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BY EMAIL and RESS

July 27, 2023
Our File: EB20230140

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Nancy Marconi, Registrar

Dear Ms. Marconi:

Re: EB-2023-0140 – EPCOR Natural Gas LP Motion to Review – SEC Submissions

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Procedural Order No.3, attached, please find SEC's submissions in the above-captioned matter.

Yours very truly,
Shepherd Rubenstein P.C.

Mark Rubenstein

cc: Brian McKay, SEC (by email)
Applicant and intervenors (by email)

EB-2023-0140

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, 3 Schedule B, as amended;

AND IN THE MATTER OF a motion to review and vary EB-2022-0184 Decision and Order (Phase 2) related to the Customer Volume Variance Account.

SUBMISSIONS OF THE
SCHOOL ENERGY COALITION

Overview

1. EPCOR Natural Gas Limited Partnership ("EPCOR") filed a motion to review and vary certain aspects of the Ontario Energy Board's ("OEB") Phase 2 Decision and Order, dated April 6, 2023 ("Phase 2 Decision")[1], where it granted approval of the company's request for a Customer Volume Variance Account ("CVVA"), albeit on a modified basis.

2. Pursuant to Procedural Order No. 3, these are the School Energy Coalition's ("SEC") submissions.

3. This motion to review, as was the case with the underlying application, asked the OEB to saddle increased costs on customers who were never made aware of the possibility when EPCOR's rate framework was established, for the purposes of bailing the company out for the choices it made (or did not make) during the CIP process and in the Custom IR application. The OEB should once again reject this request and deny the motion.

Background

4. The OEB selected EPCOR to build a new greenfield utility and serve the communities of Southern Bruce[2] by way of a competitive Common Infrastructure Plan ("CIP") process[3], that arose as a result of the Generic Proceeding on Community Expansion.[4] As part of that CIP process, two

[1] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023

[2] Specifically, the Municipality of Kincardine, Township of Huron-Kinloss., and the Municipality of Arran-Elderslie, excluding the geographic area of the former Township of Arran and the former Village of Tara.

[3] *Decision and Order* (EB-2016-0137/138/139), April 12, 2018

[4] *Decision with Reasons* (EB-2016-0004), November 17, 2016

proponents, EPCOR and Union Gas, who sought to construct a new greenfield utility to serve the Southern Bruce communities, filed proposals based on a common set of agreed upon parameters. One of those agreed upon parameters was average consumption volume for each customer type.

5. The CIP process provided that the successful proposal was to be the basis for the derivation of the revenue requirements and rates over a 10-year rate stability period.[5]

6. After EPCOR was the successful proponent, it filed a Custom IR rate application to cover the mandated rate stability period (2019-2028)[6]. As part of the application, EPCOR forecast its annual revenue based on a forecast number of customers, their types, and their average annual consumption, which were included as part of the CIP process.[7] The outcome of that proceeding, which included a partial settlement, was approval of rates effective January 1, 2019[8], and a rate framework for the remainder of the 10-year rate stability period.[9] The approvals included, among other things, a mechanism for annual adjustments and a number of deferral and variance accounts ("DVAs"). [10]

7. In its Custom IR application, EPCOR did not request any mechanism to record variances in average customer volumes. The evidence was not that it forgot to request the CVVA, or that it did not believe that approval was needed. EPCOR said that it did not think that there would be a material variance in average consumption necessitating the need for an account.[11]

8. As EPCOR started building and connecting customers to its new natural gas system in the Southern Bruce communities, it discovered that the average customer consumption parameter that it had agreed to use in the CIP process, and was subsequently used in setting rates, did not reflect the actual average customer consumption of these new customers. Weather normalized average customer volumes are approximately 32% less than was assumed during the CIP process.[12] The variance is most acute with respect to Rate 1 customers, where primarily residential customers' consumption is

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[5] *Decision and Order* (EB-2018-0264), November 28, 2019, p.8

[6] EB-2018-0264

[7] EB-2018-0264, Application, Exhibit 3

[8] *Rate Order* (EB-2018-0264), January 9, 2020

[9] *Decision and Order* (EB-2018-0264), November 28, 2019; *Decision on Settlement Proposal and Procedural Order No.6 (*EB-2018-0264), October 3, 2019, Schedule A, Settlement Proposal, September 16, 2019, p.19

[10] *Rate Order* (EB-2018-0264), January 9, 2020

[11] EB-2022-0184, IRR Staff-3 (September 19, 2022)

[12] EB-2022-0184, Application, p.31

materially lower than the CIP common parameter, leading to a significant and growing revenue variance compared to what was approved for each year.[13]

9. While SEC does not dispute that as part of the CIP process, the average volume per customer was a common assumption, that only meant that EPCOR had the right as part of its Custom IR application to bring forward a proposal to deal with that specific risk. The OEB specifically told proponents, which included EPCOR, that it "does not consider the setting of ratemaking 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", and that "[h]ow the revenue requirement will be recovered, including the actual permissible annual revenue updates, will be decided later with the full participation of affected ratepayers."[14] It warned the proponents that CIP parameters, which included customer consumption levels, "that involve rate making assumptions should be considered in that context."[15]

10. What it cannot do, after having had its rate framework approved, on which both connecting and soon to be connecting customers have relied on, is to change the bargain struck during a period which is explicitly about rate stability. SEC finds it highly unlikely that if the opposite had occurred (average annual consumption was materially higher than the CIP common assumption), EPCOR would have requested the CVVA.

11. EPCOR's evidence was that for Rate 6 customers, the rate class that schools are (or will be) in, the difference is more muted. In 2021 and forecast for 2022, average customer consumption was higher than was forecast as part of the CIP process, but beginning in 2023 EPCOR forecasts the average customer consumption will be lower each year.[16] The result is that under EPCOR's initial proposal, over the rate stability period, Rate 1 customers would expect a very significant increase in their bills, and Rate 6 customers would likely expect a comparatively smaller increase.[17]

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[13] EB-2022-0184, Application, p.31; EB-2022-0184, IRR Staff-1 (October 20, 2022); Updated in Additional Evidence (November 14, 2022), p.2

[14] *Decision on Preliminary Issues and Procedural Order No. 8* (EB-2016-0137/138/139), August 22, 2017, p.3

[15] *Decision on Preliminary Issues and Procedural Order No. 8* (EB-2016-0137/138/139), August 22, 2017, p.3

[16] EB-2022-0184, IRR Staff-1 (October 20, 2022)

[17] EB-2022-0184, IRR SEC-6 (October 20, 2022). SEC notes that bill impacts shown in the interrogatory response SEC-6 were not updated to reflect the corrected balances EPCOR filed (See cover letter to EPCOR IRR (December 5, 2022, corrected information contained in the 'Summary' tab of file EPCOR_IRR_CVVA_excel_20221205). The bill decrease for Rate 6 customers shown in interrogatory response SEC-6, if updated, would show a bill increase. Regardless of the forecast, since most forecast customers during the rate stability have yet to connect[17], it is hard to

12. As a result of these variances, EPCOR filed an application as part of its request to mechanistically update its 2023 rates, for approval of its CVVA, to capture the difference in actual weather normalized average customer volumes from what was approved as part of its Custom IR application, retroactively to January 1, 2021. EPCOR proposes to collect or refund the balance to/from customers, calculated on a rate class specific basis.

13. In its Phase 2 Decision, over the objection of SEC, the OEB approved the establishment of the CVVA, although on a modified basis, with an effective date of January 1, 2023, as to do otherwise would be retroactive ratemaking.[18] In granting modified approval, the OEB found that based on the evidence of significant overall under-earning in certain years, it was prudent to establish the CVVA.[19] Even though it approved the establishment of the CVVA, it noted that it was not changing the approved 10-year Custom IR framework, which was not subject to a motion to review or appeal.[20]

14. In establishing the parameters for the CVVA, the OEB found that a 50/50 risk sharing mechanism was appropriate as neither shareholder nor customers were entirely responsible.[21] The OEB agreed to allow EPCOR to recover 50% of the annual balance until its earnings reached 300 basis points below the ROE that underpinned its rates.[22]

The Role of a Reviewing Panel

15. Many of EPCOR's arguments in this motion to review are, in substance, no different from those it made in the original EB-2022-0184 proceeding. While it has attempted to couch its disagreements with the Phase 2 Decision as errors in law, they are really just a disagreement of how the hearing panel exercised its discretion. The revised *Rules of Practice and Procedure* explicitly preclude "disagreement as to how the OEB exercised its discretion…unless the exercise of discretion involves an extricable error of law."[23]

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accurately forecast what any future average volumes (and so CVVA balance) will be, especially with respect to medium to large customers.

[18] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.7,11

[19] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.7

[20] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.7-8

[21] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.17

[22] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.16

[23] *Rules of Practice and Procedure*, Rule 42.01(a)(i)

16. The OEB has previously said that "[a] reviewing panel should not set aside a finding of fact by the original panel unless there is no evidence to support the decision and [it] is clearly wrong."[24] The reason for this is that a motion to review is not a hearing de novo[25], nor an opportunity for a party to re-argue its case.[26] In the rate-setting context, there is almost never a clear 'right' or 'wrong' answer. The OEB is required to exercise judgment and balance various considerations, and so deference should be provided to the original decision-maker.

OEB Has Not Breached any 'Regulatory Compact'

17. Almost all of EPCOR's lengthy arguments in this motion to review are premised on the notion that the company entered a "regulatory compact" with the OEB through the CIP process, where in its view, average customer volumes were not a risk it would assume.[27] By denying approval of an after-the-fact variance account to capture 100% of the impacts of the lower than assumed average customer volumes, it breached this "regulatory compact".[28] This, in EPCOR's view, was an error of fact and law as it was bound to follow the framework that was set out in the CIP process.

18. EPCOR's argument fundamentally misunderstands what was approved as part of the CIP process. This is a fatal flaw to its entire argument.

19. While SEC does not dispute that the CIP process can be said to have determined the 'rules' regarding the scope of the rate application that EPCOR would have to file with the OEB, the Custom IR application determined the 'rules' regarding what customers would have to pay for gas distribution service during the rate stability period. EPCOR never sought any mechanism in the Custom IR application to capture the impact of a variance in the average.

20. The distinction is critical as EPCOR seems to believe that the CIP process governs the rules customers would have to pay, notwithstanding the approvals it both sought and received in the Custom IR application.

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[24] *Decision and Order* (EB-2009-0063), August 10, 2010, para. 38

[25] *Decision with Reasons* (RP-2004-0167/EB-2005-0188), October 6, 2005, p.7

[26] *Decision and Order* (EB-2019-0180), December 5, 2019, p.10; *Decision with Reasons* (EB-2006-0322/338/340), May 22, 2007, p.18

[27] Argument-in-Chief, p.3

[28] Argument-in-Chief, p.3

21. The CIP process was not a rate proceeding. The OEB was exercising its authority under the *Municipal Franchises Act,* not section 36 of the *Ontario Energy Board Act.*[29] In the CIP decision the OEB required EPCOR to "demonstrate that the forthcoming leave to construct and rates applications are consistent with its CIP proposal".[30] As part of the OEB's decision in the Custom IR application, it found that "[s]ubject to the matters and adjustments discussed within this Decision, the OEB concludes that EPCOR Southern Bruce's proposed rates are consistent with the CIP."[31] EPCOR has never challenged that finding.[32] It is in a rate application that the OEB determines how much customers are required to pay for natural gas service. As part of its application, no CVVA was sought or approved. Customers look to the rate application, which was premised on a 10-year rate stability period, not the CIP process, which only provided approval to bring forward a rate application.

22. None of this should have come as a surprise to EPCOR since this was explicitly what the OEB said to the proponents in the CIP process. In the very same decision where it approved the CIP common parameters and assumptions, it directed parties who had made submissions regarding permissible annual revenue updates, that this is an issue for a subsequent rate-setting proceeding.[33]

23. Based on that direction, if the OEB had relied solely on the CIP process as EPCOR argues, it would have breached the procedural fairness rights[34] and legitimate expectations[35] of customers who were told that this is a matter to be brought forward in the successful proponent's rate application.

24. Connecting customers to EPCOR's system are in a very different situation than most other natural gas customers in the province. These new customers have had to make significant and costly upfront investments on their side of the meter just to begin to receive natural gas. Those decisions are generally based on understanding the payback period that would result from savings by switching some of their energy supply needs to natural gas. For many customers, including medium and large customers, they have to make the decision to switch to gas long before actually connecting and

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[29] *Decision and Order* (EB-2016-0137/138/139), April 12, 2018, p.1

[30] *Decision and Order* (EB-2016-0137/138/139), April 12, 2018, p.8

[31] *Decision and Order* (EB-2018-0264), November 28, 2019, p.8

[32] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.7-8

[33] *Decision on Preliminary Issues and Procedural Order No. 8* (EB-2016-0137/138/139), August 22, 2017, p.3

[34] See *Rogers Communications Partnership v Ontario Energy Board,* 2016 ONSC 7810, para. 15-16

[35] See *Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36, para. 94-95

receiving service. They need to order (and pay) for customer-side equipment and make installation arrangements.

25. The OEB recognized this in its Phase 2 Decision, directing EPCOR to communicate to existing and potential customers in South Bruce the forecast bill impacts and delivery costs, inclusive of the impact of the CVVA, for the remainder of the rate stability period.[36]

26. From a customer's perspective, the information they had as the input to that analysis, which includes understanding delivery rates during the rate stability period, was based on the approvals received from the OEB as part of the Custom IR application.

27. This is in contrast to the other variance accounts that EPCOR sought as part of its Custom IR application, such as for energy content, regulatory costs, and municipal taxes.[37]

28. EPCOR argues that while it "could theoretically have brought forward a proposal at the time of the [Custom IR] application to implement the CVVA", it did not since it did not have the required data or information to support the implementation. SEC submits that is not an argument against seeking establishment of the account at the right time, especially in light of its own argument that the CIP process placed the entire risk of customer volume variance on customers. Moreover, the data was not required for the proposed Municipal Tax Variance Account, which was sought and approved precisely on the basis that EPCOR was a "greenfield utility, the actual municipal tax assessment is still unknown" and so "costs can therefore be higher or lower than forecast."[38]

29. The OEB was entirely correct to reject EPCOR's characterizing that the 10-year rate stability period was a 'regulatory compact'[39]. If there was any 'compact' that arose out of the CIP, it was the right for EPCOR to bring forward an application consistent with its proposal and that process. It actively chose not to as part of the Custom IR application. The OEB was correct to refuse to accept the idea that, throughout the rate stability period, the company had an unfettered right, to seek from customers 100% of the variances. Customers had a legal right to rely on the rate framework that was sought and approved as part of the Custom IR application, and which was meant to promote rate stability.

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[36] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.19

[37] *Decision and Order* (EB-2018-0264), November 28, 2019, p.18-20

[38] *Decision and Order* (EB-2018-0264), November 28, 2019

[39] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.7

Risk Sharing Methodology Adopted Is Appropriate

30. EPCOR argues that the OEB made a legal error by implementing the cost sharing mechanism for a number of reasons, all of which should be rejected.

31. First, EPCOR argues that it was inconsistent with the CIP process. As discussed earlier, the CIP process governed the Custom IR rate application, not the request for the CVVA brought forward in the 2023 rates application. The OEB was neither required, nor would it have been appropriate, to solely rely on the CIP process in adjudicating the need for the variance account. The OEB approved the CVVA in the Phase 2 decision, over the objection of some parties, even though it found that the "the Custom IR decision and the approved partial settlement agreement stand unaltered".[40] In essence, it found that notwithstanding the Custom IR application, the CVVA was required to ensure rates remained just and reasonable based on the forecast ROE.[41] The intent of the risk sharing mechanism was to align with the need for additional funds and to ensure that the rates remain just and reasonable, not consistency with what EPCOR believed was required by the CIP process.

32. The specific mechanism put in place by the OEB was reasonable based on the evidence and in light of the financial impact the variance was causing the company, as well as the need to share the risk with customers. In rejecting EPCOR's position that customers should bear 100% of the cost of the CVVA balance as it was not EPCOR's fault, the OEB was entirely correct to point out, "[i]f the OEB were to accept that premise, are customers at fault?".[42] The answer is of course not, and so the mechanism "to share the net impact evenly between the shareholder and customer in a case where no party bears all of the fault", is entirely appropriate. [43]

33. Second, EPCOR criticizes the 300 basis point deadband for any CVVA recovery. It spends a considerable amount of ink in its submission attempting to demonstrate that the references to various regulatory mechanisms that use the 300 basis point threshold are inapplicable to the company.[44] EPCOR fundamentally misunderstands the Phase 2 Decision. The reference to the Incremental Capital Module, Z-Factor, and policy recovery of amounts related to COVID-19, was to demonstrate that the 300 basis point deadband or threshold is widely used across a wide-range of OEB regulatory recovery

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[40] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.8

[41] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.7

[42] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.16-17

[43] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.17

[44] Argument-in-Chief, para. 77-80

mechanisms. It was not intended, nor suggested, that those mechanisms would apply or be available to EPCOR in the context of its approved rate-setting framework, or otherwise.[45]

34. Similarly, EPCOR's argument that the 300 basis point deadband does not provide it with opportunity to earn a fair return is premised on a misunderstanding of what the law requires. The Supreme Court of Canada has held that in the context of setting just and reasonable rates, the *Ontario Energy Board Act*, requires that over the *long-run* a utility is given an *opportunity* to earn a fair return on its investment.[46] There is no requirement that in the short-term, a utility be guaranteed a fair return. The OEB found that the 300 basis point threshold would allow it the opportunity to do so. This is similar to what it has found in the context of the OEB's COVID-19 policy, where it commented that "the 300 bps threshold is a reasonable indicator of when a utility's ability to earn a fair return may be compromised, and one that is administratively straightforward to implement."[47]

35. While the variance may be material, the actual evidence is that it would not harm EPCOR's financial viability or its long-term ability to earn a fair return. Given the opportunity to file additional evidence related to the financial impacts should the OEB not approve the CVVA as it had proposed, it filed nothing regarding the implications of denial of approval, for example, on its expansion plans or debt credit metrics.[48] As it relates to its parent, it was explicit that it will not.[49] Moreover, as part of the approved partial settlement proposal in the Custom IR application, the parties agreed that EPCOR would not be eligible for the generic +/- 300 basis points earnings off-ramp.[50] This is an indication, that EPCOR itself realized that its financial viability, would not be at risk if it failed to earning a fair return, even substantially, during the deferred rebasing period

36. The evidence before the hearing panel was that EPCOR's low forecast ROE over the rate stability period is primarily driven by factors outside of the variance in average customer volumes.[51] These are risks that EPCOR does not deny it assumed during the rate stability period. This is confirmed

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[45] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.17

[46] *Ontario Energy Board v. Ontario Power Generation Inc.,* 2015 SCC 44, paras. 16-17

[47] *Report of the Ontario Energy Board: Regulatory Treatment of Impacts Arising from the COVID-19 Emergency* (EB-2020-0133), June 17, 2021 p.19

[48] See EB-2022-0184, Additional Evidence (November 14, 2022

[49] EB-2022-0184, IRR Staff-3(i),(m) (September 19, 2022)

[50] *Decision on Settlement Proposal and Procedural Order No.6 (*EB-2018-0264), October 3, 2019, Schedule A, Settlement Proposal, September 16, 2019, p.19

[51] See EB-2022-0184, IRR SEC-8 (December 15, 2022)

by the affidavit filed by Savannah Robinson on this motion to review (discussed later), that even if it has received full recovery of the CVVA, its ROE would be -0.2% (as compared to -2%).[52] All of this goes to demonstrate that the approval of the modified CVVA, which includes risk sharing and 300 basis points deadband, are not EPCOR's real problem.

37. Third, EPCOR goes as far as to argue that the proposed sharing mechanism is punitive. This reflects another misunderstanding of the Phase 2 Decision. The approval of the modified CVVA allows EPCOR to recover *additional* funds that, contrary to its central position in this motion, would otherwise not be allowed as it was not part of the approved rate framework. The OEB is not disallowing recovery amounts from ratepayers, it is in fact providing the company with incremental recovery that was not part of its approved Custom IR rate framework. Before the Phase 2 Decision, there was no CVVA, and so no ability for EPCOR to recover any additional amounts related to variance in average customer use. The fact that the OEB did not approve 100% of the recovery of any amounts is neither punitive nor improper. It reflects the OEB's findings that in this unique situation, it would depart from the approved Custom IR framework, and allow some, albeit not all, of the amounts EPCOR sought from customers through the CVVA.

Recovery of Pre-2023 Amounts Would Result in Impermissible Retroactive Ratemaking

38. EPCOR challenges the OEB's decision to establish an effective date of the CVVA as of January 1, 2023, where it found that the proposed date of January 1, 2021, would constitute impermissible retroactive ratemaking.[53] EPCOR argues that the OEB erred in fact and by law, by failing to consider the broader circumstances where retroactive remaking is permissible.[54] The OEB made no such error, and even if it did, would have still resulted in a January 1, 2023 effective date.

39. The OEB is prohibited from ordering recovery of amounts from utilities or customers related to a previous period, unless it falls under one of the known exceptions to the rule[55] against retroactive ratemaking.[56] The OEB correctly noted that there are two general exceptions to the rule against

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[52] Affidavit of Susannah Robinson, May 10, 2023, para. 26, and Exhibit A

[53] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.11

[54] Argument-in-Chief, para. 81-82

[55] EPCOR takes issue with the use of the word "rule" as opposed to "principle" against retroactive. SEC notes the case law uses both terms (see for example *Capital Power Corporation v Alberta Utilities Commission*, 2018 ABCA 437). The OEB has more consistently used the term "rule", even in circumstances where it allowed a retroactive rate adjustment for rates approved on a final basis where there was no deferral account (See for example, *Decision and Rate Order* (EB-2021-0038), December 16, 2021).

[56] See *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453, para. 88-89.

retroactive ratemaking, which are rates declared interim, or the existence of a deferral (or variance) account.[57] Neither were relevant here, nor does EPCOR suggest otherwise.

40. EPCOR argues that the OEB did not consider other circumstances that it had raised, that give rise to exceptions to the prohibition against retroactive ratemaking. EPCOR proposed an approach to the issue of retroactive ratemaking that would render it almost meaningless and stretches the comments by the Ontario Court of Appeal that "'[s]lavish adherence to the use of interim rates and deferral accounts should not prohibit adjustments' in a proper case" beyond its intent.[58] What the Ontario Court of Appeal, like the Alberta Court of Appeal that it referenced, were getting at is not the specific mechanism or its label used (e.g. deferral account or interim rates), but that "[t]he critical factor for determining whether the regulator is engaging in retroactive ratemaking is the parties' knowledge [that the rates were subject to change]".[59] This is exactly what SEC pointed to in its submissions, when it cited the OEB's decision in the Halton Hills 2018 IRM application, which discussed the knowledge requirement.[60]

41. Similar to that Halton Hills decision, here, the OEB did not establish an expectation to customers that EPCOR's rates have been anything but final. If anything, they did the opposite, by creating a 10-year rate stability period. Until its application, EPCOR did not provide customers with any expectation that rates would change during the Custom IR period due to average volume variance. Its evidence, that the first it provided any indication to customers in the material provided to them is through the OEB's formal notice requirements as part of Procedural Order No.1.[61] The OEB found that customers that connected to the Southern Bruce system "were not aware of the changes to their rates that may result from the disposition of the CVVA".[62]

42. As the OEB pointed out, the intent of the prohibition was "to provide customers with rate certainty and to avoid intergenerational inequity, among other objectives" and not to "reduce utility risk of financial impairment or to enable higher rates of return on invested capital as implied by EPCOR

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[57] *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453, para. 88-89; *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023, p.11

[58] *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453, para. 91

[59] *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453, para. 91

[60] EB-2022-0184, SEC Submissions, p.7; *Decision and Order* (EB-2017-0045), April 26, 2018, p.20

[61] EB-2022-0184, IRR VECC-3a,b (October 20, 2022)

[62] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.19

in its reply submission."[63] Contrary to EPCOR's suggestion, the specific circumstances strongly support the OEB decision that a retroactive effective date is inappropriate. Knowledge and finality of rates must be the paramount consideration. Not only did customers make consumption decisions based on EPCOR's approved delivery rates, more importantly, they decided to connect to the gas system for the first time, which involves significant upfront costs they must bear, based on the expectation of a rate framework and rates approved in the Custom IR application.

Robinson Affidavit

43. As part of its Motion to Review, EPCOR filed an affidavit of Susannah Robinson, the Vice President of EPCOR's general partner, EPCOR Ontario Utilities Inc., dated May 10, 2023.[64] EPCOR has not identified on what grounds the affidavit is admissible on in this motion to review, and the OEB has provided no opportunity for any discovery on it.[65] While it does contain new information regarding the specific financial impact of the Phase 2 Decision[66], the hearing panel already understood the range of impacts as EPCOR had requested[67], and was granted[68] the opportunity to file additional information specifically regarding the impact if the OEB denied the CVVA in its entirety.[69] The modified CVVA is more favorable to the company than if no CVVA had been approved.

44. Ms. Robinson also makes a number of assertions related to investor confidence and future expansion. This includes the statement that "[i]nvestor confidence, in particular as relates to the prospective Brockton Project, is at an all-time low and the filing of a Leave to Construct application for the project is now uncertain".[70] On June 29, 2023, EPCOR filed a leave to construct application for its Brockton expansion project (EB-2022-0246).[71] Clearly investor confidence is not that low as a result of the Phase 2 Decision.

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[63] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.11

[64] Affidavit of Susannah Robinson, May 10, 2023

[65] The Affidavit does not present new facts that have arisen or facts that could not have been discovered by reasonable diligence and if proven reasonably be expected to have resulted in a material change to the decision or order, pursuant to Rule 42.01(a)(ii), (iii), or (d) under the OEB's *Rules of Practice and Procedure*.

[66] Affidavit of Susannah Robinson, May 10, 2023, para. 26-28

[67] EB-2022-0184, EPCOR Letter Re: Customer Volume Variance Account (CVVA) Settlement Conference, October 28 2022

[68] *Procedural Order No.3* (EB-2022-0184), November 7, 2022

[69] EB-2022-0184, Additional Evidence (November 14, 2022

[70] Affidavit of Susannah Robinson, May 10, 2023, para. 32

[71] EB-2022-0246, EPCOR Brockton Expansion Leave to Construct Application (June 29, 2023)

Summary

45. SEC submits the OEB should deny the motion to review, and the Phase 2 Decision should be expeditiously implemented. As part of the Phase 2 Decision, the OEB directed EPCOR to communicate to existing and potential customers a forecast of bill impacts and delivery costs inclusive of the impact of the CVVA during the remainder of the rate stability period.[72] This is important information that existing and potential customers need to have as soon as possible, so that they can make informed decisions based on the modified CVVA that was approved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Mark Rubenstein
Counsel to the School Energy Coalition

[72] *Decision and Order* (Phase 2) (EB-2022-0185), April 6, 2023 p.19