



BY EMAIL and RESS

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June 11, 2020
Our File: EB2020133

Attn: Christine Long, Registrar & Board Secretary

Dear Ms. Long:

Re: EB-2020-0133 – COVID-19 Deferral Account Consultation – Draft Issues List Comments

We are counsel to the School Energy Coalition (“SEC”). These are SEC’s comments on the Draft Issues List, and substantive comments on any required advance policy direction (Issue 1a). Due to the significant number of stakeholders participating, to be most helpful we have limited our comments on the Draft Issues List to identifying material issues that have not been included.

General Comments

The COVID-19 pandemic and the resulting emergency declaration are an extraordinary and hopefully once in a hundred-year event. It has and continues to cause a significant impact on almost all aspects of society. Individuals and businesses in Ontario are suffering through severe economic contractions, and these effects are likely to be felt long past the end of the pandemic and cessation of the emergency declarations.

The Board’s fundamental role as an economic regulator is to regulate those utilities who are structured as for-profit corporations in the public interest. As these utilities do not compete in the market, the Board’s task in rate-setting is to act as a market proxy.¹ The Board’s job is not to provide or even design a bailout for troubled companies. That is the role of governments, not regulators.

For 2020, rates have already been set for all Ontario utilities. Any disposition of the COVID Deferral Account (the “Account”) would be to supplement those rates with additional amounts relating to some or all of the financial impacts of the pandemic. In the normal regulatory context, the Board has mechanisms that allow a utility to bring an application to recover additional costs, over and above those in base rates, where exceptional circumstances exist (i.e. Z-Factor mechanism, or Incremental Capital Module (ICM)).

¹ *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, para. 11

The creation of the Account, the specific sub-accounts, and the Draft Issues List suggest that the Board correctly recognizes that we are not in the normal regulatory context, and therefore the existing mechanisms may not apply because of the extraordinary nature of the situation. At the same time, the Board must ensure that the starting point of this consultation is not an assumption that there should be a greater ability for recovery than would otherwise be the case. That would be an a priori allocation of the risk of the pandemic to the customers, and there is no basis in evidence or otherwise to make that allocation at this time. The COVID-19 emergency may warrant the exact opposite approach, and this consultation is designed to help the Board make that determination as a matter of policy.

The fundamental question that the Board must decide in this consultation, from which all other issues flow, is what principles should apply to determine *if*, and on *what basis*, recovery of any these amounts that relate to COVID-19 are appropriate *at all*?

SEC notes that the answer to this likely lies somewhere on a spectrum:

- **Keep the Utilities Whole.** At one end, SEC expects that certain parties, including some utilities themselves, will argue that the principle is that of ensuring that utilities are kept whole from the impact of the COVID-19 pandemic.
- **No Re-allocation of Impacts.** On the other end, in the context of wide-spread economic hardships faced by individuals, businesses, and shareholders in the wider economy, some customer groups may argue that the Board should not allow any recovery of amounts. Customers are also bearing costs associated with the pandemic, and there is no reason to shift the costs of the utilities to the customers, when they are already bearing their own.
- **Financial Viability.** Somewhere in between, there is the principle that amounts should be recoverable only to the extent necessary to ensure that individual utilities and the sector remain financially viable. This would be consistent with the objectives under the *Ontario Energy Board Act*.² Even then, it is likely parties will argue the Board should only do so after a full review, since the reason the utility's financial viability is in peril is likely the result of many factors, with only a small part being the result of COVID-19. It should only be a rare case in which a utility is so close to the brink that the pandemic would push it over the edge.

Companies and shareholders across Ontario are hurting and seeing their own ROE being eliminated because of the pandemic. In most cases, they will be unable to pass on the increased costs and revenue losses through higher future prices, because their customers are financially hurting. In fact, ratepayers themselves are now less likely to be able to absorb any utility price increase, just as customers of those ratepayers are less able to absorb price increases from them.

As the market proxy, it is not the role of the Board to treat utilities any different from how they would fare in a competitive market. They are not regulated as non-profits, and while there is no doubt that they are an essential service, they are regulated as for-profit companies and provided with an ROE on a deemed level of equity that is meant to compensate them for risks. A regulatory ROE is not

² *Ontario Energy Board Act, 1998*, sections 1(1)2, 2(5.1)

guaranteed, and ratepayers should not be required to subsidize utilities who, like most other businesses, are seeing reduced revenues and in some cases increased costs.

In this context, the Board will need to decide what is properly its role as a rate regulator with a statutory mandate to protect customers, as opposed to a government, who can and have used the tax base to provide relief to individuals and companies due to the impact of the pandemic.

SEC recognizes that aspects of this question are directly or indirectly embedded within some of the draft issues, but believes it would be beneficial for this specific core issue to be front and centre. Only after the Board determines this issue can the Board properly determine all other issues that relate to what amounts to record, how to measure, criteria for specific disposition, and the specifics of when to do so. These subsidiary issues are all vital, but most are dependent on the Board's determination of the broader principles.

Proposed New Issues

What are the principle(s) that should guide the Board in determining what are the appropriate amounts to be recorded in the accounts, and if, and on what basis, recovery of any balance in the accounts is appropriate?

Given the above comments, SEC proposes that the Board either replace Issue 2, or add an issue, that gets to the central question that will need to be answered in the Board's policy that is the outcome of this consultation.

As currently worded, Issue 2 appears to suggest that the Board is relying solely on high-level principles set out in previous reports.³ These high-level principles are important and useful in guiding any Board policy on the Account, but they do not get to the fundamental question that the Board must address in this consultation.

How should the OEB measure a utility's financial viability, and what processes should be put in place for the Board to make that determination?

If the Board determines that a utility must face a threat to its financial viability to be eligible to recover amounts in the Account, then a relevant issue is how to measure financial viability. Is it based on liquidity, return on equity, ability to access required financing and debt etc., or some combination thereof? The Board must also consider whether the appropriate approach is a common set of metrics or case-by-case consideration of the unique circumstances of individual utilities.

In addition, the Board will need to determine what process will be put in place to make such a determination. This may require a full cost of service application or a similar detailed review to determine the extent to which the reason for a threat to a utility's financial viability is the pandemic, as opposed to other causes, and to determine the best approach to restoring financial viability, while at the same time maintaining the principle of just and reasonable rates and complying with its statutory mandate to protect the customers. At present, no issue addresses what type of process or application will be required.

³ These principles include: fairness, minimizing intergenerational inequity, minimizing rate volatility, appropriate allocation of risk, transparency, and providing value to customers.

If the OEB allows disposition of any amounts from the Account, what conditions, if any, are appropriate?

SEC submits the Board should add an issue with respect to conditions that may be warranted if the Board's policy is to allow for any disposition of the accounts. These may include reporting requirements, the imposition of future earnings-sharing so that customers may share in future benefits if they are required to compensate utilities now, and even prohibitions against the payment of shareholder dividends, repayment of shareholder loans, and other shareholder benefits for a certain period.⁴ In certain circumstances, it could even be a requirement that shareholders inject equity into the utility, much as often happens when competitive companies face financial challenges.

What mitigation, if any, should be required to address the individual or cumulative impact of any recovery of the Account, and other COVID-19 related electricity or natural gas bill impacts?

SEC submits under the 'Recovery Mechanism and Timing' section, the Board should add an issue regarding potential mitigation that may be required as it relates to both individual account disposition by a single utility, and the cumulative impact on customers of the recovery of the Account across multiple utilities that serve those customers.

Traditionally, the Board has looked at the bill impact of a utility rate increase in isolation from changes to other parts of the bill. In this one consultation, the Board should consider the cumulative potential increase to all the entities that are part of the consultation, and flow through to the same customers' electricity (distribution, transmission, commodity through Ontario Power Generation payment amounts) and natural gas bills. Further, even though this is not in the control of the Board, it is known that in 2021 customers' electricity commodity bills will be higher than otherwise would be the case due to the recovery of deferred global adjustment charges.⁵ This may also have to be factored into mitigation plans.

When should Utilities cease recording amounts in the Account?

SEC notes that the Draft Issues List has no issue that addresses when utilities will cease recording amounts in the Account. It is not clear if the Account is supposed to be open-ended, or it will at some date (either generic or specific to a utility's rate-setting plan) be closed for new entries. While ultimately the Board may determine that after the consultation is over, it may not be able to provide an answer, as the COVID-19 pandemic and its impacts will still be evolving, we do not know this at the time. By way of example, it is possible that debit entries into the Account are more front-loaded, but credit entries, which would reduce customer obligations, end up arising later on. Further, it may be appropriate to signal to utilities through the policy the initial sense of the Board's thinking on the timing issue.

This is also important for utilities who are rebasing for 2021 rates and need to understand the interplay between the forecasts in those applications and the impacts of COVID-19 that are dealt with by way of the Account. Several material issues are likely to arise in 2021, 2022, and even 2023 rate applications relating to forecasting, since the Board's rate-setting paradigms are mainly premised on

⁴ By way of example, under the Federal Government's COVID-19 Large Employer Emergency Financing Facility, companies that accept financing are prohibited from among other things, paying dividends, capital distributions and share repurchases. See <https://www.cdev.gc.ca/leeff-factsheet/>

⁵ See <https://news.ontario.ca/mndmf/en/2020/05/ontario-providing-support-for-industrial-and-commercial-electricity-consumers-during-covid-19.html>

the future being similar to the past, with only limited exceptions. The impacts of the pandemic, and the impact of the Account, may disrupt some aspects of that “normal course of business” approach.

Modification of Issues

Issue 11 discusses various aspects of the question of lost load. SEC believes the Board should modify issue 11 to capture in one of the sub-issues potential increases in load.

While SEC expects that for most utilities there will be a reduction in revenue from reduced load during the pandemic, this may not be the case for OPG, which has a unique situation. SEC understands that OPG has delayed the refurbishment of Darlington Unit 3 as a result of the pandemic.⁶ Previously OPG has forecast, and included as part of its approved nuclear production forecast, that at no point during 2020 would all four units be in-service at the same time.⁷ With Unit 2 now back online⁸ and the refurbishment of Unit 3 delayed until at least the fall, it will have all four Darlington units in-service and producing. Furthermore, insofar as OPG has delayed planned outages due to the pandemic, that may also increase its production.

Advance Policy Direction

The Board confirmed through its letter of June 4th that it is seeking substantive submissions on Issue 1(a), whether any advance policy direction is appropriate. At this point, it is hard to know what specific advanced policy direction may be requested, and so we are limited in the comments we are able to provide at this time. SEC will respond to any specifics in the context of its reply submissions.

With that said, SEC does provide the following general comments.

We cannot foresee a legitimate reason to provide advance guidance on amounts that should be recoverable in advance of the issuance of any final policy document. There is no urgency that would require the Board to shortcut procedural fairness. SEC would expect that a utility whose financial viability is in such peril that it cannot wait for the conclusion of this consultation, would need much more than advance policy direction in any case, and should be bringing an urgent application before the Board for approval of specific rate relief tailored to their specific circumstances.

By providing advance policy direction on recovery, the Board would be required to undercut the purpose of the consultation, and prejudice its outcome by making a preliminary determination with limited information and without full submissions on the central issues. This is not appropriate.

SEC also cautions the Board, in reviewing requests for advance policy directions from utilities, that the “need” of lenders for greater certainty about recoverability, in order to support lending, is not generic. Financial institutions, rating agencies, and accountants would always like greater certainty regarding recoverability and revenues. This itself means nothing unless a utility can demonstrate that without this direction, that specific utility has an immediate need for borrowing to maintain financial viability and that Board guidance or assurances are necessary to support that borrowing. As noted earlier, that likely requires a specific application, with cost of service level information, for the Board to assess the utility’s situation.

⁶ See <https://www.opg.com/news/opg-targets-fall-date-for-unit-3-refurbishment-due-to-covid-19/>

⁷ See EB-2016-0152 Exhibit E2-12, p.3

⁸ See https://www.opg.com/news-and-media/media-releases/media_release/darlingtons-refurbished-unit-2-reactor-returns-to-service/

There was discussion at the stakeholder meeting, and it is alluded to in the Board's June 4th letter, that there may be a need for advance policy direction solely to record a regulatory asset on a utility's financial statement. The Board should reject this as a basis for any advance policy direction. Under IFRS and US GAAP, to record a regulatory asset on a financial statement, a utility must have sufficient assurance that these amounts will be recoverable. This is the subject of the entire consultation, and so it would be inappropriate to provide this assurance at this time. If the Board says these accounts can be treated as regulatory assets from an accounting point of view, it is publicly assuring the utilities and their lenders and shareholders that the amounts in the accounts will be recovered from customers, subject only to normal tests of calculation and prudence. The Board is not in a position, prior to the completion of the consultation to provide this assurance.

SEC would propose that the Board provide one particular advance policy direction, albeit of a different kind than with respect to Account recoverability. This is on the issue of operational mitigation. As utilities expect lower revenues this year and into the future because of the economic impact of the pandemic, they should be required to mitigate those losses by reducing costs as appropriate. Most utilities will in fact do this without guidance, since reducing certain costs to offset necessary increases and to match revenues is part of the normal course of business. However, it is probably useful for the Board to state this clearly.

Depending on the longer-term impact of the pandemic, utilities who are under IRM, should not expect that it will be reasonable to close as much capital to rate base as they had originally forecast. They have less revenue, they are operating under practical constraints (e.g. enhanced employee safety protocols), and their load forecasts may no longer be reasonable to support previously anticipated growth. They should, therefore, be considering a revision to their system plans. Utilities who can, should also be renegotiating callable affiliate debt to take advantage of low-interest rates. Utilities should be proactively reducing the size of the problem through operating and capital cost reviews.

Other Comments

During the stakeholder meeting, Board Staff noted that the Board would like to wrap up the entire consultation within six months. This is a relatively short period. Given that this is being undertaken as a consultation and not a generic proceeding, it is important that all stakeholders have access to sufficient information to provide informed submissions to the Board.

SEC is happy to have seen in its set out in its June 4th letter the Board's commitment to providing certain initial data collected from the utilities on the sub-account balances in July, but further information and research will be required. Many issues in this proceeding are complex, and may require expert knowledge so that stakeholders have a better starting point to make their substantive submissions, and to help inform the Board in deciding its policy.

SEC requests that Board Staff undertake, either itself or by retaining an expert, necessary research, and provide initial proposals related to a few important topics that will better stakeholders' substantive decision. These topics should include, among others,

- a) ways that the Board can measure a utility's financial viability, and
- b) methodologies to calculate lost load that is attributable to the COVID-19 pandemic.



Both of these issues are complex, and stakeholders, especially those who do not have access to the resources and data of the utilities, will be assisted by Board Staff undertaking initial research, either themselves or through the retention of an expert.

Having a baseline of research and proposals will be especially important where the Board may ultimately need to develop models to ensure uniformity across utilities. SEC recognizes that there is limited time between the filing of the comments and the next stakeholder session in late July, but we believe having independent expert analysis on these topics is important for stakeholders' presentations and comments.

All of which is respectfully submitted.

Yours very truly,

Shepherd Rubenstein P.C.

A handwritten signature in black ink, appearing to read "Mark Rubenstein", with a large, sweeping flourish extending to the right.

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Interested Stakeholders (by email)