ONTARIO POWER GENERATION

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BY RESS

Ms. Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street
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Toronto, ON
M4P 1E4

Dear Ms. Marconi:

Re: EB-2023-0209 – Ontario Power Generation Inc. Motion to Review and Vary the June 27, 2023 Decision and Order in EB-2023-0098

Please find attached OPG's Reply Submissions in the above-mentioned proceedings. OPG has submitted these documents through the Regulatory Electronic Submissions System.

If you have any questions regarding this submission, please contact me at 416-592-2976.

Respectfully submitted,

Saba Zadeh

Saba Zadeh

CC:
Peter Cuff (OPG) via e-mail
Charles Keizer (Torys LLP) via e-mail
Intervenors of Record in EB-2023-0098

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.

REPLY SUBMISSIONS

A. OVERVIEW

1. Ontario Power Generation's ("OPG") motion concerns the proper application of the test, established under its approved payment amounts framework, to establish a variance account to record costs arising from an event unforeseen at the time OPG's payment amounts framework was approved. The prudence of the costs that OPG proposes to record in the account is not at issue. If granted, OPG's motion would result only in the creation of the variance account, with the prudence of any recorded amounts to be assessed in a future application. The amounts to be recorded are increased compensation costs, currently estimated at $188 million, that OPG has and expects to incur for its nuclear business during the 2022-2026 period as a result of a court striking down as unconstitutional, legislation imposing a three-year wage cap on public sector employees in Ontario ("Bill 124").

2. OPG's motion is to review and vary the Ontario Energy Board's ("OEB") June 27, 2023 Decision and Order in EB-2023-0098 (the "Decision"),[1] which denied OPG's application for the requested variance account, concluding that because the court challenge had been filed at the time of OPG's

[1] See Book of Authorities ("BOA"), Tab 1 (filed with OPG's Argument-in-Chief).

payment amounts application (by entities unrelated to OPG), it was a foreseeable risk that the legislation might be struck down. The following are OPG's reply submissions. For the reasons set out herein, as well as in OPG's Motion and Argument-in-Chief, the Decision should be varied and the accounting order establishing the requested variance account granted effective from the requested effective date.

B. REPLY SUBMISSIONS

3. The following are OPG's responses to the submissions of OEB staff and the intervenors, organized under the following headings: (a) The Decision Misapplied the Established Basis for Authorizing Accounting Orders Under OPG's Approved Payment Amount Framework, (b) The Decision Reached Conclusions on a Speculative and Non-Factual Basis, (c) The Decision Incorrectly Applied the Materiality Criterion for Variance Account Eligibility, and (d) Other Issues. Among the Other Issues addressed in the last section, OPG responds to the suggestions from certain parties that the Decision was entirely at the OEB's discretion and that OPG failed to meet obligations to disclose information about the constitutional challenges and the risks they posed to OPG. As discussed below, the OEB did not have complete discretion but, instead, was required to make its decision within the constraints established by the approved payment amount framework. Furthermore, it is incorrect to assume that OPG was in possession of any special knowledge or information needing to be disclosed regarding the legal challenges or the risk they presented.

a. *The Decision Misapplied the Established Basis for Authorizing Accounting Orders Under OPG's Approved Payment Amount Framework*

4. In its Argument-in-Chief, OPG submitted that the primary error in the Decision is the Decision's failure to apply the standard for establishing accounting orders under OPG's approved payment amount framework. Under OPG's approved payment amount framework, OPG is entitled to seek a variance account during the rate period to record the costs of "unforeseen" events. As OPG submitted, that standard is met where the occurrence of a particular risk (i.e., the event) cannot be predicted or anticipated.[2] OPG submitted that, as a matter of law, the outcome of a

[2] OPG, Argument-in-Chief, p. 2.

constitutional challenge cannot be predicted or anticipated before the court hearing the matter makes a decision.[3] OPG also explained that, as a factual matter, OPG could not have foreseen that Bill 124 would be struck down.[4]

(i) OPG's motion does not require the OEB to apply "subjective foresight"

5. OEB staff and Canadian Manufacturers & Exporters ("CME") argue that OPG seeks to establish a "test of subjective foresight."[5] This is not an accurate characterization of OPG's position. OPG's submission is that the outcome of constitutional litigation cannot be predicted in general. The case law that OPG provided (addressed below) illustrates that the courts themselves cannot predict how they will deal with a constitutional challenge. It is not a question of what OPG could have subjectively foreseen but rather what anyone could foresee.

6. The fact that a court challenge had been filed at the time of OPG's payment amounts application should not have determined the outcome of OPG's request. Certainly, the court challenge created a risk that the legislation might be struck down. But the fact that a risk existed was not the proper end to the inquiry. Every utility faces risks—what matters is not the fact that a risk exists but whether the outcome of the event giving rise to the risk can be foreseen. In the case of a constitutional challenge to duly enacted legislation, OPG's position is that no regulated entity can predict the likelihood of a constitutional challenge being successful. To require this level of foresight from OPG is to impose a level of foresight that, as the courts have explained, even they do not have with respect to how constitutional challenges will be decided.

7. As Vulnerable Energy Consumers Coalition ("VECC") acknowledges, variance accounts exist to protect costs "where there is a reasonable probability that the event will materialize."[6] The striking down of the legislation as unconstitutional is not an event that anyone could determine as "reasonably probable" to occur.

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3 OPG, Argument-in-Chief, p. 2.

4 OPG, Argument-in-Chief, p. 3.

5 OEB staff Submission, p. 3; CME Submission, para. 25.

6 VECC Submission, para. 9.

8. Contrary to CME's submission, granting OPG's motion will not disincentivize regulated entities from exercising "reasonable and prudent foresight" when evaluating the risks that impact their business.[7] The risk at the centre of OPG's motion (that a duly enacted piece of legislation would be declared unconstitutional) is narrow and not precedent setting. It is an outlier among the types of risks that regulated entities face. Regulated entities are not regularly faced with risks related to legislation being declared unconstitutional. Accepting OPG's position, that predicting constitutionality is not a matter a regulated entity can undertake, has no impact on the typical operating risks associated with a regulated entity's business, to which the application of normal prudent foresight is properly applied.

9. Granting OPG's motion would be consistent with how regulated entities, and indeed the OEB, have always treated constitutional challenges. For instance, when the Global Adjustment was challenged as unconstitutional, the OEB, the Independent Electricity System Operator, and Ontario's regulated electricity entities did not establish contingency accounting schemes simply because a court challenge had been filed.[8] Without a court decision on the merits of the challenge, everyone continued to operate on the basis that the Global Adjustment was constitutional. That is what OPG did with Bill 124; only when the constitutional challenge was sustained did OPG seek a variance account. At that time, the risk manifested and OPG's compensation costs became subject to a material variance that required an account.

(ii) OPG's position on this motion has not changed from its position in EB-2023-0098

10. OEB staff and CME argue that the OEB should not vary the Decision because it applied an "objective" standard of "reasonable foreseeability" that OPG argued for in the underlying motion. In support of their position, OEB staff and CME quote sections from OPG's reply in EB-2023-0098.[9]

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7 CME Submission, paras. 25, 35.

8 *National Steel Car Limited v Independent Electricity System Operator*, 2019 ONCA 929, paras 9, 10 (the Court of Appeal holding that National Steel Car's claim "is sufficiently plausible on the evidentiary record" and "[i]t is not plain, obvious and beyond doubt that the Global Adjustment, and particularly the challenged component, is properly characterized as a valid regulatory charge and not as an impermissible tax"; the issue was remitted to the Superior Court for rehearing).

9 OEB staff Submission, pp 7-8; CME Submission, para 26.

11. OEB staff and CME's position misconceives OPG's arguments in the motion below. Those arguments are consistent with OPG's position here. As OPG stated in its reply in EB-2023-0098, in sections quoted by both OEB staff and CME, OPG argued:

> *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.*[10] (emphasis added)

12. This is entirely consistent with OPG's position here—as the case law illustrates, it is not possible to predict with any certainty (let alone reasonable certainty) the likelihood that a piece of challenged legislation is unconstitutional. The occurrence of that risk cannot materialize until there is a court decision on the point. To require more would be to impute a level of constitutional foresight to OPG that the courts themselves have said they do not possess.

(iii) Case law supports OPG's position

13. OPG's Argument-in-Chief referenced five judicial decisions to support the fundamental principle that statutes enacted by the legislature are presumed constitutional. OPG submitted that the presumption means organizations are entitled to organize their affairs on the assumption that the laws in place are not unconstitutional, unless and until there is a legal determination to the contrary.[11]

14. OEB staff and CME argue that these decisions, addressed below, do not apply to OPG's situation. They seek to distinguish the decisions on the basis that they "were decided in significantly different contexts."[12] OEB staff and CME's arguments misunderstand the decisions and the broad principle that they stand for—that the constitutionality of legislation is not something that anyone can predict. No intervenor has provided a case dealing with constitutional challenges, in the energy context or in any other context, that contravenes this broad principle. There is no basis to

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[10] EB-2023-0098, OPG Submission, pp. 3 (ll15-17) and 18 (ll 7-9); OEB staff Submission, p. 8; CME Submission, para 26.

[11] OPG Argument-in-Chief, paras 4, 28.

[12] CME Submission, para 29.

apply any different standard of constitutional foresight to OPG, or to expect the OEB to assess the merits of pending constitutional challenges when establishing deferral and variance accounts.

15. ***MacNeil v Nova Scotia*, [1978] 2 SCR 662 (BOA Tab 8)** – This is the foundational Supreme Court of Canada decision on the presumption of constitutionality. OEB staff and CME seek to distinguish this case by pointing to the fact that the presumption outlined by the Supreme Court is one that courts themselves apply when approaching a constitutional challenge.[13] Neither OEB staff nor CME have explained how a different standard should apply to OPG's assessment of the potential validity of a constitutional challenge to the Act. If the courts themselves presume, as a starting point, that laws are constitutional, then entities governed by those laws that should also operate under the same presumption.

16. OEB staff further points to the Supreme Court's caution in *Manitoba v Metropolitan Stores* that the "innovative and evolutive character" of the *Charter* means courts should not apply the presumption literally in *Charter* challenges.[14] However, this decision only illustrates the point the Federal Court of Appeal made in the *Schmidt v Canada* decision (addressed below) that "constitutional law can change" and courts themselves cannot predict the outcome of future constitutional challenges. The highly unpredictable nature of constitutional litigation means that affected organizations have three choices when a court challenge is filed: (i) assume the law is valid, unless and until the court rules otherwise; (ii) assume the law is invalid, immediately; or (iii) make their own determination of the potential constitutional validity of the legislation (*i.e.*, put themselves in the court's shoes). Since the courts themselves cannot predict the outcome of constitutional challenges, it is inappropriate to ask regulated entities to make their own assessments of the legal strength of such a court challenge. Regulated entities are not in the business of deciding constitutional challenges to legislation; this is the purview of courts. This leaves the other two options. No intervenor has provided a case that stands for the proposition that parties should immediately assume a law is invalid whenever a court challenge is filed. In this situation, a party can do no better than assume that as between two possibilities (validity and

[13] OEB staff Submission, p. 4; CME Submission, para 29(a).

[14] OEB staff Submission, p. 4 (Manitoba (AG) v Metropolitan Stores Ltd, [1987] 1 SCR 110, para 24).

invalidity) that it does not have the expertise to assess, it should assume the law is valid until a court finds otherwise.

17. ***Schmidt v Canada (Attorney General)*, 2018 FCA 55 (BOA Tab 9)** – In this decision, the Federal Court of Appeal noted that "constitutional law can change" and "[c]onstitutional authorities are not necessarily good precedent in later cases. Courts can now depart more readily from earlier constitutional precedents."[15] OEB staff and CME argue that this decision shows OPG should have known there was a risk the court challenge could succeed.[16] OEB staff and CME's submissions miss the point. That risk always existed. *Schmidt* illustrates that when courts approach a constitutional issue, it is not a straightforward analysis – how courts have ruled in the past may not govern how they will rule on similar constitutional issues in future. In these circumstances it is harder (not easier) to predict the likelihood of a particular constitutional outcome occurring. OPG cannot be expected to be more capable of predicting the constitutional outcome of a challenge than a court.

18. *Schmidt* is also the answer to OEB staff's argument that because other labour unions have successfully challenged other wage legislation in the past, OPG should somehow have been able to predict the legal strength of the challenge in this case.[17] As the Federal Court of Appeal noted in *Schmidt*: "Constitutional authorities are not necessarily good precedent in later cases." As noted, the trouble with the arguments from the intervenors that oppose OPG's motion is that they would seek to put OPG into the shoes of a court and require OPG to make an assessment of the likely outcome of the court challenge, which as demonstrated above, is inherently unpredictable. Under OPG's approved payment amount framework, the occurrence of an event that is inherently unpredictable cannot be one that is "foreseen."

19. ***R v Weir*, 1999 ABCA 275 (BOA Tab 10)** – In this decision, the Alberta Court of Appeal held that parties are not "fortunetellers" and cannot "be expected to predict the course of constitutional change in Canada's courts."[18] OEB staff and CME emphasize the nature of the criminal proceeding

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15 Schmidt v. Canada (Attorney General), 2018 FCA 55, paras 90-91.

16 OEB staff Submission, p. 5; CME Submission, para 29(c).

17 OEB staff Submission, p. 7.

18 R v Weir, 1999 ABCA 275, para 10.

in which the Court of Appeal made the statement.[19] However, the statement is not confined to that context. The criminal context is simply an example of a sphere where constitutional issues arise on a regular basis. The Court of Appeal was not creating an exception to a general rule when it held that people are not "fortunetellers." The Court did not state that, outside of the criminal context, people are expected to predict the constitutional validity of duly enacted legislation. Rather, what the Court said was that the very lawyers who were arguing the criminal case could not be faulted for having failed to predict legislation being struck down on constitutional grounds. If lawyers engaged in the heart of a case cannot be expected to have this level of foresight, there is no basis to require it of OPG, which was not involved in the court challenge at issue.

20. ***Air Canada v. British Columbia*, [1989] 1 SCR 1161** – In this decision, Supreme Court Justice Wilson noted that the appellant taxpayers "were entitled in making their payments to rely on the presumption of validity of the legislation"; Justice Wilson's statement was made in dissent because the majority of the court upheld the law and therefore did not need to deal with the issue of the validity of the appellant's conduct. OEB staff seeks to downplay the importance of Justice Wilson's comment by emphasizing the tax context of the case: "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."[20] In OPG's submission, Justice Wilson's statement precisely illustrates OPG's position. In assessing whether or not to seek a variance account as part of its payment amounts application, OPG was entitled to rely on the presumption that Bill 124 was valid legislation. OPG was not required to perform an analysis of the likelihood that of the legislation being struck down (which as illustrated by the cases above, is an impossible task).

21. ***Mustapha v Culligan*, 2008 SCC 27** – This is a leading case on the law of negligence, cited by OEB staff. OEB staff argues that this case should give the OEB comfort because its articulation of how "reasonable foreseeability" is defined in negligence law excludes "far-fetched risks." OEB staff argues that OPG had the necessary ingredients to determine that the risk of Bill 124 being declared unconstitutional was not "far-fetched." The factors that OEB staff cites to support their

[19] OEB staff Submission, p. 5; CME Submission, para 29(b).

[20] OEB staff Submission, p. 5.

conclusion that OPG's application should have addressed the risk that Bill 124 would be found unconstitutional illustrate where this argument leads. If the OEB accepts OEB staff's position, it would be endorsing a position that requires OPG to put itself in the shoes of a court and to make a prediction on complex legal questions of constitutional validity. The factors OEB staff says should have led OPG to realize the risk was not far-fetched are all legal points—they are that a reasonable person:

a. "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";

b. "would have known that in recent years various federal and provincial wage restraint statutes have been challenged, leaving judges divided"; and

c. "would have known that the Ontario Superior Court had found a provincial law imposing collective agreements for teachers to violate the freedom of association."[21]

22. While these are factors that a court could weigh, they are not factors that regulated entities in the electricity sector are expert at assessing. As noted, the courts have explained that even lawyers are not "fortunetellers" and cannot predict the outcomes of constitutional cases. OEB staff's position goes far beyond what a "reasonable" organization can be expected to evaluate when a court challenge is filed – it would have the OEB impose on OPG the obligation to weigh a constitutional question at the level that a court would.

23. **RP-2003-0203, Enbridge Gas Distribution Inc (BOA Tab 12)** – In this decision, the OEB found that it would be premature to establish an account to capture the impacts of litigation before the outcome of the litigation was known. OEB staff, School Energy Coalition ("SEC") and VECC emphasize the fact that the case was decided in the context of Enbridge Gas Distribution's ("Enbridge") annual cost-of-service model (meaning the issue could theoretically be dealt with in the next application).[22] These submissions ignore the fact that even in that context, Enbridge was

[21] OEB staff Submission, p. 7.

[22] OEB staff Submission, p. 5; SEC Submission, para 22; VECC Submission, para 16.

concerned it needed to apply for an account. The guidance that the OEB provided is that, in such circumstances, regulated entities should wait until the occurrence of the event. This guidance, that it is premature to apply for a variance account when the outcome of litigation is not known, is directly on point for OPG. In waiting to seek a variance account until after a court decision was issued declaring Bill 124 invalid, OPG acted in a manner consistent with such guidance. The Decision applies an approach inconsistent with the Enbridge decision in denying OPG's motion and holding that a variance account should be requested before the initial outcome of litigation is known.

(iv) Other arguments about foreseeability

24. The other arguments of OEB staff and the intervenors regarding foreseeability do not support the Decision:

a. ***Interrogatory about court challenge***. OEB staff argue that because OPG did not provide "a complete response" to an interrogatory about the chances of success of the court challenge, the OEB should "infer that it must have known there was a real risk of Bill 124 being overturned."[23] The fact that OPG did not answer that aspect of this interrogatory is consistent with OPG's position, not OEB staff's—OPG did not provide a prediction of the likely occurrence of Bill 124 being struck down because it could not.

b. ***Risk should have been foreseen because it had "considerable cost consequences."*** SEC and Association of Major Power Consumers in Ontario ("AMPCO") submit that the Decision's conclusion is supportable because the cost consequences of the legislation being struck down were "considerable," "significant," and would have a "material impact."[24] These arguments ignore the fact that materiality is related to the outcome of an event and not whether the event itself could be foreseen. This is addressed under the Materiality part of the test for a variance account. The size of the potential outcome is not a factor when determining the threshold issue, which is whether the occurrence of

[23] OEB staff Submission, p. 9.

[24] SEC Submission, para 16; AMPCO Submission, p 4.

the event giving rise to the risk could have been predicted (and therefore foreseen). These are independent inquiries.

c. ***What makes the risk foreseen now, if an appeal court might reverse the Superior Court?*** VECC takes the position that, because the Superior Court's decision has been appealed to the Court of Appeal and might be reversed (there, or by the Supreme Court of Canada), OPG is in no different position than it was before the Superior Court's decision was issued.[25] This submission misses the point. Before the Superior Court's decision, OPG was not in a position to evaluate the likelihood that a court would agree with the court challenge. While that challenge might yet fail in the appellate courts, there is now a decision from a court endorsing the challenge and because the ruling is not stayed, it is the law and OPG must abide by it. This is consistent with OPG's position throughout.

d. ***Decision's conclusion on "foreseeability" affected conclusion on Causation criterion.*** The Decision concluded that because "OPG could have foreseen the impact on its compensation expenses from the *risk* of Bill 124 being overturned," OPG's motion failed to meet the OEB's traditional causation requirement as well.[26] SEC makes the same argument, focusing on the foreseeability of risk: "foreseeability of *risk* is an important component of the causation inquiry, especially in the context of a multi-year rate framework."[27] The problem with SEC's argument, and the Decision's conclusion on causation, is that it is not the "foreseeability of risk" that matters under OPG's approved payment amount framework, but whether the costs were caused by an "unforeseen *event*" and the resulting outcome. Because, in this case, the occurrence of the event could not be predicted, the costs are caused by an unforeseen event. The Decision's conclusion on causation is in error.

e. ***Uncertainty of the risk different than uncertainty of the costs.*** VECC's submission confuses the ability to predict the likelihood that the event will occur with the ability to

[25] VECC Submission, para. 15.

[26] Decision, p. 7 (emphasis added).

[27] SEC Submission, paras. 17-19.

determine what the cost of the event would be (if it occurred). Contrary to VECC's submission, OPG's position is not that the risk of the event can only be foreseen if its cost can be "reasonably estimated or forecast."[28] Variance accounts exist to capture the uncertain impacts from events that have or are expected to occur. In this case, the expectation that the legislation was unconstitutional properly arose after the Superior Court issued its decision striking the legislation down. The cost of that event remains partly uncertain today. For example, even if the law is ultimately upheld, the collective bargaining outcome with the Society of Energy Professionals for the third year of the three-year "moderation period" under Bill 124 anticipated in OPG's payments amounts, being year 2024, is subject to ongoing negotiations and therefore is not yet known.

(v) The Effect of the Decision is that Every Potential Risk Must Now be Addressed

25. The Decision departed from the established "foreseen" standard and misapplied the approved basis for establishing variance or deferral accounts under OPG's payment amount framework by focusing on the foreseeability of the risk only and not whether the occurrence of the event could be predicted (i.e., expected or anticipated).[29]

26. According to the Decision, it was sufficient for the OEB to find that "the risk of Bill 124 being overturned" was present prior to the OEB-approved settlement proposal ("Settlement Agreement").[30] If there is a risk of an event and it is foreseeable, then according to the Decision, notwithstanding whether that the event's occurrence or non-occurrence can be anticipated, there is no basis for regulatory relief. However, being able to foresee or not foresee the occurrence of an event is different from knowing the existence of a risk of an event. If an event is expected or anticipated to occur, then the utility would either include the cost-related impacts of the event in rates or to the extent the cost-related impacts are unknown or uncertain the utility would seek a deferral or variance account. If it is expected or anticipated that the event will not occur, no relief would be sought.

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28 VECC Submission, paras. 8, 10.

29 OPG Argument-in-Chief, p. 2.

30 Decision, p. 6.

27. By considering the foreseeability of the risk only, the OEB, incorrectly, has applied a fundamentally different and broader standard. The effect of the Decision therefore is to require OPG, as part of its payment amounts applications, to identify every material risk and to request a deferral or variance account for every such risk or potential risk. This is not a reasonable interpretation of the approved payment amount framework and is indicative of its misapplication. It would render meaningless the OEB's prior approval of the mechanism for the treatment of unforeseen events as part of OPG's payment amount framework. Moreover, it is not a practical outcome to inform future applications by OPG, and other regulated entities in comparable circumstances.

28. Intervenors and OEB staff argue that OPG has overstated its concerns in this regard. Based on the wording of the Decision, OPG disagrees. SEC asserts that OPG 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. This would imply that OPG would be required, regardless of whether the event to which the risk relates is predicted, to identify the corresponding cost consequences and consider a rate remedy request. This is the very concern that OPG has articulated above.

29. CME states that the use of an objective standard of 'reasonable and prudent foresight' makes it clear that regulated entities would not have to predict every possible risk and request a variance account for each.[31] However, CME's submission supports the opposite conclusion. Under the standard CME sets out, a prudent applicant would be compelled to seek a deferral or variance account for every risk that, if realized, could have a material financial consequence, whether or not this consequence was foreseen at the time of the application. Failing to do so would put the applicant in jeopardy of a subsequent retrospective review determining that the risk could have been foreseen at the time of the application using "reasonable and prudent foresight."

b. ***The Decision Reached Conclusions on a Speculative and Non-Factual Basis***

30. As noted above, the OEB erred in its application of the approved requirements for establishing an accounting order because of its focus on "risk" and not on the predictability of the event to establish whether an event is unforeseen. In considering whether an event is unforeseen or

[31] CME Submission, p. 7.

foreseen, it is irrelevant to consider potential impacts on the Settlement Agreement underpinning the accounting order. This is because if the event is unforeseen, then it cannot be the basis of costs underpinning the Settlement Agreement and the resulting payment amounts order and, as such, the Settlement Agreement would not have been impacted.[32] If the event is foreseen, then the approved requirements for establishing an accounting order are not met and there is no reason to consider the Settlement Agreement. Based on the approved requirements and process for establishing an accounting order, the issue before the OEB was whether the overturning of Bill 124 was unforeseen. It was not a retrospective consideration of what the potential impact on the settlement negotiations might have been if the event could be foreseen and relief was sought or considered.

31. Notwithstanding the foregoing, the OEB considered and based its findings on the submissions of intervenors regarding the potential impact of the recovery of recorded Bill 124 related compensation costs on the settlement. This included findings that the risk and its potential OM&A budgetary implications should have been disclosed by OPG to inform the settlement negotiations, as well as that the exercise of reasonable and prudent foresight on OPG's part might have significantly altered the agreed-upon budget and subsequent OEB decision approving the Settlement Agreement. These were erroneous conclusions, first because the Decision's view of what is unforeseeable is premised on risk and not the ability to predict the event, and second, because the OEB reached these conclusions without any evidence that the Settlement Agreement could have been impacted.

32. It was an error for the OEB to find that a request for a variance account in EB-2020-0290 could or would have affected the terms of the Settlement Agreement because this finding was made based not on evidence but, rather, on speculation as to how the negotiations might have unfolded in that circumstance. Moreover, the potential impacts on settlement are not relevant to the determination of whether the proposed variance account should be granted because the basis for considering the proposed account is whether the event of Bill 124 being found unconstitutional was an unforeseen event and outside of the base upon which rates are derived.

[32] OPG Argument-in-Chief, p. 15.

33. OEB staff acknowledges that OPG is correct that the OEB's finding was not based on any evidence.[33] OEB staff, however, incorrectly asserts that no such evidence could have been led, as the parties to the settlement conference are precluded from disclosing the details of their confidential discussions and that the OEB could deduce the conclusion above because OM&A expenditures are typically the focus of rate regulatory proceedings.[34] However, the Settlement Agreement says that "the documents and other information provided during the course of the settlement proceeding, the discussion of each issue, the offers and counter-offers, and the negotiations leading to the settlement – or not – of each issue during the settlement conference are strictly privileged and without prejudice. None of the foregoing is admissible as evidence in this proceeding, or otherwise, with one exception: the need to resolve a subsequent dispute over the interpretation of any provision of this Settlement Proposal."[35]

34. The issue before the OEB was whether the overturning of Bill 124 was unforeseen. This is directly related to the interpretation of the term "unforeseen" as part of the agreed-upon and approved process to establish a variance account as articulated at Exhibit A1-3-2, p. 13 in EB-2020-0290,[36] which stated that unforeseen events affecting the nuclear business would continue to be addressed through an accounting order process. Among the settled issues of the payment amounts application was Issue 2.1, which concerned the question of whether OPG's approach to incentive rate-setting for establishing the nuclear payment amounts was appropriate. On that issue, the parties reached a complete settlement, noting that "the Parties accept OPG's proposed rate framework to the five-year IR term from 2022 to 2026."[37] The nuclear rate-setting framework evidence that included OPG's proposed treatment for unforeseen events was incorporated into and accepted by the parties as part of the settlement. Given that the potential impact to the Settlement Agreement was raised by intervenors as a basis for supporting their interpretation of "unforeseen" forming part of the Settlement Agreement, the above language would permit

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33 OEB staff Submission, p. 10.

34 OEB staff Submission, p. 10.

35 OEB, Decision and Order re Ontario Power Generation, EB-2020-0290, November 15, 2021, Schedule A – Approved Settlement Proposal, p. 5 of 51. (emphasis added)

36 See BOA, Tab 4.

37 OEB, Decision and Order re Ontario Power Generation, EB-2020-0290, November 15, 2021, Schedule A – Approved Settlement Proposal, pp. 32-33 of 51.

intervenors to lead evidence in support of the interpretation of the Settlement Agreement. There was no bar to filing evidence and, subject to the OEB's ruling, the OEB's confidentiality protocols could have been implemented to permit evidence to be filed and the information protected.

35. In their submissions, both SEC and VECC assert that there was no need to file evidence and their submissions alone are sufficient (as articulated by VECC) to conclude that parties could have had in their minds the matter of Bill 124 at the time of the negotiations.[38] 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. VECC and SEC's submissions ignore the fundamental aspect that the issue before the OEB is analogous to issues arising in contract since it involves the interpretation of the Settlement Agreement. As noted by OPG, an established rule of evidence is that statements made by a party after a contract is formed are not reliable and do not form part of the default factual matrix that is admissible to determine what the parties intended. If any evidence had been filed (and none was), it would have had to be contemporaneous evidence from the time the settlement was negotiated.[39] This is because the retrospective application of hindsight is inherently unreliable as parties can impose upon the settled agreement to their advantage aspects that were not necessarily contemplated by the parties at the time of the settled agreement.

36. SEC takes the position that the OEB is legally permitted to consider comments from intervenors' arguments regarding the fact that, had the information been disclosed, it would have impacted the settlement negotiations.[40] OPG submits that SEC's position is incorrect and that the acceptance and application of such an approach by the OEB would be legally unfair and a breach of natural justice. An applicant has the right to know the case it has to meet. This includes an appropriate level of discovery and examination to facts led by parties before the tribunal.[41] This is the reason the OEB does not permit parties to introduce untested facts through final

38 SEC Submission, p. 10; VECC Submission, p. 7.

39 OPG Argument-in-Chief, p. 16.

40 SEC Submission, p. 9.

41 *Kane v Bd of Governors of UBC*, [1980] 1 SCR 1105, p 1114 (citing Lord Denning in *Kanda v Government of the Federation of Malaya* [1960] AC 322: "a party must … know the case which is made against him. He must know what evidence has been given.")

submissions, which is what the intervenors and OEB staff are attempting to accomplish. Parties are free to seek leave to file evidence to the extent it is relevant. No intervenor sought to do so. As a result, the submissions of the intervenors and OEB staff regarding Settlement Agreement impacts should be given no weight in the current proceeding and the OEB was incorrect to have relied on those submissions in the original proceeding or to base any findings on those submissions.

c. ***The Decision Incorrectly Applied the Materiality Criterion for Variance Account Eligibility***

37. The Decision incorrectly applied the Materiality criterion in two respects. First, having accepted that OPG's actual returns on equity in a given year are not indicative of OPG's future returns, the Decision erred in concluding that OPG's performance in 2022 counteracts the suggestion that OPG would experience "operational hardships" in the future without the requested account. Second, by applying the stricter "operational hardships" test instead of the "significant influence" test, the Decision erroneously applied the Materiality criterion in a way that effectively rendered the first prong of the OEB's two prong test materiality test meaningless.

38. With respect to the first error, OEB staff acknowledge that OPG is correct in asserting that the OEB's ruling is internally inconsistent. However, OEB staff incorrectly dismiss this inconsistency with the off-handed comment that it is "trite" to say that past performance is not indicative of future performance and that past performance is the only consideration available. OEB staff's position should be rejected since the OEB's statement on past performance is at the very heart of the Decision's finding on materiality and, also, because it is counter to the fundamental regulatory principle of setting rates and providing regulatory relief on a prospective basis. Regarding this latter aspect, the purpose of approving a variance account is to permit the prospective recording of future amounts and the potential recovery of those recorded amounts in a future rate application. The use of a variance account for past periods would be retroactive rate making. It is not appropriate from a regulatory perspective to apply retrospective considerations to a prospective regulatory mechanism such as a variance account.

39. SEC likewise asserts that one year's financial performance is a sufficient indication of financial performance over the remaining four years of OPG's rate term.[42] However, this ignores that financial results for 2022, a year not covered by the variance account request, may be very different from the results over the period in which the variance account would apply such that the impacts of overturning Bill 124 would have significant influence.

40. To justify its position, OEB staff notes that the OEB looks at a utility's most recent return on equity when determining whether the utility is eligible for adjustments to base rates. However, this is inaccurate since the OEB does not rely on return on equity results of plus or minus 300 basis points alone to consider whether a utility should rebase. The circumstance referenced by OEB staff is for early rebasing. In that circumstance, the OEB monitors results filed by regulated entities through their reporting requirements and determines if a regulatory review is warranted. It is important to note that, consistent with the regulatory principles above, any "such review will be prospective"[43] and not retrospective as stated by OEB staff. As such it would consider a variety of factors over the remaining rate term and not a singular data point that, as stated by the OEB, is not indicative of future results.

41. VECC argues that every regulated utility in Ontario uses history to support its case for future needs. However, this is only partly accurate. While past results provide context, they are not determinative of the future as suggested by VECC and other intervenors and OEB staff. Instead, it is the prospective forecasts which underpin rates, including aspects such as planning assumptions, external needs and operational concerns.

42. In perpetuating the retrospective approach, SEC presents an incorrect comparison between the estimated cost impacts of Bill 124 being overturned and the 2022 financial results. SEC asserts that OPG earning greater than 300 basis points by $48.9 million is sufficient to offset the incremental costs of $188 million. However, the appropriate comparison is not retrospective but prospective and prospective comparisons such as relative to the total stretch factor reductions of

[42] SEC Submission, p. 11.

[43] Filing Requirements for Electricity Distribution Rate Applications, Chapter 3, p. 24.

$112 million incorporated into the nuclear payment amounts over the 2023-2026 period[44] or the outage OM&A budgets for a nuclear station ranging from $61.3 million to $192.6 million[45] over the same period clearly demonstrate the materiality of the incremental costs of $188 million. For context, this represents a 150% increase in stretch factor dollars or is equivalent to an annual nuclear station outage budget. Furthermore, this context also addresses the intervenors and OEB staff's submission that OPG has not demonstrated "significant influence" on the operation of the regulated business. Increasing the stretch factor by 150% or eliminating the outage OM&A budget for a nuclear station clearly would have a significant influence on OPG's operations. In any event, these submissions are irrelevant for the purposes of this motion, since the issue before the OEB in this motion is whether the materiality criteria and the OEB approved process to establish an account has been properly applied.

43. SEC attempts to draw a parallel between OPG's application for a variance account and the OEB's Z-Factor criteria and the requirements for Advanced/Incremental Capital Module ("ACM/ICM") funding. This comparison is inapposite because SEC ignores a fundamental difference between OPG's variance account application and a Z-Factor or ACM/ICM funding request. OPG's application seeks approval of an account to record costs rather than the disposition of an account with corresponding rate treatment. A Z-Factor or ACM/ICM is a request for funding and rate treatment. Based on the OEB's filing requirements, for Z-Factor cost recovery an account is already established before the cost recovery request is made, with costs recorded in Account 1572, Extraordinary Events Costs Account.[46] For an ACM/ICM funding request, no account is established and the request is for rate relief via a rider. The parallel that SEC is trying to make applies only to the recovery of recorded or approved amounts and not to the establishment of an account to record costs for disposition in a future application.

44. CME takes the position that the reliance on OPG 2022 financial results by the OEB was a direct response to a potential suggestion that OPG may experience 'operational hardship' and that the Decision does not apply the 'operational hardship' as the threshold test, but only as an answer to

[44] EB-2020-0290 Payment Amounts Order, App. A, sum of Table 7, lines 6, 12 and 13, cols. (b)-€.

[45] EB-2020-0290 Payment Amounts Order, App. A, Table 7, lines 3 and 9, cols (b)-(e).

[46] Filing Requirements for Electricity Distribution Rate Applications, Chapter 3, p. 22.

a possible objection from OPG. The OEB should give no weight to CME's submission as it is inappropriate to suggest that the OEB's Decision was somehow directly responding to a hypothetical point that might be made by OPG at some unspecified point in time in the future.

45. As noted, it is OPG's position that the OEB applied the stricter "operational hardships" test instead of the "significant influence" test and, in doing so, erroneously applied the Materiality criterion in a way that effectively renders the first prong of the OEB's two prong test meaningless. Application of the Materiality criterion requires consideration of two questions: (i) Does the financial impact of an event meet the materiality threshold (which for OPG is $10 million)? and (ii) Will it have a significant influence on the operation of the utility? The OEB correctly concludes that the materiality threshold is exceeded. The second aspect of the materiality test, however, is applied in the context of the new standard of "operational hardship." In this regard, the Decision opines that costs of approximately $188 million will not cause OPG "operational hardship."[47]

46. OPG's position is that the two prongs of the materiality test are to be considered together and not separately or independent of each other. Exceeding the materiality threshold under the first prong must have substantive meaning – of material financial consequence – otherwise it would not be part of the Materiality criterion. The "significance influence" under the second prong must also be considered in this context given that the influence on the operations of the utility arises from the circumstances giving rise to the material incremental costs in the first prong. The Decision errs, however, because it applies the two prong test in a manner that renders meaningless the first prong by opining that the costs of approximately $188 million will not cause OPG "operational hardship" given OPG's approved annual nuclear revenue requirement ranging between $2.4 billion and $3.5 billion. Instead of considering the operational aspects that would be significantly influenced by the incremental costs, the OEB in effect applies a second and new financial materiality test. Having found under the first prong that the incremental costs are material, it is inappropriate to cancel or disregard the results of that part of the test to apply a second, more onerous financial materiality threshold. There is no clear articulation as to what ratio of incremental costs to annual nuclear revenue requirement would be sufficient to satisfy

[47] Decision, p. 9.

the second prong, operational hardship, the parameters of which remain unknown to current and future applicants.

47. CME misinterprets OPG's position that the two components of the test should be considered together.[48] OPG takes no issue with CME's statement that the 'materiality' test is a conjunctive test which requires the utility to meet both branches in order to be eligible for an accounting order. OPG also agrees that conjunctive tests are tests that require that each branch of the test to be met in order for the test as a whole to be met and that each branch of the test in a conjunctive test "adds something important" and "none of the branches can be seen as an optional extra."[49]

48. However, OPG entirely disagrees with the CME's application of the foregoing. CME mischaracterizes OPG's application of the materiality test and infers that OPG's position is that if the first prong of the materiality test is met, then that implies the second prong is met as the material financial consequence would have significant influence. This, according to CME, would mean that the second prong is an "optional extra that added nothing to the test". However, as noted above, this is not OPG's interpretation of the test. OPG believes each prong has meaning and that the first prong should not be subsumed into the second prong, as in the Decision, by applying a more aggressive financial materiality test. In fact, based on the criteria articulated by CME, the Decision in effect renders the first prong "an 'optional extra' that no longer add(s) anything to the test."[50]

49. CME disagrees with OPG's submission that the Decision applied a new "operational hardship" threshold rather than a "significant influence" threshold.[51] In this regard it is important to consider the Decision's flow of reasoning. The OEB applied the first prong of the materiality test, finding "that the quantum of costs related to the overturning of Bill 124 likely exceeds OPG's $10 million materiality threshold." The OEB then correctly articulates the two-pronged test. The OEB then concludes "[i]n this instance, the OEB expects OPG to be able to manage these costs within

48 CME Submission, p. 16.

49 CME Submission, p. 16.

50 CME Submission, p. 16.

51 CME Submission, p. 18.

its approved revenue requirement (which ranges between $2.4 billion and $3.5 billion) over the 2022 to 2026 period." Having made reference to the two prongs, it makes this statement without distinction as to whether the foregoing applies to either the first or second prong. To reinforce the foregoing, the OEB then considers OPG's 2022 regulated return on equity ("ROE") and concludes: "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." Nowhere in its ruling relating to Materiality does the OEB state that it is considering what has or what does not have significant influence. Instead, it applies two financial materiality calculations and a needs assessment to come to the conclusion that there is not and will not be "operational hardship," which can only be read as an entirely new and unknown test that fundamentally changes the manner on which the OEB has traditionally considered requests for an accounting order.

50. Although the ROE that OPG will realize over the period covered by the requested variance account is currently unknown, it is worth noting that OPG's approved payment amounts framework already includes an asymmetrical earnings sharing mechanism. Under this mechanism, 50% of earnings, including any variance account impacts, that exceed 100 basis points above the ROE reflected in the approved payment amounts over the 2022-2026 period would be returned to customers.[52]

51. OPG agrees with Power Workers' Union ("PWU"), which states in its submission that "(a)dding an additional "operational hardship" condition to the consideration of materiality violates the principles of performance-based regulatory framework that guides the OEB. OPG's return on equity is not relevant to the materiality criteria and its ROE in the years the coincide with the proposed variance account are unknown."[53]

[52] OEB, Decision and Order re Ontario Power Generation, EB-2020-0290, November 15, 2021, Schedule A – Approved Settlement Proposal, p. 33 of 51.

[53] PWU Submission, p. 4.

52. OPG also acknowledges the following important comment from Society of United Professionals ("SUP"):

> 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.[54]

d. *Other Issues*

53. This section responds to five additional issues raised in the submissions of OEB staff and intervenors which do not relate directly to, or clearly fit within, any of the foregoing.

(i) **Standard of Review**

54. CME makes lengthy submissions on the standard of review based on their interpretation that OPG implicitly argued that the standard of review on OPG's motion to review and vary is the "correctness" standard rather than the "reasonableness" standard.[55] No other party made submissions on the standard of review. For the most part, CME's analysis is applicable to a court and not an administrative tribunal where intervention of a court in administrative decisions is the focus of the basis of the standard of review. The OEB's *Rules of Practice and Procedure* are silent on the applicable standard of review on a motion to review and vary. The OEB is in a position to administer its own process of review. It should, however, be cognizant of the fact that the issue

[54] SUP Submission, pp. 7-8.

[55] CME Submission, pp. 4-6.

before the OEB is a review of a material error and the correctness of the action taken by the ruling panel.

(ii) **Discretion**

55. OEB staff argues, without saying more, that the Decision "was a discretionary one".[56] SEC and AMPCO argue that the OEB has discretion in assessing the appropriateness of approving a new variance account under OPG's payment amount framework and that OPG's motion concerns disagreements over how the OEB exercised its discretion that do not amount to a material and clearly identifiable error of fact, law or jurisdiction.[57] However, the OEB in determining OPG's application was required to make its decision within the constraints established by the approved payment amount framework. To the extent the OEB exercised its discretion in a manner inconsistent with the approved payment amount framework, this amounts to a clearly identifiable error of law.

56. OPG's motion clearly identifies the aspects of the Decision which are inconsistent with the approved payment amount framework and which thereby give rise to clearly identifiable errors of law. In the circumstances at issue in this motion, the approved payment amount framework consists of the specific payment amount framework that the OEB, in a prior decision and order made pursuant to section 78.1 of the *Ontario Energy Board Act* in EB-2020-0290, adopted for OPG. That payment amount framework includes a specific mechanism for addressing unforeseen events affecting OPG's nuclear business, namely through the accounting order process that was proposed by OPG and agreed to by the parties. OPG's motion, as further articulated in OPG's Argument-in-Chief and these Reply Submissions, identifies that the OEB's findings in the Decision, regarding (1) whether the Ontario Superior Court's determination as to the unconstitutionality of Bill 124 was an "unforeseen event", and (2) the second prong of the materiality test, were inconsistent with the approved payment amount framework. As such, these aspects, as well as the OEB's reliance on speculative submissions regarding potential impacts on settlement, amount to clearly identifiable errors of law.

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[56] OEB staff Submission, p. 2.

[57] SEC Submission, p. 4; AMPCO Submission, pp. 6-7.

57. Moreover, under Rule 43 of the *Rules of Practice and Procedure*, the OEB considered the threshold question of whether OPG's motion raises relevant issues material enough to warrant a review of the Decision on the merits. Notably, one of the considerations in applying that threshold question is whether the alleged errors are in fact errors, as opposed to disagreements regarding the weight the OEB applied to particular facts or how it exercised its discretion.[58] In Procedural Order No. 1, issued on July 25, 2023, the OEB determined that OPG's motion does raise relevant issues material enough to warrant a review of the Decision on the merits. The OEB has therefore already determined, implicitly, that the errors alleged in OPG's motion would be actual errors rather than disagreements regarding how the panel in the underlying proceeding exercised its discretion.

(iii) **Disclosure**

58. In their submissions, SEC and AMPCO raise concerns about disclosure. SEC states that "OPG had an affirmative duty to present information regarding a material risk that it knew about as part of its payment amounts application" and that 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".[59] AMPCO states that "OPG should have disclosed this compensation risk to the Board" and that "the disclosure of this information would have factored into settlement negotiations".[60] The submissions from SEC and AMPCO on this point should be given no weight because they incorrectly assume that OPG was in possession of special knowledge or information regarding the legal challenges or the risk they presented, and they pretend that the intervenors were unaware of those aspects and were therefore dependent on OPG's disclosures.

59. OPG was not the subject of or a party to any of the constitutional challenges and therefore had no special access to information regarding those challenges. Its access in this regard was no different than that of the intervenors that participated in the settlement negotiations. As CME recognizes in its submissions, "the evidence before the Board demonstrated that there was

58 OEB, Rules of Practice and Procedure, Rule 43.01(a).

59 SEC Submission, pp. 2, 6.

60 AMPCO Submission, p. 5.

significant and pervasive media coverage about the challenges."[61] Any information that OPG might have had would have consisted of information that was widely available through the media coverage at the time, including to the intervenors. Not only was this information *available* to the intervenors, but VECC acknowledges that intervenors were *actually* aware at the time of the settlement negotiations of the risk associated with Bill 124 being declared unconstitutional as a result of those challenges. Specifically, VECC states that "clearly the risk was apparent at the time of negotiations" and "even if nothing was explicitly said about a Bill 124 deferral account that does not mean it was not in the minds of the parties."[62]

60. In addition to being aware of the legal challenges and their associated risks, it is clear that the intervenors understood from OPG's evidence that its compensation forecast was based on the requirements imposed under Bill 124. Similarly, the intervenors would have understood from OPG's proposed payment amount framework that unforeseen events arising during the rate term could result in requests for deferral or variance accounts. Based on the foregoing, it is hard to imagine what information SEC and AMPCO believe OPG needed to disclose that was not widely known or already evident from the application. Based on the submissions of VECC and CME, at the time of settlement negotiations the intervenors were aware of and understood the very risks that SEC and AMPCO argue OPG was obligated to disclose and failed to disclose. The apparent conclusion is the intervenors understood and accepted that OPG would seek an account under the mechanism provided for in the payment amount framework if Bill 124 were to be overturned during the rate period.

(iv) Prudence

61. SEC has made submissions regarding prudence which should be ignored as they are not relevant to OPG's motion which is now before the OEB.[63] Specifically, SEC takes issue not with anything in OPG's motion but with the manner in which the OEB dealt with the issue of prudence in the Decision. In the Decision, as SEC acknowledges, the OEB found that OPG met the criteria for

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61 CME Submission, p. 15.

62 VECC Submission, p. 7.

63 SEC Submission, pp. 12-13.

prudence. If SEC wanted to file a motion to review that part of the Decision, it had an opportunity to do so in accordance with the *Rules of Practice and Procedure*. SEC did not file such a motion and is now improperly using its submissions as an opportunity to raise its concerns with the Decision long after the window for a motion has closed. The reviewing panel should therefore disregard SEC's submissions on prudence in considering OPG's motion.

(v) Calculation of Incremental Costs

62. SEC argues that OPG's forecast incremental costs of Bill 124 being declared unconstitutional, being an estimated $188 million over the 5-year rate period (2022-2026), are "significantly inflated" on account of the methodology that OPG has proposed to use for the requested variance account.[64] Effectively, SEC takes issue with the methodology because it would be based on actual outcomes of collective bargaining processes, rather than a hypothetical forecast of such outcomes in the absence of Bill 124 at the time of the payment amounts application.

63. The OEB should give no weight to this argument in deciding on this motion. The forecasted incremental costs provided in the EB-2023-0098 proceeding were intended to demonstrate the level of materiality and not the amount that OPG would seek to disposition in a future application. As noted in OPG's EB-2023-0098 Reply Submissions, OPG was not seeking approval of a methodology to determine the balance as part of the requested accounting order and clearly acknowledged that establishment of the account would not constitute approval of the balance.[65] Parties, including SEC, would be able to challenge the recorded amounts, including the methodology used to compute them, at the time of disposition of the account.

C. CONCLUSION

64. The OEB erred in its findings in the Decision in three fundamental respects. First, it misapplied the approved basis for establishing accounting orders under OPG's approved payment amount framework by incorrectly applying a standard of "unforeseeable" rather than the standard of "unforeseen." In addition to impacting the outcome of OPG's application, going forward this

[64] SEC Submission, p. 11.

[65] EB-2023-0098, OPG Reply Submission, pp. 22 (ll,8-12).

would have the significantly impractical and inefficient effect of requiring OPG and other similarly situated regulated entities to address every possible material risk in their rate-setting applications, regardless of how remote it may be and to request a deferral or variance account for each one. Second, the OEB made conclusions on a speculative and non-factual basis, and without evidence, regarding potential impacts on the Settlement Agreement related to OPG's payment amounts application. Third, the OEB incorrectly applied the Materiality criterion for variance account eligibility by making internally inconsistent findings with respect to the materiality test and by applying a new, stricter test that differs both from the OEB's established materiality test (i.e., by considering "operational hardships" rather than "significant influence on operations") and which renders meaningless the consideration of OPG's materiality threshold as part of the approved payment amounts framework in considering the Materiality criterion.

65. Accordingly, the reviewing panel should grant the motion and correct the errors by providing the requested relief. Specifically, the OEB should vary the Decision by (a) re-establishing the interim variance account originally established on March 22, 2023 and effective as of March 1, 2023 to record the impact of Bill 124 being declared unconstitutional on OPG's nuclear revenue requirement, and (b) approving the requested accounting order establishing a new variance account to record the aforesaid impact, effective March 1, 2023 until the effective date of the OEB's next nuclear payment amounts order for OPG.

All of which is respectfully submitted this 18th day of September, 2023.

ONTARIO POWER GENERATION INC.
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