulatory principle and practice. SUP is concerned that the OEB decision in the EB-2023-0098 case was based on inclusion of criteria that were outside the requested scope of the proceeding. Specifically, OPG stated that its request was based on the "proper application of the test to approve a variance account to record new costs unforeseen at the time OPG's payment amounts were approved. The prudence of the costs that OPG proposes to record in the account is not a matter that OPG is asking the OEB to decide at this time." (OPG Argument in Chief [AIC] EB-2023-0209 p.1).

This position is consistent with OPG's initial submission that originally argued for approval of the variance account in EB-2023-0098. In that submission, OPG noted it was requesting "approval to establish a variance account to record the nuclear revenue requirement impacts resulting from the Ontario Superior Court overturning the Protecting a Sustainable Public Sector for Future Generations Act, 2019 (Bill 124)." (OPG Submission EB-2023-0098 p.1)

On page 3 of that same submission, OPG noted it "expects that information supporting the balance in the proposed account, as well as the timing and manner of its disposition, would be reviewed in a future OPG application."

In its March 22, 2023 Procedural Order (PO) for EB-2023-0098, the OEB noted that "Ontario Power Generation Inc. (OPG) filed an application with the Ontario Energy Board (OEB) on March 1, 2023, under section 78.1 of the Ontario Energy Board Act, 1998 seeking approval to establish a variance account to record the nuclear revenue requirement impacts resulting from the Ontario Superior Court overturning the Protecting a Sustainable Public Sector for Future Generations Act, 2019 (Bill 124)." There was no mention in the PO's description of the proceeding's scope to include an assessment of recoverability. This makes sense as the establishment of a new

variance account almost always includes words to remind participants that there is to be no presumption of recoverability until a future prudence assessment is completed.

In its submissions on EB-2023-0098, SUP expressed concern that the issue of recoverability and prudence was improperly finding its way into the arguments put forward by other intervenors and Staff. On page 2 of its submission, SUP noted: “OPG is not making a request for a prudence review at this time. It is only requesting that a variance account mechanism be established to track the revenue requirement impacts of additional compensation amounts it will have to pay due to the overturning of Bill 124.”

Also, in its comments on SEC’s request for OPG to file certain ROE information as interrogatory responses, SUP noted: “This hearing is to assess whether a new variance account should be established, not to determine whether and when amounts recorded therein should ultimately be collectible.” (SUP EB-2023-0098 Submission page 3).

SUP is concerned that other participants in the proceeding strayed outside the scope of OPG’s technical request, which was whether or not it met the regulatory criteria to establish a variance account. Establishment of a variance account should be a technical matter best resolved by assessing whether the documented criteria applicable to that rate regulated enterprise have been met. Instead of appropriately restricting the assessment to established and documented technical criteria for establishing such an account, SUP was concerned to see the improper comingling of other subjective or irrelevant factors into the process that were related to recoverability. As recoverability was not in the proceeding scope, SUP is of the opinion that there was an insufficient or potentially non-existent evidentiary basis for many of the assertions made by and positions taken by intervenors and Staff.

While some of these extraneous factors could have relevance in a future discussion of recoverability, SUP considers that they were not relevant to OPG’s initial request or to the proceeding’s specific scope. Examples of such factors include the date when OPG knew of the court challenges against Bill 124, a discussion of actual 2022 ROE (without inclusion of subsequent actual or forecast ROEs and with no explicit consideration of related effects of OPG’s existing earning sharing mechanism), and introduction of the newly introduced concept of “operational hardship.”

Application of Existing Regulatory Criteria

In its EB-2023-0098 submission, OPG summarizes its understanding of the documented criteria for the establishment of a variance account under its regulatory model. (OPG EB-2023-0098 Application pp. 3-4). No party opposed this interpretation.

Summarizing these criteria:

1. The event triggering the new costs must be unforeseen at the time of the last rate reset.
2. From OEB Distribution filing requirements three additional specific and generic criteria must also be met:
 - a. Causation (the costs must be outside the basis on which rates were most recently set);
 - b. Materiality (costs must be in excess of the OEB materiality threshold for the entity and must have a significant influence on the entity's operations);
 - c. Prudence (the costs must be reasonably incurred and must represent the most cost-effective option for consumers).

SUP will not summarize OPG's convincing legal arguments on the use of "unforeseen" versus "foreseeable" as a criterion. They are different. SUP agrees with OPG's assessment and with the position that an entity must always base its rate requests on the enacted laws in effect at the time of filing and argument (OPG AIC EB-2023-0209 pp. 10-14). SUP made this same argument in its submission for EB-2023-098.

Specifically:

"The additional compensation for the PWU and SUP moderation periods that will almost certainly be caused by the overturning of Bill 124 could not have been reasonably foreseen or estimated by OPG during the EB-2020-0290 proceeding because the direction, nature and timing of court's decision was not reasonably predictable. Even if OPG had correctly guessed that the court would eventually overturn Bill 124 on a constitutional basis, there would have been no regulatory basis for including anything in excess of the Bill 124 wage caps that were included in payment amounts. Bill 124 was the law in existence until the court overturned it. Including any amounts in excess of Bill 124 maximums at that point in time would not have been considered prudent or consistent with regulatory theory, even if a reasonable estimate of actual future obligations could have been made at that time."
(SUP submission EB-2023-0098 p. 2)

With respect to the three filing requirements criteria paraphrased above, the criteria are clearly met because:

- a. Re. Causation - OPG's rate did not include the additional costs that will result from the reversal of Bill 124.
- b. Re. Materiality – the \$10 million threshold for OPG is far exceeded by the estimated \$188 million impact over the rate period of reversing Bill 124. The “significant influence” aspect of the criterion is discussed separately below.
- c. Re. Prudence – the costs are reasonably incurred because OPG has no realistic ability to avoid them. Increases will either be the result of good faith negotiation or arbitration. As much as intervenors might not like it, the increased costs are the most cost-effective option while continuing to meet OPG's requirement to serve. With respect to prudence, it is important to note that inflation sky-rocketed to unexpected levels not seen in decades in 2022. This resulted in higher salaries being negotiated by the PWU and awarded by the arbitrator for the Society. OPG had very limited control over these costs. In the absence of such inflation levels following the last payment amounts proceeding, it is questionable whether a variance account would have been needed or sought by OPG.

As noted above, the materiality criterion refers to the costs being large enough to have a significant influence on the entity's operations. Somehow, during the EB-2023-0098 process, this concept morphed into “operational hardship.” Operational hardship took on a flavor approaching a going concern test. Nowhere in regulatory theory does it appear that a utility should only be able to recover incremental costs sufficient to conduct its work program and to stay financially afloat. If there is concern that an enterprise will recover more than it reasonably requires to cover its costs, complete its work program and provide a reasonable return to investors, this issue is best handled through the introduction of an earnings sharing mechanism (ESM). OPG has such an asymmetrical mechanism in place, a significant fact that was mentioned only once in the OEB's EB-2023-0098 Decision. Strangely, based on the documented rationale, the existence of OPG's ESM does not appear to have been a factor considered in the OEB's decision.

SUP is very wary of regulatory theory, principles and criteria that are made up or changed “on the fly.” In SUP's view there is no regulatory equivalency between “significant influence” and “operational hardship.” In the EB-2023-0098 case, the adoption of an “operational hardship” test as a result of certain intervenors' advocating such a view, resulted in the creation of a new criterion replacing “significant influence.” This resulted in a new decision precedent incorporating that material change to the established written regulatory criteria for establishing a variance account. Adopting changes to important documented regulatory criteria without due process risks the creation of an unmanageable regulatory model whereby all participants must refer both to written policy guidelines and procedural guidance and also be knowledgeable of all relevant case precedents. Other future Board panels face the same problem. This combines to create a real risk of flawed

and inconsistent decision making. A change as significant as this one should be exposed and discussed as a change in regulatory guidance or filing requirements, not slipped into a process and resulting decision without any suitable evidentiary support.

Inclusion of Recovery-Related Factors in the OEB's Variance Account Eligibility Decision

SUP has already alluded to the inclusion of 2022 actual ROE in the assessment of whether or not the criteria for a variance account had been met. In its decision (EB-2023-0098 p.8), the OEB noted:

"OPG estimated its 2022 actual ROE for its regulated facilities will be between 12.5% and 13.0%, which is in excess of the OEB approved 2022 ROE of 8.66%."

and

"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." (Decision p. 10)

In its EB-2023-0098 submission, SUP noted:

"SUP would also note that actual ROE prior to the effective date of March 1, 2023 is, if relevant at all, only part of the story. If ROE is going to be taken into account in future, SUP would argue that ROE for the entire period up to the next payment amounts effective date needs to be considered. Obviously this cannot be assessed now, reinforcing the view that ROE should be considered a potential factor for argument at a future prudency review rather than now at the account establishment stage."

In addition, if actual ROE is going to be considered in some way, other impactive regulatory mechanisms such as earnings sharing need to be taken into account to ensure a logically consistent and coherent conclusion."

In addition, SUP asserted:

"In its May 9, 2023 letter, SEC requested that OPG provide actual ROE information without making a convincing case for why this is relevant to the simple establishment of a new regulatory account. OPG's position is that "an applicant's actual ROE is not relevant to the establishment of a deferral or variance account." In addition, OPG notes that "there is no "means test" or "need" criterion for establishing a deferral or variance account in the OEB's regulatory model under which it operates."

SUP concurs with this view.

The decision before the Board is whether or not to allow or require OPG to establish a variance account and conceptually how the various components of revenue requirement should be reflected within it.” (SUP EB-2023-0098 Submission p.4)

SUP stands by its statement excerpted above and believes that the OEB erred in its decision by expanding its assessment of OPG’s eligibility to open a variance account to include factors that refer more to ultimate recoverability than to whether or not the technical criteria for the establishment of such an account had been met.

Conclusion

SUP agrees with OPG that the OEB erred in its decision to deny OPG approval for a variance account to accommodate the costs related to the reversal of Bill 124. SUP believes that the variance account should have been approved as requested effective March 31, 2023.

Furthermore, SUP is concerned that OPG will not get a fair hearing on the merits of recoverability of any costs included in the account if the EB-2023-0098 decision is not reversed and made non-applicable. Many assertions made by intervenors found their way into their own and Staff submissions and ultimately into the OEB decision without any appropriate evidentiary basis. SUP believes that an assessment of recoverability should occur at OPG’s next payment amounts proceeding without reference to discussion or conclusion found in the EB-2023-0098 decision as such discussion was incompletely supported and out of scope. Appropriate evidence should be tabled and examined by interested parties at the next payment amounts proceeding to determine the extent to which the established recovery criteria have been met. This erroneous decision will not assist in the fairness of that process and it should be disregarded.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS
30th DAY OF AUGUST, 2023**