Ontario Energy Board | Commission de l'énergie de l'Ontario

BY EMAIL

July 27, 2023

Ms. Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4
Registrar@oeb.ca

Dear Ms. Marconi:

Re: Ontario Energy Board (OEB) Staff Submission
EPCOR Natural Gas Limited Partnership
Motion for Review and Variance, South Bruce, 2023 Custom IR, Customer Volume Variance Account, EB-2022-0184
OEB File Number: EB-2023-0140

Please find attached OEB staff's submission in the above referenced proceeding, pursuant to Procedural Order No. 3.

EPCOR Natural Gas Limited Partnership is reminded that its reply submission is due by August 10, 2023.

Yours truly,

Arturo Lau

Digitally signed by Arturo Lau
Date: 2023.07.27 11:17:05 -04'00'

Arturo Lau
Advisor, Natural Gas

Encl.

cc: All parties in EB-2023-0140

ONTARIO ENERGY BOARD

OEB Staff Submission

EPCOR Natural Gas Limited Partnership

Motion for Review and Variance

EB-2023-0140

July 27, 2023

Background and Overview

EPCOR Natural Gas Limited Partnership (EPCOR) has filed a motion to review and vary (Motion) a decision of the Ontario Energy Board (OEB) dated April 6, 2023 (Decision).[1] The primary relief sought through the Motion is an order varying the terms the OEB placed on a Customer Volume Variance Account (CVVA), and an order changing the effective date of the CVVA from January 1, 2023 to January 1, 2021.

The proceeding which gives rise to the Motion commenced when EPCOR filed an incentive rate setting mechanism application (Application) for its Southern Bruce service territory. This was the fourth application[2] by EPCOR for an annual update to its rates in accordance with its approved custom incentive rate setting framework for the period 2019-2028 (Framework). This Framework was approved by the OEB through a custom incentive rate making decision of the OEB dated November 28, 2019 (the CIR Decision)[3], which also set EPCOR's base rates for the commencement of the rate term. The primary purpose of the Application was to make the annual adjustment to EPCOR's rates in accordance with the incentive rate setting formula that had been approved through the CIR Proceeding, and to consider the clearance of any balances in the deferral or variance accounts that were approved in the CIR Proceeding. As part of the Application, EPCOR also sought approval for the creation of a CVVA.

The CIR Proceeding followed, and was informed by, a competitive process proceeding (Competitive Process Proceeding) in which the OEB considered whether to award the relevant certificates of public convenience and necessity for the previously unserved Southern Bruce service territory (Certificates) to EPCOR or to Union Gas Ltd. (Union Gas, which has since amalgamated with Enbridge Gas Distribution Inc. and operates under the name, Enbridge Gas Inc.).[4] The OEB considered proposals from both EPCOR and Union Gas and ultimately awarded the Certificates (i.e. the right to serve the Southern Bruce franchise territory, subject to a subsequent proceeding and decision of the OEB to set rates) to EPCOR.

The Competitive Process Proceeding involved the creation of a "common infrastructure plan" (CIP), which was a standard set of parameters regarding Union Gas and EPCOR's respective proposals to serve the Southern Bruce service territory. The purpose of the CIP was to "allow the OEB to undertake a comparison of the stated revenue requirements [i.e. the revenue requirements that the proponents stated they required to serve the Southern Bruce service territory] on a set of common parameters."[5] The CIP included both "Common Parameters" that were to be held

[1] EB-2022-0184
[2] EB-2022-0184
[3] EB-2018-0264
[4] EB-2016-0137/0138/0139 (Competitive Process Proceeding)
[5] Competitive Process Proceeding, Procedural Order No. 6, p. 4.

constant as between EPCOR and Union Gas Ltd. (one of which was average customer volumes for mass market customers), and certain other factors over which the two utilities could file competing proposals (for example the number of forecast customer attachments and pipeline routing).

Ultimately the OEB issued a decision awarding the Certificates to EPCOR (Competitive Process Decisions)[6]. Although the Competitive Process Decisions awarded the Certificates, it did not set rates, and the OEB was clear that final rate making parameters would be determined in a future rates case (which turned out to be the CIR Proceeding).[7]

The Application included a request for a new CVVA which would 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 OEB-approved CIP to serve the Southern Bruce area; and (b) the actual average customer volume from January 1, 2021 until December 31, 2028. The reason for this request was that the actual average use of customers was significantly lower than what had been forecast, which in turn resulted in EPCOR earning less revenue than it had forecast. This contributed to its under-earning against the return on equity that was notionally embedded in its base rates during the 2019-2022 period, and EPCOR expected that this under-earning would continue throughout the term of the Framework.

The CIR Decision did not establish a variance account (such as the CVVA) for variances from annual customer volumes, and EPCOR did not request such an account in that proceeding.

In the Decision, the OEB approved a modified version of the CVVA in which EPCOR would be permitted to record a portion of the revenues associated with the difference between forecast and actual average customer consumption volumes. Instead of allowing EPCOR to record the full difference between forecast and actual customer volumes, the OEB instead limited entries into the CVVA to 50% of the accumulated annual difference in annual versus forecast customer consumption volumes, up to the point where EPCOR's actual earnings reach 300 basis points below the ROE notionally embedded in its base rates (described by EPCOR as the "Risk Sharing Mechanism"). The OEB also set an effective date of January 1, 2023 instead of the effective date of January 1, 2021 that had been requested by EPCOR.

The Motion seeks an order overturning the Decision, and substituting it with an order approving the CVVA as applied for by EPCOR with an effective date of January 1,

[6] There are in fact a number of decisions in the Competitive Process Proceeding that are relevant to the Motion. These are footnoted as appropriate throughout this submission, however for convenience they are referred to collectively as the Competitive Process Decisions.
[7] EB-2016-0137/0138/0139, Decision on Preliminary Issues and Procedural Order No. 8, p. 3.

2021. OEB staff submits that the OEB did not make any material errors of fact, law, or jurisdiction in the Decision, and that the Motion should be dismissed.

Motions under Rules 40-43 of the OEB's Rules of Practice and Procedure

EPCOR's Motion is brought under Rule 40.01 of the OEB's Rules of Practice and Procedure (Rules). There are three permitted grounds for a motion under Rule 40.01, only the first of which is relevant to the current Motion:

> **42.01(a)(i)** the OEB made a material and clearly identifiable error of fact, law or jurisdiction. For this purpose, (1) disagreement as to the weight that the OEB placed on any particular facts does not amount to an error of fact; and (2) disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction unless the exercise of discretion involves an extricable error of law.

In a letter introducing certain proposed changes to Rules 40-43 dated May 13, 2021, the OEB explained the purpose of the proposed amendment to Rule 42.01(a) as follows:

> First, the OEB wishes to reinforce through the Rules that the purpose of a review is not simply to reargue a case that was already presented to the original panel of Commissioners. Motions to review should be limited to instances where a party can clearly identify a material error of fact, law or jurisdiction in the decision or order, or if there is a change in circumstances or new facts that would have a material effect on the decision or order. The proposed amendments also clarify that for the purposes of the Rules, a disagreement about how the OEB exercised its discretion or the weight that it placed on particular facts are not a basis for a motion to review. The proposed amendments to Rule 42.01 (a) are intended to provide further guidance to parties on these and other issues relating to the types of matters that are appropriate subjects for a motion to review, including new requirements that must be met by notices of motion to review.[8]

The task for a reviewing panel, therefore, is not to consider the matter under review *de novo* (i.e. as a fresh application). Instead, the reviewing panel should consider whether the moving party has been able to clearly identify a material error of fact, law or jurisdiction in the original decision or order. The question is not whether the reviewing panel might have exercised its discretion differently from the original panel; the question is whether the original panel made a clearly identifiable error of fact, law or jurisdiction. As described in further detail below, it is OEB's staff's submission that the Decision does not contain a clearly identifiable error of fact, law or jurisdiction, and should be dismissed. The OEB's decision was within its discretion to set just and reasonable

[8] Letter from the OEB, May 13, 2021, page 2. The proposed amendments to Rule 42.01(a) were adopted with the wording as presented in the letter with one minor revision: the addition of the words "unless the exercise of discretion involves an extricable error of law".

rates, and a disagreement with respect to how the OEB exercised its discretion is not an appropriate ground for a motion to review.

The Motion

The Notice of Motion alleges that the OEB made a number of errors of fact and/or law in the Decision with respect to the conditions the OEB placed on the CVVA:

a) the Decision ignores the common infrastructure plan from the Competitive Process Proceeding as the basis for just and reasonable rates;
b) the Decision fails to follow previous binding decisions;
c) the Decision amounts to a review and variance of the CIP proceeding; and
d) the Decision is based on inapplicable and incorrect findings.[9]

OEB staff observes that there is overlap amongst these categories. Further, EPCOR's argument in chief does not strictly follow these categories. In its argument in chief EPCOR describes the questions for the OEB as follows: "This review process is not to revisit the appropriateness of establishing the CVVA. What the Board must review in this proceeding is: (ii) whether the Risk Sharing Mechanism should be set aside; and (i) the appropriate effective date of the CVVA – January 1, 2021 or January 1, 2023."

OEB staff will structure its submission based on these two questions.

<u>The Establishment of the Risk Sharing Mechanism in the CVVA and the Regulatory Compact</u>

EPCOR argues that the Risk Sharing Mechanism embedded in the CVVA by the OEB is inconsistent with the regulatory framework that had been established through previous OEB decisions, primarily the Competitive Process Decision and the CIR Decision.[10] EPCOR states that the OEB had already determined that all risk in respect of average customer consumption volume variances would lie with ratepayers (and therefore not EPCOR), and that the Decision inappropriately changed that risk allocation.[11] EPCOR argues that this is a breach of the "regulatory compact", and is as such a legal error, and that the Risk Sharing Mechanism should be rescinded.

The Supreme Court has described the regulatory compact as follows:

> Rate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed …
>
> These goals have resulted in an economic and social arrangement dubbed the "regulatory compact", which ensures that all customers have access to the utility at a fair price — nothing more. … Under the regulatory

[9] EPCOR Notice of Motion, pp. 5-11.
[10] EPCOR argument in chief, paras. 8, 11.
[11] EPCOR argument in chief, para. 21.

> compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated…
>
> Therefore, when interpreting the broad powers of the Board, one cannot ignore this well-balanced regulatory arrangement which serves as a backdrop for contextual interpretation. The object of the statutes is to protect both the customer and the investor …. The arrangement does not, however, cancel the private nature of the utility. In essence, the Board is responsible for maintaining a tariff that enhances the economic benefits to consumers and investors of the utility.[12]

OEB staff accepts that the regulatory compact is an important principle in the setting of just and reasonable rates. At its core, the regulatory compact requires the OEB to balance the interests of the utility (and its shareholder) with the interests of the ratepayers. However, it is clear that the regulatory compact does not require ratepayers to bear all risk in respect of a utility's investments, nor does it guarantee that a utility will actually earn its full return on equity (utilities are given "an opportunity to earn a fair return").

OEB staff submits that nothing in the Decision is inconsistent with any previous decisions of the OEB. Contrary to the arguments of EPCOR, the allocation of risk in respect of average customer volumes had not been determined by the OEB prior to the Decision. The first time that the issue of allocation of risk respecting average customer consumption volumes was directly before the OEB was in the proceeding which gave rise to the Decision (i.e. EPCOR's 2023 Custom IR Annual Update application).[13] The OEB's Decision to essentially split that risk (through the Risk Sharing Mechanism) between EPCOR and its ratepayers was consistent with the regulatory compact – i.e. the requirement that the OEB balance the interests of ratepayers and the utility - and was a determination that lies well within the OEB's discretion to set just and reasonable rates.

EPCOR argues that the OEB determined through the Competitive Process Decisions that all risk associated with average customer volume variances would be borne by ratepayers, and that this was the regulatory compact approved by the OEB.[14] OEB staff submits that at no point did the OEB state, either in the Competitive Process Decisions or anywhere else, that risk associated with average customer volumes would be borne by ratepayers.

[12] *Atco Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4, para. 62-64*
[13] EB-2022-0184
[14] Notice of Motion, para. 14.

EPCOR notes that, in the Competitive Process Proceeding and pursuant to direction from the OEB, EPCOR and Union agreed to hold certain parameters common between them as part of the CIP. The purpose of this exercise was to allow the OEB to focus on areas where EPCOR and Union might legitimately compete and come up with different proposals to serve the Southern Bruce territory (for example, the number of customers served, capital costs, etc.). Common Parameters were meant to capture things where there was no reason to expect that EPCOR or Union should have different assumptions (such as depreciation rates, capital structure, upstream reinforcement costs, etc). Average use per customer is a good example of this: there is no reason to expect that the average use for a particular mass market customer would vary based on whether they were served by Utility A or Utility B. Establishing Common Parameters prevented either utility from using different figures for matters where there was no reason to believe that there should be differences between them; this allowed the OEB to focus exclusively on the areas where there might be legitimate differences between their proposed costs and assumptions to serve the Southern Bruce service territory. EPCOR and Union Gas largely agreed on what the Common Parameters should be.[15] However, nowhere did the OEB indicate that Common Parameters would be automatically shielded from utility side risk in a future rates case.

In support of its arguments EPCOR provides a number of quotes from the Competitive Process Decisions and other documents that were placed on the record in that proceeding; however none of these quotations directly address the issue of risk allocation as between the utility that was ultimately awarded the Certificates and ratepayers. For example, at paragraph 19 of its argument in chief, EPCOR provides a quote from an OEB staff report that was filed in the proceeding, which outlined the areas of agreement and disagreement between EPCOR and Union Gas regarding the CIP parameters[16]:

> Proponents [i.e. Union Gas and EPCOR] agreed to use the same value for the average annual usage of mass market consumers. Proponents agreed to work together to develop common consumption levels for each mass market segment, including residential, small/medium commercial, small/medium industrial, hospitals, schools and other municipal or institutional consumers.
>
> Proponents agreed that consumption levels forecast for any large commercial or industrial customers should not be set in common, but rather left to competition in each proponent's proposal.

EPCOR goes on to conclude that this expresses a clear intention from the proponents that average annual consumption was not a parameter for which they would take any

[15] EB-2016-0137/0138/0139, OEB staff Progress Update, filed July 20, 2017, pp. 3-4.
[16] The CIP parameters were later approved by the OEB in Decision on Preliminary Issues and Procedural Order No. 8.

risk.[17] However, nothing in the paragraph cited mentions risk at all. It simply states that for the purposes of preparing a CIP the proponents would use common assumptions with respect to mass market average annual volumes.

EPCOR also relies on a statement made by the OEB in considering the appropriate CIP parameters:

> The OEB recognizes that both proponents have agreed to certain assumptions regarding CIP parameters. The common assumptions of the CIP should be explicitly included in each proponent's proposal to ensure that proponents are adhering to their agreement. However, the OEB does not expect proponents to disclose those competitively derived elements that build up the revenue requirement.
>
> *Agreed Upon Parameters*
>
> A full description of the parameters that were agreed upon can be found in the OEB Staff Report filed on July 20, 2017. The OEB has summarized the agreed upon parameters below and finds that they are appropriate:
>
> […]
>
> - 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. The proponents agreed to work together to develop these values. These values should be included in proponents' proposals. If the proponents are unable to agree on the values to be used, they may seek further directions from the OEB.

Again, at no point in this reference does the OEB directly address the issue of utility versus ratepayer risk at all – it is a simply a statement that for the purpose of preparing their CIP proposals the proponents are expected to use common assumptions in respect of average mass market customer volumes. As discussed further below, the OEB was clear that a subsequent rates case would be the appropriate forum in which to consider detailed rate making issues.

OEB staff submits that EPCOR has conflated the concept of Common Parameters – which were developed to reflect assumptions that were thought to be common as between EPCOR and Union – with a determination that the utility that "won" the competitive process would not face any risk in respect of those Common Parameters. At no point did the OEB state this. Many of the Common Parameters were agreed to by EPCOR and Union, including that they should use common annual volume assumptions

[17] EPCOR argument in chief, para. 21.

for their mass market customers.[18] In its Decision on Preliminary Issues and Procedural Order No. 8 in the Competitive Process Proceeding, the OEB accepted that using common consumption levels was appropriate for the purposes of comparing the proposals of EPCOR and Union.[19] However, the OEB did not state that average customer volumes would be at the risk of ratepayers in a future rates case; it did not address that issue at all.

In fact, the OEB was clear that the Competitive Process Proceeding was not a rates case, and details related to the future rate-making framework would be addressed when the successful proponent filed its rates application under section 36 of the OEB Act. In response to concerns expressed by ratepayer groups that they had not been directly involved in developing the common and competitive parameters, and that some of the matters put forward by EPCOR and Union Gas strayed into rate-setting matters, the OEB stated:

> The OEB recognizes that submissions were made by the proponents [i.e. EPCOR and Union] on permissible annual revenue updates at the hearing. The OEB does not consider the setting of rate-making parameters for the purpose of establishing comparable CIP proposals to be determinative of any element of the future rate-making scheme for the successful proponent. **How the revenue requirement will be recovered, including the actual permissible annual revenue updates, will be decided later with the full participation of affected ratepayers. All of the following parameters that involve rate making assumptions should be considered in that context**.[20]

It appears clear, therefore, that the Competitive Process Proceeding: (a) did not make any determinations one way of the other as to who – as between ratepayers and the utility – would bear the risk for variances related to revenues associated with average mass market customer volumes; and (b) determined that details related to the rate-making framework, including permissible annual revenue updates, would be considered in a future rates case (which turned out to be the CIR Proceeding).

EPCOR filed its CIR application on October 3, 2018. The application used the same forecast of mass market annual customer volumes (i.e. Rate 1 and Rate 6) that had been agreed to by EPCOR and Union Gas in the Competitive Process Proceeding, and its forecast revenues were based on those average volume forecasts (amongst many other things). The parties to the CIR Proceeding settled many of the issues, including EPCOR's proposed distribution revenue. Embedded in the distribution revenue are the

[18] See the OEB staff Progress Report filed in the Competitive Process Proceeding on July 20, 2017, p. 6
[19] EB-2016-0137/0138/0139, Decision on Preliminary Issues and Procedural Order No. 8, p. 5.
[20] EB-2016-0137/0138/0139, Decision on Preliminary Issues and Procedural Order No. 8, p. 3 (emphasis added).

revenues from Rate 1 and Rate 6, which is driven in part by the forecasts of average consumption. However, there was no specific mention of the forecast average annual consumption for Rate 1 and Rate 6 in the settlement proposal.[21] The OEB accepted the settlement agreement in a decision dated October 3, 2019. This decision did not specifically address the revenues associated with the forecast of average annual consumption for Rate 1 and Rate 6. Neither the settlement proposal nor the OEB's decision accepting the settlement proposal discuss who should bear the risk related to any variances from the average annual consumption forecasts for Rate 1 and Rate 6.

OEB staff observes that EPCOR's CIR application included requests for several deferral and variance accounts. Some of these accounts were agreed to through the settlement proposal, whereas there was no settlement in respect of three proposed accounts. Ultimately two of the disputed accounts were approved by the OEB in the CIR Decision, including an Energy Content Variance Account (ECVA) to record any variations in revenues or costs resulting in differences in the energy content (heat content) of the gas actually delivered and the assumed energy content.[22] It is not clear to OEB staff why EPCOR believes it could not also have included a request for a CVVA as part of its application. Indeed, in approving the ECVA, the OEB noted that Enbridge Gas Distribution (which had amalgamated with Union Gas since the Competitive Process Proceeding) has a deferral account that captures variances from forecast consumption volumes – in other words an account that captures the consumption volume variances that EPCOR later sought to capture through the CVVA. The ECVA is an example of a new variance account that EPCOR proposed, and was granted through the rate setting process even though it was not mentioned through the Competitive Process Proceeding. OEB staff sees no reason why EPCOR could not have included a request for the CVVA in the CIR Proceeding. Indeed the CIR Proceeding was the proper place for such an account to be considered, to ensure there would be no confusion regarding how variances from forecast annual volumes for Rate 1 and Rate 6 would be treated.

The first time this issue was placed directly before the OEB was the proceeding which gave rise to the Motion, during which the OEB gave careful consideration to the issue and determined through the Decision that a Risk Sharing Mechanism was appropriate.

Conclusion with Respect to the Risk Sharing Mechanism

The Framework was established through the CIR Decision for the period of 2019-2028. EPCOR did not seek a CVVA as part of that proceeding, and none was provided for in the CIR Decision. Arguably the OEB could have held EPCOR to the terms established in the CIR Decision and denied the Application for a CVVA outright, which was the position of some intervenors. However, the OEB recognized the hardship that the lower

[21] EB-2018-0264, Settlement Proposal, filed September 16, 2019, p. 9.
[22] CIR Decision, November 28, 2019, p. 3.

than anticipated average customer consumption volumes were creating for EPCOR, and decided that a sharing of risk between the utility and ratepayers was appropriate. Nothing in Decision conflicted with the Competitive Process Decision, and the OEB had not directly considered this risk before (in part because no party had raised it). Consistent with the regulatory compact, the Decision represented an appropriate balancing of risk between EPCOR and its ratepayers, and it should be not overturned through this Motion. The Decision was within the OEB's broad jurisdiction to set just and reasonable rates. The Motion has not revealed any material errors of fact, law or jurisdiction.

The Appropriate Effective Date for the CVVA

In the Application (which was filed July 18, 2022, and for which the Decision was issued on April 6, 2023), EPCOR requested an effective date for the CVVA of January 1, 2021. The OEB instead set an effective date of January 1, 2023. The OEB stated:

> The OEB finds that January 1, 2023 is the appropriate effective date for the CVVA. The January 1, 2023 date is the same effective date for the IRM rate increase approved in Phase 1 of the current proceeding. An earlier date would amount to retroactive ratemaking which cannot be justified given the circumstances specific to this case. Exceptional circumstances under which retroactive ratemaking can be considered (i.e., interim rates or a deferral and variance account) do not apply in this case.
>
> The rule against retroactive ratemaking exists to provide customers with rate certainty and to avoid intergenerational inequity, among other objectives. The rule does not exist to reduce utility risk of financial impairment or to enable higher rates of return on invested capital as implied by EPCOR in its reply submission, and the OEB finds that an effective date prior to January 1, 2023 is not appropriate.[23]

The arguments presented by EPCOR on this issue are not appropriate grounds for a motion to review. It is notable that EPCOR's arguments regarding the effective date on this Motion are very similar to the arguments they presented before the OEB in the Proceeding. They essentially seek to reargue a case that was already presented to the original panel of Commissioners, which the OEB indicated in its letter of May 13, 2021 (referred to above) is not the purpose of a motion to review.

Further, it is not clear what legal or factual error EPCOR is actually alleging in respect of the OEB's decision respecting the effective date. EPCOR points out that there are circumstances under which retroactive rate orders are legally permitted, and these are not strictly limited to cases where interim rates are in place or there is a deferral or variance account. OEB staff accepts that there are additional circumstances under

[23] The Decision, p. 11.

which retroactive rate orders can be permitted. However, there is certainly no legal requirement that the OEB issue retroactive orders, and the case law is clear that retroactive orders are exceptions to the general principle that rates should be set prospectively (in part, as the OEB observed in the Decision, for the purposes of rate certainty).[24] OEB staff submits that the Decision gave proper consideration to the effective date, and made a determination that is consistent with the law respecting retroactive rate orders – in this case deciding that a retroactive order was not appropriate, in part because of considerations related to rate certainty and intergenerational inequity.

EPCOR's submissions are in effect an argument that the OEB should have exercised its discretion differently. Rule 42.01(a)(i) of the Rules is clear that this is not a permissible ground for a motion to review.

For these reasons, OEB staff submits that EPCOR's request that the effective date of the CVVA be changed to January 1, 2021 should be dismissed.

~All of which is respectfully submitted~

[24] *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 452, para. 82.