

June 27, 2023

## Ontario Energy Board issues decision on Ontario Power Generation accounting order application

### DECISION

Today, the Ontario Energy Board (OEB) issued its Decision and Order denying the application filed by Ontario Power Generation Inc. (OPG) for approval to establish a variance account to record the nuclear revenue requirement impact of the overturning of Bill 124.<sup>1</sup> As a result, OPG will not be allowed to recover from ratepayers any increased compensation costs resulting from the overturning of Bill 124 over the 2022-2026 period, and must instead manage those costs within its current approved revenue requirement.

### BACKGROUND

Bill 124 set a 1% limit on annual wage and total compensation increases for Ontario public sector employees, including employees at OPG, for a three-year moderation period effective November 8, 2019. The limits on compensation set out in Bill 124 were the basis of the forecast compensation costs reflected in OPG's OEB approved revenue requirements for the 2022-2026 period<sup>2</sup> (2022-2026 Payment Amounts).

The Ontario Superior Court overturned Bill 124 on November 29, 2022 and declared it to be "void and of no effect". OPG's affected unions have indicated that they will seek enhanced wages for the periods that their members' compensation has or would have been restrained due to Bill 124.

The variance account proposed by OPG would have recorded the difference between the forecast compensation costs included in OPG's 2022-2026 Payment Amounts order and the compensation costs for the nuclear facilities resulting from the overturning of Bill 124.

### KEY FINDINGS

OPG's current rate framework includes provisions related to "unforeseen events". The criteria for approving a new variance account under OPG's approved rate framework are that the costs in question be "unforeseen" at the time the rate framework was approved, and that the three criteria from the OEB's Filing Requirements<sup>3</sup> – causation, materiality and prudence – be met.

<sup>1</sup> *Protecting a Sustainable Public Sector for Future Generations Act, 2019*

<sup>2</sup> EB-2020-0290, Decision and Order, November 15, 2021

<sup>3</sup> [Filing Requirements for Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications - Chapter 2 Cost of Service, December 15, 2022, Section 2.9.2 Establishment of New Deferral and Variance Accounts](#). In addition to the requirement that the event be "unforeseen", the application referenced EB-2018-0002, which was a proceeding in which the OEB approved a proposed OPG accounting order. In that case the OEB adopted the criteria outlined in the OEB's Filing Requirements for Electricity Distribution Rate Applications (the Filing Requirements) for the establishment of a new deferral or variance account. These Filing Requirements for establishing a deferral/variance account are not specific to OPG and are typically applied to OEB regulated utilities.

In its application, OPG stated that all of these criteria are met.

**Was the overturning of Bill 124 Unforeseen?** (Section 3, pp. 4-6)

The OEB did not accept that the overturning of Bill 124 was an unforeseen event.

Although OPG would not have known with certainty that Bill 124 would be overturned, OPG was clearly aware of the legal challenges to Bill 124 before filing the 2022-2026 Payment Amounts application. The OEB found that the risk of Bill 124 being overturned was certainly present prior to the filing and OEB approval of the Settlement Agreement in the 2022-2026 Payment Amounts proceeding, and thus was a known variable that OPG should have taken into consideration.

The OEB concluded 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 OEB's decision that approved the Settlement Agreement terms.

**Causation** (Section 3, pp. 6-7)

The OEB found that the causation criterion is related to the foreseeability criterion. OPG could have foreseen the impact to its compensation expense from the risk of Bill 124 being overturned during or prior to the 2022-2026 Payment Amounts proceeding, and it could have sought to account for that risk in that proceeding.

**Materiality** (Section 3, pp. 7-9)

The OEB's materiality test is a two-pronged test that speaks to both the amount of additional costs that a utility expects to incur due to a change in circumstances, and also to whether these costs will significantly influence the utility's operations. Although the OEB found that the quantum of costs related to the overturning of Bill 124 would likely exceed OPG's materiality threshold of \$10 million, in this instance the OEB expects OPG to be able to manage these costs within its approved annual revenue requirement (which ranges between \$2.4 billion and \$3.5 billion) over the 2022 to 2026 period. The OEB noted that OPG's expected return on equity for 2022 is well above the value set by the OEB, and that OPG's exemplary performance in 2022 is counter to the suggestion that operational hardships would ensue without the requested variance account.

**Prudence** (Section 3, pp. 9-10)

While it is not unreasonable to expect that OPG may incur these costs in the event that the finding of unconstitutionality of Bill 124 is upheld, the OEB did not need to make a finding on the prudence of incurring those costs given that the causation and materiality criteria have not been met in this case.

**REGULATORY TERMS**

*The following is a list of some of the commonly used regulatory terms that appear in this backgrounder, along with a plain language description for each.*

**Deferral and variance accounts (DVAs)** are commonly used regulatory tools that allow a utility an opportunity to address costs that were unknown or uncertain when its rates were set.

A deferral account tracks the cost of a project or program which the utility could not forecast when its current rates were set. When the costs are known, the utility can request OEB approval to recover the costs in future rates.

A variance account tracks the difference between the forecast cost of a project or program, which has been included in rates, and the actual cost. If the actual cost is lower or higher, then the utility can request OEB approval to return the difference to customers as a credit or to recover the difference through rates.

**Revenue requirement** is the total annual cost for a utility to provide its regulated services. It includes the cost of salaries, equipment, capital projects depreciation, taxes, interest and a return on equity. The OEB approves a utility's revenue requirement when it decides a cost-based application and uses it to set rates that the utility can charge its customers or in OPG's case, to set payment amounts that are used in compensating OPG for its production of electricity.

## **About the OEB**

The OEB is the independent regulator of Ontario's electricity and natural gas sectors. It protects the interests of consumers and supports the collective advancement of the people of Ontario. Its goal is to deliver public value through prudent regulation and independent adjudicative decision-making which contributes to Ontario's economic, social and environmental development.

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*Ce document est aussi disponible en français.*

*This Backgrounder was prepared by OEB staff to inform Ontario's energy consumers about the OEB's decision and is not for use in legal or regulatory proceedings. It is not part of the OEB's reasons for decision; those may be found in the Decision and Order issued today, which is the official OEB document.*