



Ontario
Energy
Board

Commission
de l'énergie
de l'Ontario

DECISION AND ORDER

EB-2023-0209

ONTARIO POWER GENERATION INC.

**Motion to Review and Vary the June 27, 2023 Decision and Order
in EB-2023-0098**

BEFORE: Fred Cass
Presiding Commissioner

Lynne Anderson
Chief Commissioner

Robert Dodds
Commissioner

October 24, 2023

1 OVERVIEW

On June 27, 2023, the Ontario Energy Board (OEB) denied an application by Ontario Power Generation Inc. (OPG) for 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, on constitutional grounds, provincial legislation (Bill 124) limiting wage increases for the broader public sector.¹

OPG filed a notice of motion to review and vary the OEB's decision (Motion). OPG sought approval to establish the variance account effective March 1, 2023 until the effective date of the OEB's next nuclear payment amounts order. OPG also requested that the interim variance account, which was approved on March 22, 2023 but rescinded by the June 27, 2023 decision, be reinstated.

For the reasons that follow, the OEB denies the Motion.

¹ EB-2023-0098, Decision and Order, June 27, 2023.

2 DECISION

Background

Bill 124, the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, was introduced on June 5, 2019 and came into force on November 8, 2019. Bill 124 established limits on compensation increases for employees in the “broader public sector”, which includes OPG, over a three-year “moderation period”.

A number of labour organizations challenged the legislation on constitutional grounds. OPG was not a party to the litigation, but it was aware of it. On November 29, 2022, Justice Koehnen of the Superior Court of Justice found that Bill 124 violated the freedom of association under the *Canadian Charter of Rights and Freedoms*, and declared it to be “void and of no effect”.² The Government of Ontario appealed that decision. The Court of Appeal for Ontario heard the appeal in June but has not yet ruled.

On March 1, 2023, OPG filed an application 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 overturning of Bill 124, effective March 1, 2023 until the effective date of the OEB’s next nuclear payment amounts order. In that application, OPG explained that the limits on compensation set out in Bill 124 were the basis of the forecast compensation costs reflected in its approved nuclear revenue requirement for the 2022-2026 period in the EB-2020-0290 payment amounts proceeding.

Following the Court decision, the unions representing OPG workers indicated that they would be seeking enhanced wages for the periods their members’ compensation had been or would have been restrained due to Bill 124. OPG argued that the overturning of Bill 124 was a change of law that it “could not reasonably have anticipated” during the 2022-2026 payment amounts application.³ OPG said that the Court decision would in effect materially increase OPG’s compensation costs during the 2022-2026 period relative to the costs reflected in its approved payment amounts. OPG also asked for approval to establish the proposed variance account effective March 1, 2023 on an interim basis, pending the outcome of the application. An interim order to that effect was granted on March 22, 2023.

² *Ontario English Catholic Teachers Assoc. v. His Majesty, 2022*, 2022 ONSC 6658.

³ OPG application, p. 2.

After a written hearing in which all intervenors in the EB-2020-0290 proceeding were invited to participate, the OEB denied OPG's request for a variance account and rescinded the interim order. In a Decision and Order dated June 27, 2023 (the Original Decision), the OEB concluded that the overturning of Bill 124 was not unforeseen. It went on to explain, "That is not to say that OPG would have known with certainty that Bill 124 would be overturned, only that it was a foreseeable and material risk to their forecast employee compensation costs."⁴ OPG should have "governed themselves accordingly, for example by identifying the issue and also by seeking a specific variance account as part of their application."⁵ The OEB elaborated: "It is not appropriate to create a new variance account to track amounts that could have been foreseen and addressed (for example through a request for a variance account at the time of the EB-2020-0290 proceeding) when the rate framework was being established."⁶

The Original Decision also considered the impact on OPG of the incremental compensation costs, which were estimated at the time as \$130 million for employees represented by the Power Workers' Union (PWU) and \$58 million for employees represented by the Society of United Professionals (SUP) over the five-year rate term. The OEB concluded: "In this instance, the OEB expects OPG to be able to manage these costs within its approved revenue requirement (which ranges between \$2.4 billion and \$3.5 billion) over the 2022 to 2026 period."⁷ The OEB added that OPG anticipated that its actual 2022 return on equity for its regulated facilities would be in the range of 12.5-13%, well above the OEB-approved 8.66%: "The OEB accepts OPG's assertion that actual returns on equity in a given year are not indicative of future returns, but notes that OPG's exemplary performance in 2022 counteracts the suggestion that operational hardships at OPG would be forthcoming without the requested variance account."⁸

OPG then filed this Motion to review and vary the Original Decision.

On July 25, 2023, the OEB issued a Notice of Hearing and Procedural Order No. 1., The OEB found that the Motion passed the threshold test under Rule 43.01 of the OEB's *Rules of Practice and Procedure* in that the motion raises relevant issues material enough to warrant a review of the decision on the merits. A timetable for receiving written submissions on the merits of the Motion was established. The OEB also approved all intervenors in the EB-2023-0098 proceeding as intervenors in this

⁴ Original Decision, p. 5.

⁵ Original Decision, p. 6.

⁶ Original Decision, p. 7.

⁷ Original Decision, p. 9.

⁸ Original Decision, p. 9.

Motion. Seven intervenors filed written submissions. Five of them, on behalf of various ratepayer constituencies, opposed the Motion; two of them, on behalf of the two unions that represent OPG workers, supported it. OEB staff filed a submission opposing the Motion.

The test for varying a decision

Under Rule 43.03 of the *Rules of Practice and Procedure*, “The OEB will only cancel, suspend or vary a decision when it is clear that a material change to the decision or order is warranted based on one or more of the grounds set out in Rule 42.01(a).”

Rule 42.01(a) sets out a number of grounds. The one invoked by OPG in this Motion is that “the OEB made a material and clearly identifiable error of fact, law or jurisdiction.” The Rule specifies that,

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.

As OEB staff noted in its submission, when Rule 42 was recently amended, the OEB explained that “the purpose of a review is not simply to reargue a case that was already presented to the original panel of Commissioners. Motions to review should be limited to instances where a party can clearly identify a material error of fact, law or jurisdiction in the decision or order, or if there is a change in circumstances or new facts that would have a material effect on the decision or order.”⁹

OPG alleges that the Original Decision contained three material and clearly identifiable errors of fact and law, or mixed fact and law, as follows:

- a. It incorrectly applied the established basis for establishing accounting orders under OPG’s approved rate framework;
- b. It made conclusions on a speculative and non-factual basis, without evidence; and
- c. It incorrectly applied the materiality criterion for variance account eligibility.

⁹ OEB Letter re Proposed Amendments to Rules 40-43, May 13, 2021.

OPG also argued that the Original Decision sets a precedent with wide-ranging negative impacts.

The OEB will address each of these in turn.

OPG’s argument that the OEB incorrectly applied the established basis for establishing accounting orders under OPG’s approved rate framework

OPG argued that the Original Decision failed to apply the standard for establishing accounting orders under OPG’s approved payment amounts framework. OPG pointed to its last payment amounts application (EB-2020-0290), which included a proposal “that unforeseen events affecting the nuclear business continue to be addressed through an accounting order process, subject to the \$10M regulatory materiality threshold that has historically applied to OPG and which was accepted for this purpose in the EB-2016-0152 Decision.”¹⁰ The parties in that proceeding reached a settlement with OPG in which they agreed to the proposed framework for the 2022-2026 term, and the settlement was accepted by the OEB.

OPG argued that the Original Decision incorrectly considered whether the event (Bill 124 being declared unconstitutional) was unforeseeable rather than whether it was unforeseen. OPG stated that this led to a further error of incorrectly considering the risk of the event occurring rather than whether the actual occurrence of the event was foreseen. In OPG’s view, the test for establishing a variance or deferral account under its approved rate framework is “exclusively concerned with the expected occurrence of the event.”¹¹

Moreover, according to OPG, “It is a fundamental principle of law that statutes enacted by the legislature are presumed to be constitutional;” no one can be expected to be a “fortune teller”.¹² It was therefore a legal error for the Original Decision “to assume that OPG should have foreseen that Bill 124, a validly enacted statute, would be declared unconstitutional.”¹³

Other than the two unions, everyone who made a submission on the Motion disagreed with OPG. The overall thrust of these submissions was that OPG, having known about the litigation at the time of its last payment amounts application, should have foreseen

¹⁰ EB-2020-0290, Exhibit A1, Tab 3, Schedule 2, p. 13.

¹¹ Argument-in-Chief, p. 13.

¹² Argument-in-Chief, p. 10.

¹³ Argument-in-Chief, p. 12.

that Bill 124 might be overturned, and that its compensation costs might go up as a result. The Original Decision therefore did not err in finding that OPG should have addressed the risk in that application, and that it was too late to come back to the OEB after that application had been decided.

OEB staff argued that OPG's approved rate framework does not set out a test for approving accounting orders. OEB staff noted that it does not refer to the usual requirement to demonstrate causality, materiality and prudence, other than to mention the \$10M materiality threshold. While it provides for "an accounting order process", it offers virtually no guidance to the OEB on how to assess an application for an accounting order.

OEB staff further submitted that the "presumption of constitutionality" is nothing more than a tool of statutory interpretation: it "does not mean, as OPG implies, that any Charter challenge can be presumed to fail."¹⁴ Canadian Manufacturers & Exporters (CME) made a similar point, arguing that "OPG's authorities fail to support the proposition that a sophisticated regulated entity is entitled, as a matter of law, to assume that legislation will remain constitutional, even in the face of widespread, notorious, and widely published challenges to that legislation."¹⁵

VECC submitted that "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."¹⁶ In a similar vein, OEB staff argued that the "starting point" is that approving a deferral and variance in the middle of an approved rate term is "an unusual remedy": "utilities are expected to manage their costs throughout the term of the rate framework and should not expect to have access to 'true ups' (for example through a deferral or variance account) every time a cost is higher than what was forecast."¹⁷

Some intervenors added that OPG should have disclosed the risk during the payment amounts proceeding. As AMPCO put it, "The potential overturning of Bill 124 was not a remote risk. OPG had an obligation to identify a risk of this magnitude during the proceeding and it did not."¹⁸ And in School Energy Coalition's (SEC) words, "OPG

¹⁴ OEB staff submission, p. 4 (emphasis in original).

¹⁵ CME submission, p. 11.

¹⁶ VECC submission, p. 3.

¹⁷ OEB staff submission, p. 1 (citing OEB staff's submission in the original application).

¹⁸ AMPCO submission, p. 4.

cannot be allowed to remain silent regarding a specific material risk when base rates are being set, only to approach the OEB for relief after the risk materializes.”¹⁹

CME and OEB staff both suggested that OPG’s position in this Motion is inconsistent with the way it framed its original application for the accounting order. As OEB staff said, “To the extent the hearing panel applied an objective test of reasonable foreseeability, or conflated the terms ‘foreseen’ and ‘foreseeable’, that is understandable, as OPG did exactly that in its application for the accounting order.” CME and OEB staff each quoted a number of statements made by OPG in its original application, such as “The overturning of Bill 124 is a change of law that OPG could not reasonably have anticipated during the 2022-2026 payment amounts application.”²⁰

In its reply submission, OPG argued that “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.”²¹ OPG explained, “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.”²²

OPG denied that its position had changed since the original application – it has always been that no regulated entity can predict the likelihood of a constitutional challenge to duly enacted legislation succeeding.

OPG disagreed with the submissions of SEC and AMPCO that OPG had a positive obligation to disclose the risk associated with the Bill 124 challenges. These submissions “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.”²³ OPG did not know any more about the litigation than what was “widely available through the media coverage at the time, including to the intervenors.”²⁴

¹⁹ SEC submission, p. 6.

²⁰ OEB staff submission, p. 7.

²¹ OPG Reply, p. 3.

²² OPG Reply, p. 12.

²³ OPG Reply, p. 25.

²⁴ OPG Reply, p. 26.

Findings

The OEB concludes that there was a foreseeable and material risk that Bill 124 would be overturned and therefore it cannot be said that this event was “unforeseen”.

In the EB-2023-0098 proceeding, OPG relied on its approved rate framework for the nuclear business in support of its argument that a variance account should be established. The part of the rate framework relied on by OPG indicates that “unforeseen events affecting the nuclear business continue to be addressed by an accounting order process, subject to the \$10M materiality threshold”.

The “event” that OPG says was “unforeseen” is the overturning of the Bill 124. The original panel of Commissioners (Original Panel), however, did not accept that this event was unforeseen. As indicated by the Original Panel, its conclusion in this regard did not mean that OPG would have known with certainty that the legislation would be overturned, but that it was a foreseeable and material risk.

At the time of the EB-2020-0290 proceeding, the “event” relied on by OPG – the overturning of Bill 124 – did not exist. The finding made by the Original Panel, though, was framed in terms of risk; the panel found that, at the time of the EB-2020-0290 proceeding, there was a foreseeable and material risk that the “event” would occur. OPG’s arguments on the review motion attempt to make much of a distinction between an event and a risk and between the concepts of what is “foreseeable” and what is “foreseen”.

OPG’s arguments and distinctions do not raise any ground for a finding that there was an error of fact, law or jurisdiction in the decision under review.

OPG contends that the Original Panel should have considered whether the overturning of the legislation was “actually foreseen and predicted”. While it is not clear what level of predictive certainty is implied by the words “actually foreseen and predicted”, obviously it is beyond doubt that an event foreseen with full certainty cannot be an “unforeseen event”. In other words, in a scenario where the event which has occurred is one that OPG knew with full certainty would occur, there quite plainly would be no basis for OPG to argue that the event was “unforeseen” within the meaning of the rate framework.

The issue raised by OPG’s arguments is the extent to which events foreseen with something less than full certainty fall outside the words “unforeseen events” in the rate framework.

There is nothing in the rate framework relied on by OPG to introduce this notion of full certainty. The rate framework does not state, nor even imply, that an event is to be treated as “unforeseen” in all cases except where OPG knew with certainty that the event was going to occur. The OEB has been provided with no basis for reaching a conclusion that, under the rate framework, all events are “unforeseen events” unless OPG knew about them in advance with certainty.

It follows, then, that an event can fall outside the words “unforeseen events” in the rate framework, even if it was foreseen with less than full certainty. Given that an event foreseen with less than full certainty can fall outside the words “unforeseen events”, the focus of attention logically and inevitably turns to consideration of the risk that the event would occur. Putting it another way, in addressing the question of whether a less-than-certain event was “unforeseen” at a particular time, it is logical, if not necessary, to assess the risk, based on the known circumstances of the time, that the event would occur. This is what happened in the EB-2023-0098 proceeding: the Original Panel considered the risk of the legislation being overturned, based on the known circumstances at the time of the EB-2020-0290 proceeding, and found that there was a foreseeable and material risk (although not a certainty) of the occurrence of this event.

OPG’s revenue requirements are set based on OPG’s forecast of its costs for the 2022 to 2026 period. The cost of labour is a material component to the revenue requirements for utilities. It is expected that a major risk to that cost, such as the overturning of Bill 124, would be known, addressed through the utility’s planning and budgeting processes, and disclosed in a major rate proceeding. Not providing evidence on the record about a known material risk so as to give parties an opportunity to factor that evidence into settlement discussions and then expecting to recover the cost of that known risk during an approved multi-year rate-setting framework, is not appropriate.

This panel sees no reason to disagree with the finding of the Original Panel that, at the time of the EB-2020-0290 proceeding, there was a foreseeable and material risk that the legislation would be overturned. In view of the finding that there was a foreseeable and material risk that the event would occur, it cannot be said that, when the legislation was overturned, this event was “unforeseen”. If, based on known circumstances, there is a foreseeable and material risk that someone will slip and fall on a particular patch of ice during winter, it cannot be said when a fall does occur that this was an “unforeseen event”. The rate framework does not say, or suggest, that the meaning of “unforeseen events” is to be viewed so expansively as to sweep in anything except an event that OPG foresaw with complete certainty or to include as “unforeseen” an event that, based on known circumstances, was a foreseeable and material risk.

The OEB is not saying that OPG needs to be a “fortune teller”. OPG’s revenue requirement forecasts were based on the assumption that Bill 124 would not be overturned. However, this does not mean that OPG should not identify contingent risks and plan for them.

OPG’s argument that the OEB made findings on a speculative basis

The Original Decision noted that “SEC argued that the settlement negotiations for OPG’s 2022-2026 Payment Amounts would have unfolded differently if OPG had disclosed to parties at the time the legal proceedings were launched that, if the challenge was successful, it would seek approval to record the impacts in a variance account.”²⁵ It went on to conclude that “the exercise of reasonable and prudent foresight on OPG’s part could have prevented OPG’s request for a variance account in this proceeding and a possible result that might significantly alter the agreed upon budget and the subsequent OEB Decision that approved those Settlement Agreement terms.”²⁶ OPG argued that this conclusion was based on speculation rather than evidence.

Several intervenors, as well as OEB staff, responded that it was entirely reasonable for the hearing panel to infer that the outcome of the settlement might have been different if the intervenors had known that OPG would seek to reopen the operations, maintenance and administration budget in the event Bill 124 was struck down. As SEC put it, “While it is impossible to know what the exact impact would have been if proper disclosure had been made, it would undoubtedly have had an effect.”²⁷

In its reply, OPG argued that the comments by intervenors and OEB staff about the settlement discussions were untested and should be given no weight; they could have asked for permission to file evidence but chose not to do so.

Findings

The OEB does not find it necessary to speculate on whether settlement negotiations would have unfolded differently or not. The risk posed by the potential overturning of Bill 124, and OPG’s plan for addressing that risk, should have been disclosed on the record

²⁵ Original Decision, p. 5.

²⁶ Original Decision, p. 6.

²⁷ SEC submission, p. 9.

of the proceeding so parties had the opportunity to factor that into the settlement negotiations. They were not given that opportunity.

Furthermore, the OEB does not agree that intervenors could have filed evidence disclosing settlement negotiations. Matters related to the settlement proceeding are strictly privileged unless it “is necessary to resolve a subsequent dispute over the interpretation of any provision” of the settlement proposal.²⁸ The OEB concludes that there was no need to resolve a dispute over the interpretation of the settlement proposal for the purposes of either OPG's request for approval of the variance account or this Motion.

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

The Original Decision went through each part of the OEB's usual test for approving a new deferral or variance account: causation, materiality and prudence. On the question of materiality, the OEB found that, although “the quantum of costs related to the overturning of Bill 124 likely exceeds OPG's \$10 million materiality threshold,” OPG can be expected “to manage these costs within its approved revenue requirement (which ranges between \$2.4 billion and \$3.5 billion) over the 2022 to 2026 period.”²⁹ The OEB elaborated:

Further, the OEB notes that OPG expects its actual 2022 return on equity for its regulated facilities to be in the range of 12.5-13%. The expected return is well above the 2022 ROE value set by the Board in October 2021 of 8.66%. The OEB accepts OPG's assertion that actual returns on equity in a given year are not indicative of future returns, but notes that OPG's exemplary performance in 2022 counteracts the suggestion that operational hardships at OPG would be forthcoming without the requested variance account.³⁰

OPG took issue with two aspects of the OEB's findings on materiality. First, OPG argued that it was “internally inconsistent” for the OEB to say, on the one hand, that past performance is not indicative of future performance, and on the other hand, that OPG's strong 2022 performance weighs against approving the variance account. Second, OPG argued that the OEB applied the wrong test by considering whether OPG

²⁸ Practice Direction on Settlement Conferences, p. 4.

²⁹ Original Decision, p. 9.

³⁰ Original Decision, p. 9.

would experience “operational hardships” if the variance account were not approved, rather than the established test of whether the costs in question would have a “significant influence” on the operation of the regulated business.

On the first point, OEB staff noted that “It is common for the OEB to look at a utility’s most recent return on equity when determining whether the utility is eligible for adjustments to base rates.”³¹ Similarly, VECC observed that utilities may apply for mid-term relief based on historical under-earnings – by OPG’s logic, “the Board should ignore such pleas as the past is no indication of the future.”³²

On the second point, OEB staff and several intervenors contended that the reference to “operational hardships” did not amount to a departure from the established materiality analysis. OEB staff submitted that “the hearing panel correctly stated that the second prong of the test is whether the costs will ‘significantly influence’ OPG’s operations. In referring to ‘the suggestion that operational hardships at OPG would be forthcoming’, the hearing panel was merely elaborating on what a significant influence would look like.”³³ OEB staff added that it was not a “material and clearly identifiable error” for the Original Decision to conclude that OPG should be expected to manage the cumulative cost impact of the striking down of Bill 124 – \$188 million over the five-year rate term – considering that its approved nuclear revenue requirement over the term is over \$16 billion. OEB staff and SEC both pointed out that after the Original Decision was issued, OPG reported that its actual return on equity for 2022 was 12.94%, well above the approved 8.66%. SEC submitted that, “Under any analysis, the forecast incremental costs of \$188M over the 5-year rate plan (2022-2026) cannot seriously be considered to have a significant influence on OPG’s operations.”³⁴

PWU and SUP supported OPG’s position. PWU argued that “adding an additional ‘operational hardship’ condition to the consideration of materiality violates the principles of performance-based regulatory framework that guides the OEB.”³⁵ SUP agreed that “operational hardship” represents a change to the established test and added that such changes should not be made “on the fly”, without “any suitable evidentiary support”.³⁶

³¹ OEB staff submission, p. 11.

³² VECC submission, p. 6.

³³ OEB staff submission, p. 11.

³⁴ SEC submission, p. 11.

³⁵ PWU submission, p. 4.

³⁶ SUP submission, pp. 7 and 8.

In its reply submission, OPG argued that “It is not appropriate from a regulatory perspective to apply retrospective considerations to a prospective regulatory mechanism such as a variance account.”³⁷ OPG’s “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.”³⁸ Looking prospectively, the cumulative cost impact of \$188 million could be compared to increasing OPG’s stretch factor by 150% or eliminating the outage OM&A budget for a nuclear station, either of which “clearly would have a significant influence on OPG’s operations”.³⁹

Findings

The OEB finds no error in how the Original Panel applied the materiality criterion in assessing the proposed variance account.

Section 3 of the Original Decision addresses the proposed variance account and describes the eligibility criteria for a new deferral or variance account. Specifically with respect to materiality, the Original Decision states that there is a two-pronged approach to meet the materiality criterion. First, the forecasted amounts to be recorded in a proposed account must exceed the OEB-defined materiality threshold and furthermore they must have a significant influence on the operation of the utility.

On the first prong of the test, the Original Panel found that the quantum of costs relating to the overturning of the legislation was likely to exceed OPG’s \$10 million materiality threshold.

For the second prong, related to significant influence on the utility’s operations, the Original Panel concluded that, within an approved revenue requirement ranging between \$2.4 billion and \$3.5 billion, it expected OPG to be able to manage the costs related to overturning of the legislation over the 2022 to 2026 period.

Thus, the core of the Original Panel’s finding on whether the costs in question would have a significant influence on the operation of OPG was that it expected OPG to be able to manage these costs, having regard to OPG’s approved revenue requirement over the 2022 to 2026 period. Having just referred to whether the costs would “significantly influence the utility’s operations”, the Original Decision did not repeat these

³⁷ OPG reply, p. 17.

³⁸ OPG reply, p. 18.

³⁹ OPG reply, p. 19.

words and explicitly indicate an expectation that OPG would be able to manage the costs without “significant influence” on OPG’s operations. However, this is the only meaning that the words of the decision can reasonably be understood to convey, given that the decision had already addressed the first prong of the materiality test and clearly had moved to consideration of the second prong (“significant influence”).

The statement of the materiality criterion in the Original Decision is entirely aligned with OPG’s Argument-In-Chief, in which OPG defined the OEB’s established test for materiality as having two components 1) whether the financial impact meets the materiality threshold and 2) whether it will have a significant influence on utility operations.

The Original Decision provides additional reasoning on the materiality issue in a paragraph beginning with the word “Further”. The additional reasoning includes a sentence that is the basis for much of OPG’s argument regarding the materiality criterion. In this sentence, the Original Panel accepted OPG’s assertion that actual ROE in a given year is not indicative of future years, but noted that OPG’s performance in 2022 counteracted “the suggestion [of] operational hardships ... without the requested variance account”.⁴⁰

It can be seen from the plain words of this sentence that, when it referred to “operational hardships”, the Original Panel was addressing what it understood to be a “suggestion” made to it that there would be operational hardships if the account was not approved. There is nothing in this sentence to indicate that the Original Panel was creating a new “operational hardship” threshold, as submitted by OPG. The Original Decision clearly stated and applied the “significant influence” test, which OPG refers to as the “established test”. Simply because the Original Panel dealt specifically with an argument or position that it understood to be before it in the EB-2023-0098 proceeding does not in any way mean that the Original Decision intended to, or did, create a new threshold test.

OPG also says that OPG’s 2022 financial performance was not applicable for the remainder of the rate period and that it was not seeking to recover costs incurred in 2022. But it is clear from the sentence in question that the Original Panel was fully cognizant of these considerations: the sentence begins with an acknowledgment that actual ROE in a given year is not indicative of future years. The sentence merely indicates that the financial performance OPG was able to achieve in 2022 “counteracts”

⁴⁰ Original Decision, p. 9

a suggestion made to the OEB that there would be operational hardships without the requested variance account.

The OEB sees no error in the Original Panel considering a potential financial hardship to OPG, particularly given the OEB's statutory objective in section 1(1) of the OEB Act "to facilitate the maintenance of a financially viable electricity industry". Having concluded that the event was not unforeseen, and an account would not be granted, it is completely appropriate for the panel to consider whether not getting the deferral account would cause financial hardship.

OPG's argument that the decision sets a precedent with wide-ranging negative impacts

OPG argued that the Original Decision sets a precedent with wide-ranging negative impacts by "focusing on the foreseeability of the risk only and not whether the occurrence of the event could be predicted".⁴¹ OPG suggested that the effect of the Original Decision 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."⁴² That is neither practical nor consistent with the approved payment amounts framework.

Several intervenors, as well as OEB staff, disagreed. SEC argued that OPG "grossly overstates" the implications of the Original Decision: a utility's obligation to disclose material risks is not a new requirement. OEB staff cited a decision of the Supreme Court of Canada holding that, in the context of tort law, something is reasonably foreseeable if there is a "real risk" of it materializing; "far-fetched" risks are not captured.⁴³ The consensus among the ratepayer intervenors (and OEB staff) appears to be that, even if the risk could not be precisely quantified, it was more than "far-fetched". (AMPCO called it a "significant risk"; SEC called it a "material risk".)

Findings

OPG argues that the Original Decision sets a precedent that will have wide-ranging negative impacts, in that OPG and other applicants will have to forecast and request, as part of rate applications, accounts for all possible material risks.

⁴¹ OPG Reply, p. 12.

⁴² OPG Reply, p. 13.

⁴³ OEB staff submission, p. 6 (referring to *Mustapha v. Culligan*, 2008 SCC 27).

In light of the particular circumstances of this case, and the considerations referred to in the passages below from the Original Decision, the OEB does not agree with OPG's argument that the Original Decision will set a precedent with wide-ranging negative impacts.

The risk in this case was found by the Original Panel to be foreseeable and material, although not a certainty. Particularly with respect to risks that are foreseeable and material, this panel agrees with the following statement made in the Original Decision:

When applying for cost-based rates, utilities are expected to present as complete a picture of their forecast test year costs and revenues as possible – this is the “base upon which rates [are] derived”. Where a cost or revenue can reasonably be foreseen (even if it is not certain), the best forum in which to address this is in the main rates case, and not through a later request for a deferral or variance account.⁴⁴

Further, this panel agrees with the statements made in the Original Decision about the failure of OPG to bring forward the risk of the legislation being overturned in the EB-2020-0290 proceeding, including the following:

...the OEB finds that the risk of Bill 124 being overturned was certainly present prior to the Settlement Agreement and the Decision and thus a known variable that OPG should have taken into consideration and governed themselves accordingly, for example by identifying the issue and also by seeking a specific variance account as part of their application.⁴⁵

...the risk and its potential O&M budgetary implications ... should have been disclosed by OPG to allow it to inform the settlement negotiations.⁴⁶

OPG referred to a previous circumstance in which, prior to the outcome of a court decision, a deferral account was proposed for approval by the OEB. In the RP-2003-0203 decision for Enbridge Gas Distribution Inc. (Enbridge) from 2004, the OEB found it was “premature” to authorize a deferral account for damages that a court might order related to a class action lawsuit over its late payment penalty policy, although the account was approved to record costs incurred in defending the action.⁴⁷

⁴⁴ Original Decision, p. 4.

⁴⁵ Original Decision, p. 6.

⁴⁶ Original Decision, p. 6.

⁴⁷ RP-2003-0203, Partial Decision with Reasons, August 31, 2004.

The OEB finds that the circumstances of this previous proceeding are materially different than the current one, and therefore gives it no weight. A review of the decision from the RP-2003-0203 proceeding provides the following quote from a settlement proposal stating the position of all parties:

Parties acknowledge that the Garland decision of the Supreme Court has implications beyond the Company and will likely require repayment of late payment penalties which are in contravention of the Criminal Code by numerous other gas and electric utilities in Ontario. Whether such payments are properly recoverable in rates is a matter which parties agree is appropriate to be considered by the Board in a funded generic proceeding in which all stakeholders can participate.

It is clear that the RP-2003-0203 proceeding included different considerations than the EB-2023-0098 proceeding, including considerations related to the Criminal Code. Furthermore, as noted by OEB staff, Enbridge was not under a multi-year rate-setting framework at the time, therefore there was no consideration of the appropriateness of approving a deferral or variance account “mid-term” of an established multi-year framework.

3 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The Motion by Ontario Power Generation Inc. is denied.
2. Cost eligible intervenors shall submit to the OEB and copy Ontario Power Generation Inc. any cost claims no later than October 31, 2023.
3. Ontario Power Generation Inc. may file with the OEB and forward to the applicable intervenor any objections to the claimed costs of that intervenor by November 7, 2023.
4. An intervenor whose cost claims were objected to may file with the OEB and forward to Ontario Power Generation Inc. any responses to the objections by November 14, 2023.
5. Ontario Power Generation Inc. shall pay the OEB's costs of and incidental to this proceeding upon receipt of the OEB's invoice.

Parties are responsible for ensuring that any documents they file with the OEB, such as applicant and intervenor evidence, interrogatories and responses to interrogatories or any other type of document, **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's [Rules of Practice and Procedure](#).

Please quote file number, **EB-2023-0209** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the [OEB's online filing portal](#).

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address.
- Please use the document naming conventions and document submission standards outlined in the [Regulatory Electronic Submission System \(RESS\) Document Guidelines](#) found at the [File documents online page](#) on the OEB's website.
- Parties are encouraged to use RESS. Those who have not yet [set up an account](#), or require assistance using the online filing portal can contact registrar@oeb.ca for assistance.

-
- Cost claims are filed through the OEB's online filing portal. Please visit the [File documents online page](#) of the OEB's website for more information. All participants shall download a copy of their submitted cost claim and serve it on all required parties as per the [Practice Direction on Cost Awards](#).

All communications should be directed to the attention of the Registrar and be received by end of business, 4:45 p.m., on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Vithooshan Ganesanathan at Vithooshan.Ganesanathan@oeb.ca, and OEB Counsel, Ian Richler at Ian.Richler@oeb.ca.

DATED at Toronto October 24, 2023

ONTARIO ENERGY BOARD

Nancy Marconi
Registrar