

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*,  
S.O. 1998, c. 15, (Schedule B);

**AND IN THE MATTER OF** an application by EPCOR  
Natural Gas Limited Partnership for approval to change gas  
distribution rates and other charges effective January 1, 2023.

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**NOTICE OF MOTION TO REVIEW AND VARY**

**EPCOR Natural Gas Limited Partnership (“ENGLP” or “EPCOR”)**

**EB-2022-0184 (Phase 2)**

**May 10, 2023**

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**ENGLP WILL MAKE A MOTION** to the Ontario Energy Board (the “**Board**” or the “**OEB**”) at its hearing rooms at 2300 Yonge Street, Toronto, Ontario on a date and time to be fixed by the Board.

**PROPOSED METHOD OF HEARING:** ENGLP respectfully requests that the Motion be heard in writing.

**RELIEF REQUESTED:**

1. This Motion is for:
  - (a) an Order that ENGLP’s motion herein satisfies the “threshold test” set out in Rule 43.01 of the Board’s *Rules of Practice and Procedure* (the “**Board’s Rules**”);
  - (b) an Order varying the Board’s Decision and Order of April 6, 2023 in EB-2022-0184 (the “**Decision**”) as follows:
    - (i) setting aside the Board’s decision to limit ENGLP’s recovery of the CVVA to 50% of the accumulated annual balance, until the point where ENGLP’s actual earnings reach 300 basis points below its ROE; and

- (ii) finding that ENGLP shall be eligible to fully track and recover annual balances in the CVVA resulting from the revenue difference between: (A) the average customer volume forecast based on the common assumptions set out in the common infrastructure plan (“**CIP**”); and (B) the actual average customer volume from January 1, 2021 until December 31, 2028;
- (c) an Order for the hearing of the Motion on its merits, in writing;
- (d) an Order pursuant to Rule 40.04 of the Board’s Rules staying the direction in the Decision which requires ENGLP to communicate to existing and potential customers in its Southern Bruce service area a forecast of bill impacts and delivery costs inclusive of the impact of the CVVA during the remainder of the rate stability period (the “**Customer Communication Requirement**”), pending a final determination of this Motion;
- (e) an Order pursuant to Rule 40.04 of the Board’s Rules staying the Board’s accounting order in proceeding EB-2022-0184 (the “**Accounting Order**”), pending a final determination of this Motion; and
- (f) such further and other relief as ENGLP may request and the Board may deem just.

**THE GROUNDS OF THE MOTION ARE:**

**Background and Overview of this Motion**

2. On July 18, 2022, ENGLP filed an incentive rate-setting mechanism application with the Board, seeking approval for changes to rates that ENGLP charges for natural gas distribution in its Southern Bruce service area, effective January 1, 2023 (the “**Application**”).

3. In the Application, ENGLP requested a price cap adjustment and disposition of certain deferral and variance account balances, as well as approval to establish a CVVA in order to track the variance in revenue resulting from the difference between: (a) the average customer volume forecast based on the common assumptions set out in the Board-approved CIP to serve the Southern

Bruce area; and (b) the actual average customer volume from January 1, 2021 until December 31, 2028. Consistent with the CIP and previous Board determinations<sup>1</sup>, the CVVA is designed to only record volume variances for Rate 1 and Rate 6 customers.

4. On September 27, 2022, the Board issued Procedural Order No. 2, which bifurcated the Application into two phases. Phase 1 addressed the price cap adjustment and disposition of existing deferral and variance accounts, and Phase 2 addressed the CVVA issue.

5. In Phase 2 of the Application, ENGLP sought approval to establish a CVVA effective January 1, 2021 to allow for recovery of variances between forecasted and actual customer volumes over the rate stability period, and to have the CVVA apply to new expansion projects where the Southern Bruce rates apply.

6. On April 6, 2023, the Board issued the Decision, which, *inter alia*, approved the establishment of a CVVA effective January 1, 2023, but modified the approved CVVA relative to the CVVA proposed by ENGLP, in three important ways:

- (a) the Board disallowed the proposed January 1, 2021 effective date for the CVVA, based on concerns of rate retroactivity;
- (b) the Board disallowed full recovery of amounts to be recorded in the CVVA by ruling that: (i) any accumulated balance would be shared on a 50/50 basis between ENGLP's shareholders and its customers; and (ii) recovery of any amounts by ENGLP would only be permitted to the point where ENGLP's actual earnings reach 300 basis points below its ROE.

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<sup>1</sup> EB-2016-0137/-0138/-0139, Board Decision and Order (April 12, 2018) (the "**CIP Proceeding**"), at p. 11; and Decision on Preliminary Issues and Procedural Order No. 8 in the CIP Proceeding (August 22, 2017) at p. 5.

- (c) the CVVA would only apply to the Southern Bruce distribution system (within the scope of ENGLP's approved 2019-2028 Custom IR framework) and not future potential expansions such as neighbouring Brockton.

7. In support of the Decision, the Board provided the following reasons, among others:

- (a) The Board established a modified CVVA on the basis that *“it is consistent with its statutory requirements in setting just and reasonable rates to enable EPCOR to earn a fair return on its capital investments.”*<sup>2</sup>
- (b) The Board noted that it was *“not persuaded by EPCOR’s characterization of the 10-year rate stability period as a regulatory compact that somehow needs to be fixed after the fact to restore and fully implement a prior OEB decision.”*<sup>3</sup>
- (c) The Board adopted the reasoning of VECC that: *“EPCOR ought to have considered the potential risk of average use variances relative to the CIP volumes as part of EPCOR’s due diligence.”*<sup>4</sup>
- (d) The Board found that the modified CVVA *“will provide EPCOR with the incentives necessary to improve asset utilization and the resulting ROE forecasts from 2023-2028”* whereas the proposed CVVA *“provided little incentive for EPCOR to manage its risks as customers were expected to bear 100% of the revenue risk of average consumption variances.”*<sup>5</sup>
- (e) The Board found that a 50/50 risk sharing is appropriate as *“it balances the risk of consumption variances equally between shareholders and customers as neither should be entirely responsible.”*<sup>6</sup>

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<sup>2</sup> Decision, at p.7.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Decision, at p. 8.

<sup>6</sup> Decision, at p. 16.

(f) The Board assessed that the application of a means test that limits ENGLP's recovery of CVVA balances to the point that EPCOR's actual earnings reach 300 basis points below the ROE is an "*appropriate*" and "*reasonable threshold*" as it has previously been applied in other contexts such as "*impacts arising from Covid-19*" and "*the OEB's ICM/ACM policy*" and "*should provide EPCOR the opportunity to earn a fair rate of return.*"<sup>7</sup>

8. ENGLP brings the within Motion pursuant to Rules 40, 42 and 43 of the Board's Rules to review and vary the Decision to disallow the potential for full recovery of the accumulated annual balances in the CVVA by imposing a 50/50 risk sharing mechanism and a 300 basis points deadband.

9. ENGLP brings this Motion on the basis that the Board committed material and clearly identifiable errors of fact and law that raise doubts as to the correctness of the Decision.

10. Pursuant to section 43.03 of the Board's Rules, the Board may vary the Decision where the Board determines a change is warranted, based on one or more of the grounds set out herein.

### **Errors of Fact and Law in the Decision**

11. The Board made the following principal errors in reaching the Decision:

#### ***The Decision Ignores the CIP as the Basis for Just and Reasonable Rates***

12. The Board committed an error of fact and law by ignoring that the CIP Proceeding established the basis for just and reasonable rates over the ten-year rate stability period. However, rate-setting in Southern Bruce during this ten-year rate stability period cannot ignore the CIP Proceeding and the unique basis upon which rates in Southern Bruce are to be established during the first ten years of operations.

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<sup>7</sup> The Decision at p. 17.

13. The ten-year regulatory compact governing rate-setting in Southern Bruce arose from the fact that the Board established a competitive process (the “**CIP Proceeding**”) to determine which utility would be granted the right to provide service in Southern Bruce. It was a unique process, but one designed by the Board to specifically tap into competitive forces for the (rate) benefit of future gas customers. In large part, the justness and reasonableness of rates in Southern Bruce will flow from the CIP Proceeding.

14. The record in this Application clearly sets out the regulatory compact that was established and the fact that it formed the basis upon which ENGLP was selected as the successful proponent to serve Southern Bruce.<sup>8</sup> This regulatory compact included two categories for CIP parameters being common assumptions and competitive parameters. The successful proponent was to take on the risk of achieving forecasted competitive parameters; whereas ratepayers assumed the risk of common assumptions, which included forecasted volumes for Rates 1 and 6 customers.<sup>9</sup> In choosing this unique competitive approach, the Board bound ENGLP, future Southern Bruce customers and future Board panels to these CIP parameters, and the risk allocation of those parameters for ten years. This is the regulatory compact.

15. In the Decision, the Board ignored this and proceeded from a standard rate-making premise that just and reasonable rates in Southern Bruce will be achieved if ENGLP gets to the within 300 basis points of the ROE. That is clear from where the Board ends up in its Decision (i.e., the Board ends up at a place that it would likely have ended up if the Application for the CVVA were brought in the absence of the CIP Proceeding). In so doing, the Board commits an error of fact and law.

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<sup>8</sup> ENGLP Argument-in-Chief dated January 9, 2023 at pp. 3, 5-8; see also ENGLP Reply Argument dated February 13, 2023 at p. 10, EB-2022-0184 (Phase 2).

<sup>9</sup> ENGLP Argument in Chief, p.6.

***The Decision Fails to Follow Previous Binding Decisions***

16. The Board committed an error of law by failing to adhere to and implement prior Board decisions which directed that Southern Bruce rates must be consistent with the CIP.<sup>10</sup>

17. The record shows<sup>11</sup> that during the competitive CIP Proceeding, the Board stated that it would require ENGLP to demonstrate that the forthcoming leave to construct and rates applications are consistent with its proposal in the CIP Proceeding (pursuant to which it was granted the Southern Bruce franchise).<sup>12</sup> It follows that if ENGLP's rate applications were to be bound by the CIP Proceeding, the Board too must be bound. In addition, during ENGLP's 2019-2028 Custom IR proceeding (the "**Custom IR Proceeding**"), the Board reiterated that a number of cost parameters and rate components had been pre-determined through the competitive CIP Proceeding and that the Board would not be revising those overall commitments established in the CIP.<sup>13</sup>

18. The Decision fails to follow these previous decisions (and thereby fails to implement the underlying utility-customer risk sharing framework as it relates to the risk of customer consumption variances).

19. To be clear, this is not an issue of stare decisis and administrative law – i.e., that an administrative tribunal cannot bind future tribunal decisions to the same degree that courts can bind subsequent judicial decision-makers – although administrative law acknowledges that there is a “strong case for branding as reviewable those cases where statutory authorities inexplicably fail to

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<sup>10</sup> Southern Bruce Expansion Applications, Decision and Order, April 12, 2018, Section 4.2 Assessment of CIP Proposals, p. 11, EB-2016-0137/EB-2016-0138/EB-2016-0139.

<sup>11</sup> ENGLP Argument in Chief, pp. 3-4, 7; see also ENGLP Reply Argument p. 11-13, EB-2022-0184 (Phase 2)

<sup>12</sup> *Supra note 7*, at p. 8.

<sup>13</sup> Southern Bruce Rate Application, Decision on Issues List, August 20, 2019, p. 3, EB 2018-0264.

act consistently.”<sup>14</sup> Moreover, where an administrative tribunal departs from a previous decision, the departure must be accompanied by an explanation justifying the departure.<sup>15</sup> That is because previous tribunal decisions provide a “direct contextual comparison against which” the reasonableness of a new decision can be assessed.<sup>16</sup> That would be the minimum required of the Decision if the current Application were based on comparable facts – and the Board Decision fails to meet this minimum standard by failing to state how not allowing full recovery of amounts in the CVVA accords with the following from the CIP Proceeding:

“Customer Consumption

The OEB accepts this aspect of the CIP agreement and finds that using common consumption levels for each mass market segment, except for large commercial or industrial customers, is appropriate.”<sup>17</sup>

“Given the competitive nature of this process, the OEB will require EPCOR to demonstrate that forthcoming leave to construct and rates applications are consistent with its CIP proposal.”<sup>18</sup>

20. ENGLP’s CVVA Application is much more than a case of comparable facts.
21. The Application was required (by a previous Board panel) to be decided in compliance with a previous proceeding (the CIP Proceeding). The quoted excerpts from the Board above were intended to be binding on ENGLP and the Board with respect to rate-setting in the ten-year period. The CIP Proceeding, the Custom IR Proceeding, and any other rate proceeding in the ten-year rate stability period must be consistent with respect to the treatment of the CIP parameters.

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<sup>14</sup> David J. Mullan, “Natural Justice and Fairness – Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?”, (1982) 27 *McGill L.J.* 250 at 285.

<sup>15</sup> *J.D. Irving Ltd. v. I.L.A., Local 273* (2003), [228 D.L.R. \(4th\) 620](#), para. [34-37](#) (F.C.A.).

<sup>16</sup> *Altus Group Limited v. Calgary (City)*, [2015 ABCA 86](#), para. 32.

<sup>17</sup> CIP Proceeding, Decision on Preliminary Issues and Procedural Order No. 8 (August 22, 2017) at p. 5.

<sup>18</sup> CIP Proceeding, p. 11.



22. In addition, the pronouncements of the previous Board Panel in the CIP Proceeding has been relied on by ENGLP in its bid for the franchise in Southern Bruce. ENGLP had a legitimate expectation that all Board rate-setting processes during the 10-year rate period would follow the CIP Proceeding's treatment of the competitive and non-competitive parameters. On this point, the CIP Proceeding was clear and unambiguous, and there is no conflicting statutory duty that would require the Board to diverge from its previous pronouncements. The failure by the Board panel in the Decision to follow the Board's previous pronouncements in the CIP Proceeding amounts to a breach of the duty of fairness, and an error of law.<sup>19</sup>

23. The Board's failure (in the Decision) to follow the Board determinations in the CIP Proceeding amounts to an error of law.

***The Decision Amounts to a Review and Variance of the CIP Proceeding***

24. The Board committed an error of law by altering the risk allocation (for customer consumption variances) set out in the CIP Proceeding. Instead of being a risk element borne by customers entirely (as contemplated by the CIP Proceeding), the Decision states that the risk should be shared equally between shareholders and customers because "*neither should be entirely responsible*".<sup>20</sup>

25. The record clearly demonstrates that the CIP Proceeding created a utility-customer risk sharing framework wherein average consumption for Rate 1 and 6 customers was a common

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<sup>19</sup> See Brown, Donald J.M. and J. M. Evans, *Judicial Review of Administrative Action in Canada*, (Toronto, Ontario: Canvasback Publishing 1998), § 7.26 to 7.29.

<sup>20</sup> The Decision at p. 16.

assumption and therefore a risk to be borne by ratepayers.<sup>21</sup> The Decision completely changes that – which amounts to a review and variance of the Board’s previous (and as noted above, binding) decision. Moreover, the basis for materially changing the risk allocation and varying the Board’s previous determination, is not explained.

26. On that basis, the Decision amounts to an error of law.

***The Decision is Based on Inapplicable and Incorrect Findings***

27. In finding that ENGLP failed to consider the potential risk of customer use variances (relative to the CIP volumes) and that the “new” risk allocation methodology will incentivize ENGLP to improve asset utilization, the Board commits material errors of fact.

28. With respect to the first point, the Board was persuaded by the reasoning of VECC that: “EPCOR ought to have considered the potential risk of average use variances relative to the CIP volumes as part of EPCOR’s due diligence.”<sup>22</sup> It is not clear what due diligence VECC is speaking of – but it is important to note that the CIP parameters (including with respect to average customer use) were set in 2017 by the competing utilities, with the Board’s oversight, for a region never before serviced by natural gas. More importantly, the quoted text above suggests that ENGLP should have revisited the CIP Proceeding parameters after the CIP Proceeding but before the Custom IR Proceeding. That is directly *contra* the CIP Proceeding and the regulatory compact. The CIP parameters are not to be revisited. ENGLP, for example, cannot now revisit one of the competitive parameters (e.g., capital cost) and update it for better information. That risk is

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<sup>21</sup> *Supra note 6.*

<sup>22</sup> *Ibid.*

ENGLP's. By the same token, parameters for which customers bear the risk do not get revisited and reopened based on better information. This amounts to a material error of fact.

29. With respect to the second point, the Board committed a further material error of fact by basing its decision to limit recovery of CVVA balances (to 300 basis points below the ROE) because it: *“will provide EPCOR with the incentives necessary to improve asset utilization and the resulting ROE forecasts from 2023-2028”*.<sup>23</sup>

30. The utility incentives formed part of the determinations in the CIP Proceeding, which was meant to create an even playing field between the competing utilities (ENGLP and Enbridge). The record clearly demonstrates that had Enbridge Gas been the successful proponent to build the Southern Bruce system (consistent with the principle of not taking the risk on common assumptions regarding customer consumption) its existing normalized average consumption account would have captured variances in actual consumption volume relative to those approved in rates.<sup>24</sup> On the element of customer usage, there was to be no incentive.

31. However, the Board's Decision changes that, and doing so amounts to an error of fact.

32. In light of the foregoing, ENGLP submits that the Board committed errors which raise doubts as to the correctness of the Decision.

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<sup>23</sup> The Decision at p. 8.

<sup>24</sup> ENGLP Reply Submission at p.2; See also Board Staff Submission, January 26, 2023 at p. 5.

**The Threshold Test to Review the Decision is Satisfied**

33. Rule 43.01 of the Board's Rules provides that, in respect of a motion brought under Rule 40.01 to review and vary a decision, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

34. This Motion raises relevant issues that are material enough to warrant a review of the Decision on its merits. Given the issues raised in this particular Motion, in making a determination pursuant to Rule 43.01, the Board may consider the following (the "**Threshold Test**"):

- (a) Whether any alleged errors are in fact errors (as opposed to a disagreement regarding the weight the Board applied to particular facts or how it exercised its discretion);
- (b) Whether any alleged errors, if proven, could reasonably be expected to result in a material change to the decision or order; and
- (c) Whether the moving party's interests are materially harmed by the decision and order sufficient to warrant a full review on the merits.<sup>25</sup>

35. The Decision contains material and clearly identifiable errors of fact and law, or of mixed fact and law, as outlined in detail in paragraphs 11-32 of this Motion.

36. These errors, if rectified, could reasonably be expected to result in material changes to the Decision namely, they would revoke the ruling to modify and limit ENGLP's recovery of annual balances in the CVVA and substitute it with a ruling that would give the utility an opportunity to recover all accumulated balances.

37. ENGLP's interests are materially harmed by the Decision sufficient to warrant a full review of the motion on the merits. Specifically:

- (a) The adverse financial consequences of the modified and limited CVVA, includes a disallowance of approximately \$4.2 million, which amounts to recovery of 47% of

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<sup>25</sup> These are considerations (c), (d), and (e) as set out in Rule 43.01 of the Board's Rules.

total projected accumulated balances in the CVVA over the ten-year rate stability period. To further illustrate financial impacts, the Decision's disallowance will result in the utility earning an average ROE of -2.0% as opposed to -0.2% if full recovery of balances had been allowed. This disallowance is significant for a small, greenfield utility that already has incorporated a number of efficiencies through a public and highly competitive expansion proceeding. It is notable that ENGLP had an ROE of 2.9% at the rate application stage which signals that the utility has already incurred unrecoverable losses by maintaining the financial risks associated with the competitive parameters set out in the CIP and now, it is being asked to take on additional risk of customer volumes, which further harms the utility's financial position. Once the Decision is corrected, the amounts that ENGLP would have the opportunity to recover through the CVVA would be materially different than the amount provided for in the Decision and would actually enable the utility to earn a fair and reasonable return on its capital investments.

- (b) The Decision will significantly limit and potentially cease ENGLP's efforts to expand its Southern Bruce operations, particularly with respect to the Brockton community expansion project. Simply put, the Decision has eroded investor confidence that the rules of engagement established by the Board in one decision will be upheld in subsequent related proceedings so as not to introduce additional, material financial risk to the utility.

38. In support of ENGLP's assertion that its interests are materially harmed by the Decision, and pursuant to Rule 8.02 of the Board Rules, the utility relies on the evidence proffered in the Affidavit of Susannah Robinson.

39. As such, ENGLP has satisfied the Threshold Tests and the Board should proceed to hear this Motion on its merits.

**The Board Should Stay the Customer Communication Requirement and Accounting Order Pending a Final Determination of this Motion**

40. In the Decision, the Board directs ENGLP to communicate to existing and potential customers in its Southern Bruce service area a forecast of bill impacts and delivery costs inclusive of the impact of the CVVA during the remainder of the rate stability period. Depending on the outcome of the within Motion the forecasted bill impacts during the remainder of the rate stability period could change. In order to have clear, streamlined communication with customers on this issue, ENGLP respectfully requests that the Board stay the operation of this Customer Communication Requirement until a final decision on the Motion is reached by the Board.

41. Further the Board will soon issue an Accounting Order, which reflects the findings in the Decision. Given the pendency of the within Motion to review Board modifications made to the CVVA, ENGLP respectfully requests that the Board stay the operation of the Accounting Order until a final decision on the motion is reached by the Board.

42. In support of this request, ENGLP notes that no party will suffer any prejudice if the Board grants the requested stays.

**Rules and Other Grounds**

43. Rules 8, 40, 42 and 43 of the Board's Rules.

44. Such further grounds and material as counsel may advise and the Board may permit.

**THE FOLLOWING DOCUMENTARY MATERIAL AND EVIDENCE WILL BE RELIED UPON AT THE HEARING OF THE MOTION:**

45. The Decision;

46. Materials from the record in Board proceeding EB-2022-0184;

47. Materials from the record of ENGLP's 2019-2028 Custom IR Proceeding EB-2018-0264;

48. Materials from the record of the Southern Bruce Expansion CIP Proceeding EB-2016-0137/EB-2016-0138/EB-2016-0139;

49. The Affidavit of Susannah Robinson, sworn May 9, 2023; and

50. Such further and other material as counsel may provide and the Board may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 10, 2023

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**EPCOR Natural Gas Limited Partnership**  
Per: Tim Hesselink, CPA  
Senior Manager, Regulatory Affairs