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Ontario Power Generation Inc.
Motion to Review and Vary the June 27, 2023 Decision and Order in EB-2023-0098

Submission of the
Vulnerable Energy Consumers Coalition
(VECC)

August 30, 2023

Vulnerable Energy Consumers Coalition

Public Interest Advocacy Centre
613-562-4002
piac@piac.ca

Mark C. Garner

Digitally signed by Mark C. Garner
Date: 2023.08.30 20:53:38 -04'00'

Overview

1. The Application is to vary the Board's Decision EB-2023-0098. In that Decision the Board denied the establishment of a variance account to record the nuclear revenue requirement impacts resulting from the November 29, 2022 decision by the Superior Court of Justice to strike down provincial legislation (Bill 124) limiting wage increases for the broader public sector on constitutional grounds.

2. On July 17, 2023 OPG filed a notice of motion to review and vary the Decision and to grant the original request.

3. In making the decision to hear the motion the Board did not hear submissions as to whether the motion met the threshold question as set out in Rule 43.01 of the Rules of Practice and Procedure. Instead in granting the request to hear the motion the Board relies solely on the materiality of the issue. OPG estimates incremental costs of approximately $188 million due to the court striking down as unconstitutional, legislation imposing a three-year wage cap on public sector employees.

4. The Board's Rules of Practice and Procedure require grounds for a motion require the following be present:[1]

> *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;*

5. VECC submits that the Motion is without merit, adds no new information or analysis of the relevant law and simply reargues the positions of the Applicant from the original proceeding.

6. We submit the motion should be denied as it fails to meet the test of a clearly identifiable error of law.

[1] Ontario Energy Board, Rules of Practice and Procedure, Revised July 13, 2023, page 31.

Misapplying the established bases for accounting orders
Unforeseeable or Unforeseen, Risk and Materiality

7. The first ground set out in the motion is a rather convoluted argument that attempts to draw a distinction between whether the possible overturning of Bill 124 was "unforeseeable" and or "actually foreseen." OPG sums up its argument in this way:

> First, as a legal matter, the "unforeseen" test under OPG's approved rate framework is determined by considering whether the event was or should have been "predicted or anticipated"—as a basic principle of law, no party can be expected to predict or anticipate duly enacted legislation being struck down as unconstitutional. Rather than apply this standard, the Decision used the incorrect standard of "unforeseeable" to focus on the *risk* of the event occurring. It should instead have focused on whether OPG could have predicted the event's actual *occurrence* (no party could have predicted that duly enacted legislation would be declared unconstitutional). Rather than applying a factual consideration of whether the event was foreseen or predicted at the time, the OEB has incorrectly applied a fundamentally different standard of foreseeability to retrospectively consider whether there was any possibility of the legislation being declared unconstitutional.

8. In our view the distinction OPG tries to draw is without meaning and the test it tries to invent is without precedent. First as a matter of pragmatics all variance and deferral accounts are created for the purpose of capturing "unforeseeable" events. If the event is foreseeable in the sense of being able to be reasonably estimated or forecast it should be included in the initial derivation of the rate (or here price). For example, the Board allows gas utilities to create natural gas price variance accounts because changes in variable priced natural gas contracts are seen as subject to unforeseeable events which make it difficult to fix the price permanently into rates. Conversely electric distribution utilities, rather than using a deferral account, often project a given amount into operating budgets for "storm damage" based on historical occurrences and estimations of history repeating itself.

9. OPG's argument is that the Board should decide against it only if it finds the event was "*actually foreseen or predicted at the time.*" But this is oxymoronic. If the event was foreseen or predicted then it would (or should) have been included into the calculation of the base rates (prices) as part of a forecast. Obviously, Bill 124 overturning was not actually foreseen – only mystics foresee the future. Assessment of risk is not a binary exercise but rather one of probabilities. Events with a high level of probability are estimated and forecast and, along a spectrum of outcomes and mitigation strategies, those with very low probability and materiality are ignored. Variance and deferral accounts are a risk mitigation tools and sought to protect against not what is foreseen but what is foreseeable and where there is a reasonable probability that the event will materialize and in a financially material way.

10. If one were to follow OPG's argument to its logical conclusion then a variance or deferral account should only be established under the same circumstances where it would be included as part of a forecast in deriving rates/price. The Board might ask - if the event is foreseen (presumably in some non-Kreskin fashion) then why would it not form part of the utility's cost forecast?

11. The question the Board grapples with in its decision is whether the risk was known or knowable at the various times during the proceeding. Notwithstanding OPG's objection of the consideration of risk (as witnessed by the inordinate number of underlining of that word in their argument) the Board's conclusions are sound. An assessment of risk is at the essence of the tests for establishing a regulatory deferral or variance account. Otherwise, the Board might establish accounts for any potential but highly unlikely (i.e., non risky) event.

12. An assessment of the risk of occurrence is always an issue in the case of establishing a variance or deferral account. In this proceeding the Board rightfully listens to parties who argued that the "Bill 124" risk was clearly identifiable by the Utility and that OPG did not at the time of the original proceeding make a proposal for a risk mitigating account. In fact, the assessment of risk precisely goes to OPG's melodramatic claim that "[T*]he effect of the 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*.[2] We might say – and with only a bit of rhetorical licence – isn't this precisely what OPG did when it sought and had approved in EB-2020-0290 an excess of 20 different types of deferral and variance accounts[3].

13. The Motion also makes much of the uncertainty surrounding the constitutionality of Bill 124. Such statements only go to show that there was an evident risk of overturning of the law. In any event since OPG's labour contracts include "re-opener" provisions it is a matter of fact that the Utility understood a risk existed. The assessment made by OPG as to that risk and why they choose not to attempt to mitigate it during the EB-2020-0290 proceeding is known only to them. What VECC can say is had they made an application during that proceeding for this account it would clearly have had an explicit role in the settlement negotiations.

14. We also find it somewhat ironic that OPG presents its arguments today as what was once "unforeseeable" now merits the "foreseen" category. They state:

> Even today, the constitutional validity of Bill 124 is not settled. A four-day appeal was argued in June 2023 and the Court of Appeal's decision is under reserve. The Court of Appeal could overturn the Superior Court of Justice's decision and uphold the legislation, and such a decision could itself be further appealed to the Supreme Court of Canada.

[2] Page 14

[3] See EB-2020-0290, Exhibit H1, Tab 1, Schedule 1, page 4 of 42

15. So, what has changed? As during EB-2020-0290 the matter is still before the courts. At what point did the magic occur where OPG's invented test was met? In the OPG's words "*no party can be expected to predict or anticipate duly enacted legislation being struck down as unconstitutional*." Yet OPG now makes making the (risk) assessment that the legislation is unlikely to be resurrected – otherwise it would not seek the account. OPG wants the Board to believe that before it could not assess the likelihood of whether the legislation would be struck down, but now it can now make the risk assessment of whether it is likely to ultimately survive legal reversal or use of the Constitution's notwithstanding provision. If the Board wishes to follow OPG's convoluted logic then it should not deal with this matter until it is finally settled in the courts and by the legislature. That is the only time when the matter would meet OPG's "foreseen" test.

16. Finally, OPG refers to a nearly 20-year-old decision to imply the Board has a history of not approving accounts based ongoing litigation. This is a selective reference. We would note that Enbridge (then Consumers Gas) had an approved deferral account for a prolonged period to address potential litigation with respect to the production of manufactured gas.[4]

17. Aside from the selective nature of the reference it also ignores the fact specific differences. In the referenced case the Board had already approved a Class Action Suite Deferral Account (CASDA). This account was capturing litigation and other costs[5]. A reading of the Board's Decision referenced by OPG makes clear that what was at issues was the uncertainty surrounding both the quantum of an award and the uncertainty as to the liability of different parties. The facts in this case are very different. No one disputes that in the event that Bill 124 were overturned OPG would be in the position of having to revisit its labour agreements. And at Exhibit L, F4-03-PWU-023 OPG discusses the potential quantum of adjusting contracts to meet expected inflation.

18. Requests for deferral and variance accounts are always very specific to the assessment of causation, materiality and management's ability to control the circumstances. We submit the Board should put little weight on OPG's imperfect very historic analogy.

19. In our submission the arguments of OPG as to "foreseeability" are convoluted and logically inconsistent and should be rejected by the Board.

[4] See EB-2019-0105, Exhibit B, Tab 1 page 28- and the response to VECC at Exhibit I.VECC.4 for an explanation of the Manufactured Gas Plant Deferral Account (MGPDA). The account was discontinued as part of an approved settlement of the parties in that proceeding.

[5] RP-2003-0203, Partial Decision with Reasons, August 31, 2004 - Section 4.2 sets out the costs being captured by the account.

Materiality

Mitigating Circumstances – operational hardship

20. The Utility's other argument falls under the ambit of the "materiality test" but this is a bit misleading as the Board grants the hearing of the motion based on the acceptance that the matter at hand is material. OPG's grievance is that the Board imputed mitigating financial circumstances in considering whether to grant the account. These were whether the Utility was likely to face undue financial hardship should it not have recourse to the sought relief. The argument is put forward under the ambit of "operational hardship" and in this way:

> However, the Decision concluded that, based on OPG's 2022 return on equity only, the increased labour costs were not material because they would not cause OPG "operational hardship" in the future. It is incorrect on the one hand to make a finding that the evidence of OPG's 2022 performance is not applicable to the remainder of the rate period and then to disregard that finding and apply a fact found to be irrelevant to the materiality question. It is also important to note that OPG was not seeking to record costs incurred in 2022, only those costs incurred on or after the proposed effective date of the variance account, March 1, 2023.

21. In this regard OPG shows their lack of understanding of long held OEB practice with respect to the establishment of deferral and variance accounts. It is standard practice even when granted such accounts are subject on disposition to tests of materiality. That can occur based on the cost relative to overall costs or based on the overall financial performance of the utility. Deferral and variance accounts are departures from the norms of market practice. Other than for monopolies it is rare for a company to be able to retroactively adjust the price for a good or service after the initial transaction. Regulating entities are an exception to that market reality and regulators rightfully scrutinize the need by examining the utility's financial performance when considering whether that privilege should be granted.

22. The Board's Decision simply observes the ability of OPG to absorb some incremental costs based on its past and probable current performance. Nothing precludes OPG from applying later, when the cost implications are known with certainty (in OPG's words – things become "foreseen"). It is possible that OPG could provide additional information showing the unreasonable financial harm due to incremental labour costs.

23. In any event OPG's objections that the Board uses past experience to consider future capability are absurd. In EB-2020-0290 OPG did what every other regulated utility in Ontario does – its used history to support its case for future needs. A utility with historical underearnings approaches the Board for relief based on those circumstances. OPG's arguments tells that the Board should ignore such pleas as the past is no indication of the future. The Board might (and certainly we will) remember their argument the next time relief is sought.

24. In our submission the Board applies correctly the test of materiality and is well within the bounds of regulatory practice to consider whether OPG would suffer significantly from the absence of the sought account.

Consideration of the EB-2020-0290 Settlement Agreement

25. OPG also makes the following statement in response to the arguments as to the interplay between the requested variance account after the close of EB-2020-0290 proceeding and after the completion of the settlement conference in that case:

> No party filed evidence that a request for a variance account could have or would have affected the terms of the Settlement Agreement. In reaching this conclusion, the Panel relied on one assertion in one party's submissions – the assertion was a general statement and not based on evidence on which the Panel could rely. The Decision acknowledges that its conclusion was based on arguments, not evidence: "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."[22] Speculation by a party to the settlement as to how the negotiations might have unfolded based on the information at issue is not evidence upon which the Decision can properly be based.

26. We would point out that VECC also argued that the Board should consider the binding nature of the agreement between the intervening parties and OPG. Out of an abundance of caution of potentially violating the confidentiality terms of that settlement we said little else. However, we agree with SEC that had OPG sought a variance account it would have played an important role in the settlement negotiations. OPG errs in its assertion that SEC is being speculative.

27. Neither the Board nor OPG can ascertain what was in the minds of parties at the time of settlement. No evidence needs to be proffered to accept the proposition that a reasonable person might conclude that the absence a proposal for a Bill 124 variance account was a strategic error on behalf of OPG. Clearly the risk was apparent at the time of negotiations and clearly most parties were interested in reducing the obviously high compensation costs of OPG. Whatever was said at that conference is subject to confidentiality and should remain that way. However, even if nothing was explicitly said about a Bill 124 deferral account that does not mean it was not in the minds of parties.

28. VECC is not required to ensure OPG was "doing a smart thing" by not seeking an account at the time of its original application and notwithstanding the clear risk at the time that Bill 124 might be overturned. OPG is suggesting that during the settlement conference intervening parties had an obligation to pause and ask the Utility if they knew what are doing. Maybe they did. Can OPG attest that the topic was never raised? Do

they recall every conversation in every detail? Did they eavesdrop on the conversation of the other parties?

29. It certainly cannot be determined in hindsight what exactly was said at every moment of a prolonged negotiation. And what of it? What if nothing was explicitly said about the matter of Bill 124 in those negotiations? Can the Board now make the determination that silence was strategic or something else? Should the Board ask parties to explain their negotiating strategies? If so, then perhaps the Board should ask OPG what their strategy was.

30. The only question the Board can now possibly answer is whether it is reasonable to conclude that parties could have had in their minds the matter of Bill 124 at the time of the negotiations. In our submission the answer to that is obvious. We suggest the Board review OPG's response to the PWU at Exhibit L, F4-03-PWU-023 and other evidence to see that minds might clearly have been on the issue of Bill 124. Every party - including OPG - would have had an assessment as to what Bill 124 meant in the settlement negotiations. No "evidence" is required to understand that parties might use their assessment in the best way to advance their own interests. OPG's argument on this matter is dismissive of the intelligence of the intervening parties. Implicitly or explicitly Bill 124 was part of the settlement process and ergo it is part of the non-severable settlement agreement that was approved by the Board.

Summary

31. VECC submits that the Board has not erred in its original decision denying the sought variance account. The Decision in EB-2023-0098 should therefore be upheld.

VECC submits that it has acted responsibly and efficiently during this proceeding and requests that it be allowed to recover 100% of its reasonably incurred costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED