



ONTARIO ENERGY BOARD

ONTARIO ENERGY BOARD STAFF SUBMISSION ON PROPOSED ISSUES LIST

**EPCOR Natural Gas Limited Partnership (Southern Bruce) 2019-2028
Rates Application
EB-2018-0264**

July 23, 2019

1. Background

EPCOR Natural Gas Limited Partnership filed a custom incentive rate-setting application with the Ontario Energy Board (OEB) on April 11, 2019 under section 36 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for gas distribution rates to be effective January 1, 2019 and for each following year through to December 31, 2028. The application is seeking to provide first-time natural gas service within certain communities in South Bruce.

EPCOR Natural Gas Limited Partnership (EPCOR Natural Gas LP) is an Ontario limited partnership with its head office in the Town of Aylmer. EPCOR Natural Gas LP is a wholly owned indirect subsidiary of EPCOR Utilities Inc., based in Edmonton, Alberta. EPCOR Natural Gas LP operates a natural gas distribution business in two service areas in Ontario: the Aylmer franchise area (previously known as Natural Resource Gas Limited) and a new franchise area in South Bruce.

In 2018, the OEB selected EPCOR Natural Gas LP (EPCOR Southern Bruce)¹ as the successful proponent for the South Bruce gas distribution project.² The process was competitive and the selection was made on the basis of a cumulative revenue requirement, forecasted attachments and an overall rate per cubic meter for the 10-year rate stability period. EPCOR Southern Bruce made these commitments as part of the Common Infrastructure Plan (CIP) process and the OEB in its decision noted that it expected that EPCOR Southern Bruce's rate application would be consistent with its CIP proposal.³

The OEB issued Procedural Order No. 1 on May 21, 2019 in this rates application, which set out a schedule for discovery of the evidence and scheduled a settlement conference. By letter dated July 12, 2019, OEB staff advised the OEB that the parties developed a proposed issues list but were not able to reach agreement on all the items. The proposed issues list included comments and suggestions of all parties with most of the issues disputed by EPCOR Southern Bruce. OEB staff in the letter identified the issues that were agreed to by all the parties and suggested a written process for

¹ EPCOR Natural Gas LP in this application has been referred to EPCOR Southern Bruce in order to identify it separately from the Aylmer gas distribution utility.

² EB-2016-0137/0138/0139, Decision and Order, April 12, 2018

³ *ibid*

submissions on the disputed issues. Accordingly, the OEB cancelled the scheduled settlement conference to allow for submissions on the proposed issues list.

In Procedural Order No. 3, the OEB determined that it will proceed by way of written submissions and allow parties to file initial submissions and reply on other parties' initial submissions. Parties were directed to provide submissions only on the disputed issues. OEB staff in this submission has focused only on the disputed issues. Issues 1 (a and b), 4(a), 6 (a, c and d), 7 (b and c) and 9(a) were agreed to in terms of wording and scoping of the issue.

2. Purpose of an Issues List

Prior to discussing the appropriate issues in this proceeding, it is important to understand the purpose of an issues list. The issues list serves to scope the parameters of the hearing. It establishes the matters that can be considered by the OEB in making its ultimate decision. In effect it sets out the broad questions that are at issue in the proceeding. It does not serve to provide “answers” to any of those questions, it simply sets out the matters that parties are permitted to discuss as part of the hearing.

The fact that a party believes that the “answer” to a particular question is clear does not mean that it should not form part of the issues list. If something is not on the issues list, that generally means parties cannot ask any questions about it or make any submissions on it. Issues should only be excluded from the issues list, therefore, if the panel is certain that the matter has no relevance to the proceeding.

3. Proposed Issues List

Issue 2: Rate Base and Utility System Plan

- a) Is the level of planned capital expenditures consistent with EPCOR's CIP proposal and appropriate in that the rationale for planning and pacing choices is adequately explained giving due consideration to:
 - Customer feedback and preferences
 - Benchmarking of costs
 - Reliability and service quality
 - Impact on distribution rates

- Trade-offs with Operating, Maintenance & Administration (OM&A) spending
 - Government-mandated obligations
 - The objectives of EPCOR Southern Bruce and its customers
 - The Utility System Plan
- b) Is EPCOR Southern Bruce's proposed working capital allowance during the rate stability period consistent with EPCOR's CIP proposal and appropriate?
- c) Is the amount of the Contribution in Aid of Construction paid to Enbridge Gas for upstream transmission reinforcement and EPCOR Southern Bruce's proposal for recovery of those costs appropriate?
- d) Is EPCOR Southern Bruce's proposal to waive new customer connection costs consistent with EPCOR's CIP proposal and appropriate?

In the Southern Bruce expansion proceeding, EPCOR Southern Bruce was not required to provide the quantum of capital expenditures that would have been used to calculate the competitive elements of the CIP process. In other words, the reasonableness of the capital expenditures was not reviewed in any other application. OEB staff understands that as per the Southern Bruce expansion decision, any capital cost overruns incurred during the first ten years above the forecasted costs will not be permitted to be added to EPCOR Southern Bruce's rate base for year 11 and beyond.⁴ However, the capital cost forecasted to calculate the revenue requirement was never provided or tested in the Southern Bruce expansion proceeding.⁵

EPCOR Southern Bruce has filed a Utility System Plan (USP) as part of this application. It was not filed in the Southern Bruce expansion proceeding.⁶ The OEB's Natural Gas Filing Requirements provides details on the type of information required in the USP to support the proposed capital expenditures including information on the planning process, engineering plan, long-term economic and planning assumptions, selection and prioritization of investments, linkages to the gas supply plan and, linkages and trade-offs between capital projects and ongoing operating costs.⁷ The filing requirements further state that the USP must provide a description of quantifiable continuous improvements, cost savings or efficiency gains that are expected to be achieved over the Price Cap Incentive Regulation (IR) term and the means by which those improvements, savings and efficiencies will be achieved.⁸ In other words, it is not only the quantum of proposed investments that need to be reviewed but there are a

⁴ EB-2016-0137/0138/0139, Decision and Order, April 12, 2018, p.10

⁵ EB-2016-0137/0138/0139

⁶ *ibid*

⁷ Filing Requirements for Natural Gas Rate Applications, February 16, 2017, pgs.21-23

⁸ *ibid*

number of other factors against which the proposed capital investments need to be examined. OEB staff therefore submits that 2(a) is a legitimate issue in this proceeding and agrees with the proposed wording.

Issue 2(b) relates to working capital allowance and whether it is appropriate. In its application, EPCOR Southern Bruce has noted that its proposed working capital allowance of 7.5% is consistent with the value used in the CIP to estimate revenue requirement and the value allowed by the OEB for electricity distributors.⁹ However, EPCOR Southern Bruce has also estimated a working capital allowance for non-distribution costs in its application.¹⁰ Non-distribution costs which refer to upstream charges and capital contributions paid to Enbridge Gas were not considered or reviewed in the Southern Bruce expansion proceeding.¹¹ Upstream costs were not part of the CIP proposal. It is therefore a legitimate area of inquiry in this application. OEB staff agrees with the wording of the issue.

Issue 2(c) refers to any capital contribution paid to Enbridge Gas for upstream transmission reinforcement and the proposal to recover those costs. OEB staff does not agree with how the issue has been worded. OEB staff notes that the reasonableness of the amount of the Contribution in Aid of Construction (CIAC) paid to Enbridge Gas for upstream transmission reinforcement will be determined in the upcoming Owen Sound Reinforcement application. The OEB does not have the evidence in this proceeding to determine if the CIAC amount is appropriate. This will be determined in the Owen Sound Reinforcement proceeding. The applicant in its evidence notes that Enbridge Gas requires a CIAC to support the reinforcement of the Owen Sound transmission system.¹² In the M17 rate application, Enbridge Gas (formerly Union Gas Limited) noted that in order to provide gas distribution services to EPCOR Southern Bruce, it will file a leave to construct application.¹³ In the same application, Enbridge Gas indicated in an interrogatory response that any CIAC required for upstream reinforcement to serve EPCOR Southern Bruce would be subject to OEB review and would be dealt with in the specific leave to construct application.¹⁴

However, EPCOR Southern Bruce's proposal to recover and allocate the costs related to upstream transportation is an appropriate issue in this proceeding. OEB staff notes that the utility has requested a Contribution in Aid of Construction Variance Account to record the difference in capital contribution that EPCOR Southern Bruce may pay to

⁹ Exhibit 2, Tab 1, Schedule 1, p.6

¹⁰ *ibid*

¹¹ EB-2016-0137/0138/0139

¹² Exhibit 3, Tab 1, Schedule 1, p.12

¹³ EB-2018-0244, Enbridge Gas letter dated February 13, 2019.

¹⁴ EB-2018-0244, response to EPCOR Natural Gas LP IR#3

Enbridge Gas and the value that EPCOR Southern Bruce proposes to recover through the upstream recovery charge. The actual costs will be tracked in the variance account. OEB staff proposes to reword the issue as follows:

2 (c) Is EPCOR Southern Bruce's proposal to recover costs related to the amount of the Contribution in Aid of Construction paid to Enbridge Gas for upstream transmission reinforcement appropriate?

Issue 2(d) relates to customer connection costs. EPCOR Southern Bruce has proposed to waive customer connection charges presumably to make the proposition to convert to natural gas attractive. The CIP process did not go into such details. Although EPCOR Southern Bruce may have included these costs in its CIP proposal, it is not clear whether EPCOR Southern Bruce intends to capitalize these costs and recover them in a future period. EPCOR Southern Bruce will incur some costs to connect customers and it is also necessary to understand how these costs have been allocated to the different rate classes. OEB staff submits that it is an appropriate issue to be considered in this proceeding and is satisfied with the proposed wording of the issue.

Issue 3: Operating Revenue

- a) Is EPCOR Southern Bruce's proposed Distribution Revenue during the rate stability period consistent with EPCOR's CIP proposal and appropriate, giving due consideration to:
 - a. External funding
 - b. Municipal tax holidays
- b) Is EPCOR Southern Bruce's proposed Non-Distribution Revenue for the rate stability period consistent with EPCOR's CIP proposal and appropriate?
- c) Are EPCOR Southern Bruce's proposed Other Revenues during the rate stability period consistent with EPCOR's CIP proposal and appropriate?

In its evidence, EPCOR Southern Bruce noted that a number of items were not included in the total gross revenue requirement in the CIP process and as a result the revenue requirement included in the Southern Bruce expansion decision is subject to certain adjustments which include government grants, municipal contributions, capital contributions, demand side management costs, cap and trade costs and tax holidays from the municipality.¹⁵ Issue 3(a) specifically refers to adjustments related to external funding and municipal tax holidays and it is necessary for the OEB to review these

¹⁵ Exhibit 1, Tab 2, Schedule 1, p.14

adjustments and determine if they are appropriate. OEB staff supports this issue as worded in 3(a) above.

Issue 3(b) refers to non-distribution revenues which are essentially upstream transportation and gas supply costs. Upstream costs were not part of the CIP process. This issue is already covered under Issue 4(a) that deals with gas supply, storage and transportation costs. The wording of Issue 4(a) was agreed to by all parties. Accordingly Issue 3(b) is not required.

Issue 3(c) relates to Other Revenues. Other Revenues relate to non-recurring items and refer to revenues from other activities or work performed such as account information requests, bill reprint and returned cheque/payments. Considering that EPCOR Southern Bruce has proposed Other Revenues to be \$0 in this application, it can be argued that Other Revenues were either not considered or assumed to be \$0 in the CIP proposal. Other Revenues typically form a small proportion of overall revenues and there was no discussion of Other Revenues in the Southern Bruce expansion proceeding.¹⁶ However, OEB staff argues that EPCOR Southern Bruce will receive revenues related to miscellaneous charges (examples of which are noted above) and there should be an assessment of whether \$0 in Other Revenues is appropriate. EPCOR Southern Bruce itself has forecasted Other Revenues of \$31,851 for the first three years.¹⁷ The question that arises is whether \$0 is an appropriate amount to reflect Other Revenues.

OEB staff further notes that the Aylmer distribution system, a second natural gas distribution utility owned by EPCOR Natural Gas LP, forecasted Other Revenues of \$147,777 in its recent cost of service application.¹⁸ A proxy number for Other Revenues could be developed based on the assumptions underpinning the Aylmer forecast that could be applied to EPCOR Southern Bruce. OEB staff submits that Other Revenues is a relevant issue in this proceeding and is satisfied with the proposed wording.

Issue 4: Operating Expenses

- a) Is EPCOR Southern Bruce's forecasted gas supply, transportation and storage costs and proposal for recovery of those costs for the rate stability period appropriate?
- b) Are EPCOR Southern Bruce's shared services costs consistent with EPCOR's CIP proposal and appropriate?

¹⁶ EB-2016-0137/0138/0139

¹⁷ Exhibit 3, Tab 1, Schedule 1, p.15

¹⁸ EB-2018-0336

The wording for issue 4(a) has been agreed to by all parties. Issue 4(b) refers to an aspect of Operating, Maintenance and Administrative costs (OM&A). In a typical cost of service application, the assessment of OM&A costs constitutes an important element of the review process. The OM&A costs form part of the revenue requirement and the resulting rates. In cases where costs for corporate and shared services form a significant portion of the total OM&A costs, there is considerable interest in how these costs have been calculated and allocated to the applicant. However, in this case, the cumulative revenue requirement has been determined in the Southern Bruce expansion proceeding through the CIP process.¹⁹ In other words, EPCOR Southern Bruce assumed certain OM&A costs in the CIP process in order to derive the revenue requirement and the OEB, in accepting the revenue requirement, also implicitly accepted the OM&A costs underpinning the revenue requirement. In response to an interrogatory, EPCOR Southern Bruce has noted that its next rebasing application will reflect actual OM&A costs that the utility is prudently incurring as compared to using the OM&A costs assumed in the CIP proposal and escalated or inflated.²⁰ In other words, the proposed OM&A costs have already been reflected in the revenue requirement approved through the CIP process and will have no bearing on a future rebasing application. OEB staff submits that there are no other known adjustments (other than what is identified below if 5b) to OM&A that need to be made at this time. Accordingly, OEB staff submits that Issue 4(b) should be removed from the issues list.

Issue 5: Revenue Deficiency/Sufficiency

- a) Is EPCOR Southern Bruce's proposal to recover an additional \$1.764 million due to changes in construction schedule and the associated rate rider calculation consistent with EPCOR's CIP proposal and appropriate?
- b) Is the adjusted revenue requirement appropriate?

In its application, EPCOR Southern Bruce has proposed to true up the \$75.6 million revenue requirement to address the delay in the review of its leave to construct application.²¹ In other words, the utility is seeking to recover the costs related to the delay in receiving OEB approvals as compared to the timeline assumed in the CIP proposal. The change in timeline for OEB decisions on the construction schedule has triggered a revenue deficiency of \$1.764 million on a net present value basis compared to that included in EPCOR Southern Bruce's CIP proposal. The OEB needs to review

¹⁹ EB-2016-0137/0138/0139

²⁰ Response to OEB Staff IR#13

²¹ Exhibit 6, Tab 1, Schedule 1, p.2

the calculation and appropriateness of this amount. It is also necessary to assess whether the calculation and the assumed values in calculating the additional revenue deficiency (\$1.764 million) is in line with the parameters underpinning the CIP proposal. OEB staff submits that Issue 5(a) as worded above is appropriate and required.

The revenue requirement as approved in the Southern Bruce expansion proceeding is subject to a number of adjustments that were not considered in that proceeding. This includes external funding, municipal contributions, LEAP funding, gas supply, transportation and upstream reinforcement costs.²² The OEB will need to determine if the proposed adjustments are appropriate and if all adjustments have been included. OEB staff therefore submits that the issue of whether the adjusted revenue requirement is appropriate (Issue 5b) is a legitimate issue in this proceeding.

Issue 6: Cost Allocation and Rate Design

- a) Are the proposed rate classes appropriate?
- b) Are EPCOR Southern Bruce's proposed cost allocation, rate design and revenue to cost ratios appropriate and consistent with EPCOR's CIP proposal?
- c) Are EPCOR Southern Bruce's proposed rates appropriate?
- d) Are EPCOR Southern Bruce's proposed service charges appropriate?

The wording and scoping of issues 6 (a, c and d) were agreed to by all parties to the proceeding. Issue 6(b) which deals with cost allocation and rate design is disputed.

The CIP process did not establish rates for individual rate classes nor did it discuss revenue to cost ratios.²³ EPCOR Southern Bruce has based its cost allocation study on the Aylmer natural gas distribution system. In its evidence, EPCOR Southern Bruce has noted that as the South Bruce system is yet to be built and the fact that it has no customers or operating history, its cost allocation proposal is based on the CIP, the Aylmer natural gas distribution system and management judgement. The application further notes, "Therefore the results of the cost allocation study must be interpreted with caution as, even to one decimal place, they reflect current best estimates."²⁴ The observations of EPCOR Southern Bruce clearly indicate that the cost allocation study has made a number of assumptions which need to be reviewed and tested. OEB staff submits that EPCOR Southern Bruce's proposed cost allocation including the revenue to cost ratios and rate design proposal need to be reviewed and the OEB will need to

²² Exhibit 1, Tab 2, Schedule 1, p.31, Table 1-4

²³ Exhibit 7, Tab 1, Schedule 1, p.2

²⁴ Exhibit 7, Tab 1, Schedule 1, p.3

make a finding on the appropriateness of the proposal. OEB staff submits that the wording as proposed above is similar to that used in other cost of service applications and is appropriate for the EPCOR Southern Bruce Issues List.

Issue 7: Proposed Deferral and Variance Accounts

- a) Are EPCOR Southern Bruce's proposed deferral and variance accounts appropriate?
- b) What other deferral and variance accounts are required?
- c) Should EPCOR Southern Bruce's proposed Federal Carbon Charge and related deferral and variance accounts be addressed in this application or as a separate stand-alone application?

Issue 7(a) deals with the appropriateness of the proposed deferral and variance accounts. It is common for utilities to request a number of deferral and variance accounts as part of a cost of service application or in some cases as a separate application. The OEB assesses the accounts based on causation, materiality and prudence, and then determines whether it is appropriate to establish them. This is a common approach across all utilities and EPCOR Southern Bruce is no different. EPCOR Southern Bruce has proposed a number of deferral and variance accounts in its application. Some of the proposed accounts are not typical to other gas utilities such as the Municipal Tax Variance Account, Energy Content Variance Account and Contribution in Aid of Construction Variance Account. Some of the other proposed accounts are related to commodity and gas supply charges (Purchased Gas Commodity Variance Account, Storage and Transportation Deferral Account and Unaccounted for Gas Variance Account) and were not considered in the CIP process. It is necessary for the OEB to examine the rationale for these accounts, their mechanics and the type of costs that will be recorded in these accounts. OEB staff submits that it is necessary for the OEB to assess the accounts based on causation, materiality and prudence. Accordingly, OEB staff supports the wording of the issue as described above.

The description of issues 7 (b) and (c) have been agreed to by all parties.

Issue 8: Incentive Rate Setting Proposal

- a) Is EPCOR Southern Bruce's proposed Custom Incentive Rate (IR) plan during the rate stability period consistent with EPCOR's CIP proposal and appropriate?
- b) Is the proposed 10-year term for the Custom IR plan appropriate?

- c) Is EPCOR Southern Bruce's proposed annual adjustment mechanism consistent with EPCOR's CIP proposal and appropriate?
- d) Is the exclusion of:
 - i. A productivity and stretch factor consistent with EPCOR's CIP proposal and appropriate?
 - ii. An earnings sharing mechanism consistent with EPCOR's CIP proposal and appropriate?
 - iii. An earnings dead-band off-ramp consistent with EPCOR's CIP proposal and appropriate?
- e) Is EPCOR Southern Bruce's request for availability of an Incremental Capital Module consistent with EPCOR's CIP proposal and appropriate?

Issue 8 refers to the ratemaking framework proposed for the next nine years after rebasing. The different elements of the framework such as the term, the proposed annual adjustment, productivity and stretch factor, earnings sharing mechanism and Incremental Capital Module are sub-issues as noted above.

Custom IR Plan and Term

EPCOR Southern Bruce has proposed a Custom IR plan for the rate stability period. The determination of a rate-making framework and its appropriateness is clearly within the scope of this application. The CIP proposal does not constrain the hearing panel in this case in any manner with respect to determining an appropriate rate-making framework or the term of the rate plan. OEB staff acknowledges that the OEB determined ten years for the rate stability period.²⁵ However, it did not determine what kind of a framework is appropriate for the ten years, how rates should be escalated and what would be the different parameters of such a framework. EPCOR Southern Bruce has requested a 10-year Custom IR plan. This is to coincide with the rate stability period. OEB staff submits that the OEB is not constrained by the determination of the rate stability period for determining an appropriate term for the rate plan. OEB staff submits that the OEB in this proceeding can determine an IR period that is less than 10 years. For example, the OEB could approve a five year IR plan in this application (with no earnings sharing or stretch factor) and before the end of the term, direct the utility to file a subsequent 5-year IR plan for the term 2024-2028 which considers earnings sharing and a stretch factor. The OEB would have better information on historic costs and revenues for the second IR plan and would be able to make a more informed decision based on productivity improvements and efficiencies gained during the first IR

²⁵ EB-2016-0137/0138/0139, Decision and Order, April 12, 2018, p.10

plan. In other words, a single 10 year ratemaking framework cannot be considered a given in this application.

Productivity and Stretch Factor

EPCOR Southern Bruce has not proposed a productivity or stretch factor. EPCOR Southern Bruce's view is that the competitive process has already resulted in a revenue requirement that incorporates productivity and stretch factors, and to apply additional factors would result in doubling up on these elements.²⁶ The OEB in the Southern Bruce expansion decision accepted the CIP proposal of EPCOR Southern Bruce but did not confirm that all the efficiencies have been captured and there are no more efficiencies to be gained.

The OEB has been approving IRM plans in one form or another for the gas utilities and electric utilities since the early 2000s.²⁷ It has been both the OEB's practice and policy, currently and historically, to employ a stretch factor in the majority of these plans.

The stretch factor is used to denote the utility's cost trend performance in relation to other comparable utilities.²⁸ It is a measure to capture ongoing efficiency gains and continuous improvement. The CIP proposal may have captured efficiencies at a point in time. This does not imply that EPCOR Southern Bruce cannot achieve additional efficiencies over the years as it learns to better manage costs and achieve operational efficiencies.

The OEB's *Handbook for Utility Rate Applications* (Rate Handbook) states that a Custom IR application must include explicit financial incentives for continuous improvement and cost control targets. The Rate Handbook further states:

It is insufficient to simply adopt the stretch factor that the OEB has established for electricity distribution IRM applications. Given a utility's ability to customize the approach to rate-setting to meet its specific circumstances, the OEB would generally expect the custom index to be higher, and certainly no lower, than the OEB-approved X factor for Price Cap IR (productivity and stretch factors) that is used for electricity distributors.²⁹

²⁶ Exhibit 10, Tab 1, Schedule 1, p.3

²⁷ Transcript, Vol. 4 (May 15, 2018), p. 26/l. 27 to p. 27/l. 8. Enbridge Gas' first plan was about 15 years ago, while that for Union Gas was about 13 years ago, according to Amalco's witnesses. Electricity distributors had their first PBR rate adjustment in 2002 under the First Generation Rate Handbook (RP-1999-0034 and RP-2000-0069).

²⁸ Handbook for Utility Rate Applications, October 13, 2016, p.18

²⁹ *ibid*, p.26

Given the above argument, OEB staff submits that exploring the appropriateness of a productivity and stretch factor is a valid issue in this proceeding.

Earnings Sharing and/or Dead-band

EPCOR Southern Bruce has further proposed to not include an earnings sharing mechanism or an earnings dead-band off-ramp. These mechanisms are put in place to protect ratepayers during an IR term.

The Rate Handbook specifically discusses the objective of protecting customers during a Custom IR plan. It states:

Utilities that achieve productivity improvements above what is expected are allowed to keep certain earnings above the approved return on equity. However, the OEB expects utilities filing a Custom IR application to propose one or more mechanisms to protect customers from utility earnings that become excessive. Proposals would typically include mechanism such as off ramps and earnings sharing but could include other approaches specific to a utility's circumstances.³⁰

The Southern Bruce expansion application attracted two proponents (Union Gas Limited and EPCOR Natural Gas LP). The OEB selected EPCOR Natural Gas LP based on its overall proposal. But this does not imply that ratepayers do not require any protection against excess earnings during the ten-year rate stability period. OEB staff understands that the applicant is assuming the risk related to customer attachments and capital costs and therefore also the reward. However, there are a variety of factors that could impact earnings (average consumption, OM&A costs, CIAC costs etc.).

The OEB needs to ensure that the approved ratemaking framework has the necessary mechanism to protect ratepayer interests given that in this rate application it now has much more detail than the information provided as part of a proceeding (Southern Bruce expansion proceeding)³¹ that determined which entity would have the right to serve the subject area. In an IR term, ratepayers can be protected by some form of earnings sharing (over the OEB-approved return on equity) and/or through an off-ramp that allows the OEB to review a utility's performance and rates in case it has significantly over-earned or under-earned. The appropriateness of these elements is certainly within the scope of this proceeding. OEB staff is not arguing for including these elements in a

³⁰ Handbook for Utility Rate Applications, October 13, 2016, pgs.27-28

³¹ EB-2016-0137/0138/0139

ratemaking framework; it is merely arguing to include these elements for discussion purposes.

Incremental Capital Module

The last sub-issue (8-e), refers to the request for availability of an Incremental Capital Module (ICM). As set out in the OEB's ICM Policy, the ICM is a funding mechanism available to distributors whose rates are established under a Price Cap IR regime.³² The ICM and Advanced Capital Module mechanisms for funding capital for electricity distributors, or any similar mechanism approved for transmitters, natural gas distributors or Ontario Power Generation, are not available for utilities setting rates under Custom IR.³³ Since EPCOR Southern Bruce has requested a Custom IR framework, it would not be eligible for an ICM. Although EPCOR Southern Bruce has requested an ICM, the question is whether it is eligible for any capital funding over and above the forecasted capital expenditures. If it is eligible, what should be the criteria for recovery of any incremental capital costs. OEB staff suggest modifying Issue 8(e) as follows:

8(e) Is EPCOR Southern Bruce eligible for a capital factor that allows for recovery of incremental capital expenditures for discrete projects that are in addition to the capital costs included in the CIP to connect the forecasted number of customers? If yes, what should be the criteria for a capital factor?

Issue 10: Implementation

- a) Is EPCOR Southern Bruce's proposal for implementation (including its proposed January 1, 2019 effective date and its proposal for rate riders for recovery from and after this effective date) consistent with EPCOR's CIP proposal and appropriate?

In the Southern Bruce expansion proceeding, the OEB required the proponents to develop a proposal using a 10-year horizon for customer attachments and volume forecasts.³⁴ Both proponents used a 10-year forecast for the period 2019 to 2028. The OEB determined the 10-year horizon but not the starting year of the term. The proposal of the two proponents included the specific 10-year period starting in 2019 and the OEB, in selecting the winning proponent, accepted all the elements in the proposal. This does not imply that the OEB in this application cannot determine the appropriate

³² Report of the Board: New Policy Options for the Funding of Capital Investments: The Advanced Capital Module, EB-2014-0129, September 18, 2014.

³³ Handbook for Utility Rate Applications, October 13, 2016, p.27

³⁴ EB-2016-0137/0138/0139, Decision and Order, April 12, 2018, p.8

effective date of implementation. The effective date is a valid issue in this proceeding considering that no customers have been connected to-date (July 2019); prospective customers are only expected to be connected in November 2019. OEB staff submits that the OEB in this application should be able to determine the appropriate effective date of implementation and whether EPCOR Southern Bruce should be permitted to recover any lost revenues or costs. OEB staff supports the wording of the issue as described above.

Issue 11: Stakeholder Engagement

- a) Has EPCOR effectively engaged and consulted with key stakeholders and First Nations and Métis communities? Has EPCOR undertaken consultation to ensure Indigenous rights and interests in the application have been considered and addressed?

This proposed issue has two parts: 1) an issue related to general engagement with key stakeholders and First Nations and Métis communities, and 2) an issue related to whether EPCOR has undertaken sufficient consultation to consider whether Indigenous rights and interests in the application have been considered and addressed.

“Consultation”, and in particular the duty to consult, has a specific legal and constitutional meaning. To the extent that the second part of the proposed issue raises the question of whether the duty to consult has been adequately considered and discharged as it relates to this application, OEB staff has the following submissions.

The duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct.³⁵ A decision by a regulatory tribunal (such as the OEB) can give rise to the duty where the decision in question may affect Aboriginal or treaty rights. Tribunals that are empowered to consider questions of law (which the OEB is)³⁶ are required to consider the duty to consult where it arises in their proceedings³⁷, absent any restrictions in their enabling statutes.

It is important to note that for the duty to consult to be triggered, there must be a potential impact on an actual or asserted Aboriginal or treaty right. Generally speaking, Aboriginal rights are those rights that indigenous peoples enjoy as a result of their ancestors' long occupancy of the land, such as the right to hunt, gather and fish in a

³⁵ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] 1 SCR 1069 (Clyde River), para. 25.

³⁶ *Ontario Energy Board Act*, 1998, s. 19(1)

³⁷ *Clyde River*, paras. 29-34.

particular territory. It also includes rights to cultural practices and customs. Treaty rights are those rights that are set out in specific treaties.

OEB staff is not aware of any potential infringements to any Aboriginal or treaty rights that could result from this application. No party has asserted that any such rights are at issue in this proceeding, nor has any party stated that its purpose is to represent potentially impacted Indigenous communities with respect to these potential rights.

The issue was proposed by Anwaatin Inc. (Anwaatin). Anwaatin's letter of intervention does not mention the duty to consult. The letter of intervention mentions Aboriginal rights only once, and that is in the context of the impact of poor electricity reliability, which is not an issue in this proceeding. Anwaatin's letter of intervention does not mention any Aboriginal or treaty rights that could be relevant to the current proceeding. Some of Anwaatin's interrogatories ask generally about consultation, but they do not identify what rights might be impacted by the application. Similarly, none of the responses to these interrogatories reveal any potential impacts to Aboriginal or treaty rights.

The section 36 rate order is not the only OEB order that EPCOR requires to serve the Southern Bruce area. EPCOR also requires (among other things), and has received in a decision of the OEB dated July 11, 2019, an order granting leave to construct the pipeline that will serve EPCOR's customers. As leave to construct applications have direct "land" impacts the OEB typically addresses Indigenous consultation in natural gas leave to construct proceedings. As such, the adequacy of Indigenous consultation was an issue in EPCOR's Southern Bruce leave to construct proceeding. Anwaatin was an intervenor in that proceeding. Although Anwaatin submitted that the OEB should make a specific determination on whether the duty to consult had been met, it did not argue that the duty had not been met. The OEB considered these and other submissions on Indigenous consultation, and determined that the duty to consult had been sufficiently discharged for the purposes of EPCOR's leave to construct application.³⁸

It is difficult for OEB staff to envision what Aboriginal or treaty rights could be impacted by a rates case. If the application is approved, the resulting order from the OEB will be a tariff of rates. No approvals are being sought through this application that could have any "land" impacts. Absent a clear explanation from Anwaatin regarding exactly what Aboriginal or treaty rights are potentially at play in the current application, OEB staff does not support the addition of an issue relating to the duty to consult.

With respect to the broader issue of "engagement", OEB staff is, generally speaking, supportive of efforts by a utility to engage with those that are impacted by its

³⁸ EB 2018-0263, Decision and Order, p. 12.

applications (i.e. ratepayers). OEB staff observes, however, that this issue appears to be adequately covered under Issue 2: “customer feedback and preferences.”

– All of which is respectfully submitted –