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EPCOR Natural Gas Limited Partnership (EPCOR)

EB-2023-0140

Motion to review and vary EB-2022-0184 Decision and Order (Phase 2) relating to Customer Volume Variance Account, and a request for stay of the implementation of certain aspects of the Decision

Submission of the
Vulnerable Energy Consumers Coalition
(VECC)

July 27, 2023

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Overview

1. The Application is to vary the Board's Decision EB-2022-0184. In that Decision the Board established a Customer Volume Variance Account (CVVA) to track the variance in revenue resulting from the difference between customer volume forecast estimates of customer consumption presented as an element of the Common Infrastructure Plan (CIP). The Board makes the following finding in EB-2022-0184:[1]

   > *The OEB approves the establishment of a CVVA, effective January 1, 2023 until December 31, 2028. The approved CVVA is modified compared to the account proposed by EPCOR. Any accumulated balance will be shared on a 50/50 basis between EPCOR's shareholders and its customers. In addition, EPCOR shall only be eligible for the recovery of 50% of the annual balance from its customers in the CVVA until such point that EPCOR's actual earnings reach 300 basis points below its approved ROE. Further, the variance account will apply only to the South Bruce distribution system within the scope of EPCOR's approved 2019-2028 Custom IR framework.*

2. On May 10, 2023 EPCOR filed a notice of motion to review and vary the Decision. The Motion requests that the Decision be varied to set aside the 50/50 risk-sharing mechanism until the point where EPCOR South Bruce's actual earnings reach 300 basis points below its return on equity (ROE) and to change the effective date of the approved CVVA account from January 1, 2023 to January 1, 2021.

3. The grounds for the motion as set out by EPCOR are that the Decision:

   i. ignores the CIP as the basis for just and reasonable Rates;
   ii. fails to follow previous binding decisions;
   iii. amounts to a review and variance of the CIP proceeding; and,
   iv. is based on inapplicable and incorrect finding.

4. In making the decision to hear the motion the Board did not hear submissions as to whether the motion met the threshold question as set out in Rule 43.01 of the Rules of Practice and Procedure. The Board also granted the request of EPCOR to stay the Customer Communication Requirement of the Decision and to stay the issuance of the OEB's Accounting Order in proceeding EB-2022-0184 pending a final determination of the Motion.

5. VECC submits that the Motion is without merit, adds no new information or analysis of the relevant law and simply reargues the positions of the Applicant in the original proceeding.

[1] Board Decision EB-2022-0184, April 6, 2023

Board Motion Requirements

6. The Board's Rules of Practice and Procedure require grounds for a motion require the following be present:[2]

> *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;*
> *ii. new facts that have arisen since the decision or order was issued that, had they been available at the time of the proceeding to which the motion relates, could if proven reasonably be expected to have resulted in a material change to the decision or order; or*
> *iii. facts which existed prior to the issuance of the decision or order but were unknown during the proceeding and could not have been discovered at the time by exercising reasonable diligence, and could if proven reasonably be expected to result in a material change to the decision or order;*

7. The Motion provides no new facts nor do any of the reasons EPCOR sets out in the Notice of Motion or its Argument rely on new facts or facts which were unknown during the original proceeding. Therefore, the Motion should be considered solely in light of the grounds that the Board made a material and clearly identifiable error of fact, law or jurisdiction.

8. The Motion relies in its entirety on the basis of EPCOR's interpretation of the Board's Decision in what is colloquially called the "CIP Proceeding"[3]. In the Utility's view the Board in this decision created some form of "regulatory compact" as between the Board and EPCOR. This premise is not new and was expressed and examined in the original proceeding. In this Motion EPCOR provides only one new clarification to its premise of "regulatory compact." The is a short reference from the Supreme Court of Canada's decision in *Atco Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*. The entirety of the law referenced is:[4]

> [*62] Rate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed …*

[2] Ontario Energy Board, Rules of Practice and Procedure, Revised July 13, 2023, page 31.
[3] EB-2016-0137 / EB-2016-0138 / EB-2016-0139 Southern Bruce Expansion Applications
[4] EB-2023-0140, Argument of EPCOR July 6, 2023, page 3

> *[63] 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 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…*
> *[64] 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.* (our emphasis added)

9. Other than providing this vague definition of what constitutes a "regulatory compact" nothing new is added. Notably the Applicant does not address the legal question it raises in its Motion as the extent a decision in one proceeding can bind a panel of the Board in another. We hold that in general Board Decisions are not binding on future panels and that the Board is required to consider the evidence before it in making a just and reasonable decision.

10. The entire argument of the CIP regulatory compact theory is not original. It was a major theme of the Applicant's original evidence and arguments and refuted by VECC and others in their submissions. The Board heard these arguments and addressed them in it its Decision.

Regulatory Compact

11. EPCOR makes the point that this review process is not to revisit the appropriateness of establishing the CVVA. It is apparently (some might say obviously) satisfied with the Decision of the Board in establishing an account. The fact that EPCOR sought and the Board granted the account is not be glossed over. The Board granted the relief sought and notwithstanding the arguments of VECC to the contrary. The entire point of the original application was to establish a mechanism which was not part of the original Board decision establishing rates. As such the argument of EPCOR is logically and fatally flawed.

12. While there is some merit in the term "regulatory compact" how could it be that something that was not sought, not discussed and not considered in the CIP proceeding

could subsequently constitute a part of a compact with the regulator? To get around this fatal flaw in their argument EPCOR overstates its case:[5]

"*There is agreement that forecast Rate 1 and 6 customer volumes are common assumptions in the CIP and that had Enbridge Gas (Union) been the successful proponent, its existing Normalized Average Consumption Variance Account (NAC) would have likely captured the same type of volume variances that EPCOR intends to record in the CVVA*"

13. This is factually wrong, if not misleading. There was, and is, no agreement that a NAC like account would likely have captured the same type of volume variances that EPCOR intends to record in the CVVA. Certainly, we do not agree and said so in our prior arguments. That some other parties are sympathetic to that argument does not make it a consensus and we do not believe the Board has agreed. What the deciding panel did say was that "*the **modified** CVVA is consistent with its statutory requirements in setting just and reasonable rates to enable EPCOR to earn a fair return on its capital investments*." [6](emphasis added)

14. It is also factually incorrect to say that "*Union operates with a variance account similar to that of the CVVA (its NAC*)." VECC's argument was precisely to the opposite. We pointed out that not only did EPCOR not seek a CVVA account in the CIP proceeding but that would be impossible for EPCOR to create a "NAC like" account. Union's NAC account relies on rolling historical data. EPCOR, as a greenfield utility, has no such data. Instead, the CVVA is designed to protect against a project cost-benefit analysis forecast variance. That is not what "NAC like" accounts are designed to do. NAC accounts are designed as part of weather normalization schemes and to otherwise integrate long-run changes in customer consumption as a result of long run gas consumption changes (like changes in building standards or customer appliance efficiencies).

15. Since EPCOR has no historic customer gas use upon which to make a calculation similar to what is done by Union Gas (or former Enbridge Gas) it could not and cannot make a calculation similar to what would be done by (former) Union Gas. Had EPCOR made an application for a "NAC like" account in the CIP proceeding this discrepancy would have become apparent. **And more importantly it would have raised the fundamental difference that a failure by Union Gas to reach the forecast CIP volumes would have had no consequence to the new franchise customers had it been the successful proponent- unlike the case, as is now apparent, with EPCOR. This might have caused the Board to consider differently to whom it should grant the franchise.** In any event at this point it is all hindsight – like EPCOR's attempt to remedy the problem after the fact.

[5] EB-2023-0140, Argument of EPCOR, July 6, 2023, page 4
[6] Board Decision and Order Phase 2, EB-2022-0184, page 7

16. In numerous places in its Motion EPCOR also conflates Board Staff with the Board making statements like: "*Notably, OEB Staff agreed that the Board should approve the establishment of the CVVA for substantially similar reasons as set out by EPCOR*" and "*As evidenced by the agreement of OEB Staff to this common assumption, there was no better volume forecast available at the time and its use was demonstrably reasonable to provide the basis for the rates that would be subject to a 10-year rate stability period*." With all due respect to Board Staff and their agreement (nor not) does not constitute evidence or the weight to be given by the Board to parties' arguments. We urge the Board to ignore these types of statements and arguments.

17. EPCOR suggests that the Board erred in in concluding that the risk of variances for mass customer consumption was unsettled after the CIP proceeding. We may agree but not to the manner thought by ECPOR. Since no mechanism was established by the Board and none sought by the Applicant to deal with the issue of customer consumption variation from the CIP forecasts then one can indeed conclude the matter was settled. Settled in the sense that no variance accommodation would be given. It is EPCORs presumption (**again presumption)** that the answer to that question was settled to their satisfaction because – in the colloquial - "after all Union Gas has an account to deal with customer volume variances – so obviously we should get the same." Notwithstanding, as we have said on numerous occasions – it is not possible for EPCOR to establish an account similar in mechanism to the Union Gas NAC account. And, in the event, the Board never made such an order.

18. We also disagree that EPCOR's suggestion that the CIP proceeding constitutes the basis for some form of "regulatory compact" as factually incorrect. The CIP was process by which the Board set out to find on a fair basis which to judge different proponents offering new potential ratepayers gas service. It was a process constituted under provisions of *the Municipal Franchise Act*. That process is different and can be differentiated from the processes which establishes the rates for the successful proponent (section 36 of the *OEB Act*). EPCOR would like the Board to considers those singular events, but they are not. Having granted EPCOR, the franchise it was incumbent upon the successful proponent to make application to the Board for the necessary ratemaking relief. The Board said as much in its CIP Decision.

19. We also reiterate our argument that it was EPCOR who made the calculated risk to not deal with the issue of forecast risk in the first instance. Otherwise, we would have been provided an application for the said account prior to any customer connections. What took EPCOR so long to apply for this account? Would EPCOR have applied for a CVVA had the customer volumes exceeded its expectations? Would it be offering refunds had it underestimated customer volumes? As we said in our original arguments and repeat here, in our view EPCOR played a game of risk and lost. Now having lost it now wants customer to pay.

Altering ROE

20. EPCOR's position is that:[7]

> "*The bargain struck was that EPCOR's ability to achieve its target ROE would depend on the competitively determined parameters (i.e., customer connections, etc.). By introducing the -300 bp threshold on CVVA recovery, the Board is in effect after-the-fact reducing the actual ROE that EPCOR can achieve due to a factor unrelated to EPCOR's ability to meet its forecasts for the CIP competitive parameters*."
>
> EPCOR Motion also states: *"The -300 bp threshold restricts EPCOR's ability to achieve its target ROE based on a hitherto unidentified risk*."

21. We submit that what restricts EPCOR's ability to achieve its allowed ROE is its inability or resistance to innovate and address the issue of lower-than-expected customer consumption. As we also pointed out in our original arguments the Utility has shown no interest in understanding the reasons for customer under consumption or how to address that problem.

22. First off, we do not think regulator's strike "bargains" with those it regulates. This is not some game in which private enterprise, the Board (and apparently Board Staff) create a business agreement. Leaving aside EPCOR's poor choice of words the concept they embody is simply incorrect. EPCOR appears to believe that in being granted its franchise it is now entitled to the target return on equity of 8.78%. It is not. The Board has set rates which would reasonably allow the Utility to make its targeted rate of return based on assumptions the Utility put before it. It did not make an accommodation (i.e., a CVVA) which would lessen the risk that the Utility faced – it expected the Utility to manage that risk.

23. EPCOR complains that:[8]

> *"The Board justified its imposition of the -300 bp threshold on the basis that it would "incent EPCOR to act to improve capital asset utilization and EPCOR's resulting ROE forecast from 2023 to 2028."*

24. From our perspective the Board was responding to the concerns raised by VECC that EPCOR had done nothing to try to mitigate the situation of lower than expected consumption levels of new customers. We set out in our argument how load building, encouraging for example appliance replacements for water tanks or other gas appliances might ameliorate the issue faced by EPCOR. We made the point that EPCOR had seemingly made little effort in that direction and in fact had made no effort to understand the reasons for the lower than expected average customer consumption. It would be reasonable had the Board considered those arguments and found that some

[7] EB-2023-0140, Argument of EPCOR, July 6, 2023, page 19.
[8] EB-2023-0140, Argument of EPCOR, July 6, 2023, page 19

form of incentive was needed to engage EPCOR shareholders in the problem that has arisen.

25. In the Motion we are provided with this information in the affidavit from EPCOR's CEO:[9]

> "*ENGLP has already made extensive efforts to incent its customers to consume natural gas in the Southern Bruce service area by establishing partnerships with local HIAC providers to facilitate the installation of natural gas appliances in homes and by offering promotional contests that incentivize the installation of multiple natural gas appliances in customers' homes. Ultimately, there is only so much a utility can do to incentivize customers to incur the personal expense of installing natural gas appliances in their homes or consume more gas*."

26. We note that this information is essentially the same information as provided in response to interrogatory VECC-5 in the original proceeding. We found that response totally inadequate and said so.

27. Unlike what is implied and sought by EPCOR regulators are not the guarantors of returns for private regulated companies. They are required by law to establish the conditions under which a utility might reasonably attain the rates of return embodied in approved rates. Utilities, like any other non-regulated company, are entitled (and expected) to try to maximize their returns through best business practice. Like in the private market the expectation is that better managed companies will outperform more poorly managed ones. In this case VECC expressed its astonishment at the lack of response by management to the issue of lower than expected customer consumption[10]. No studies were being done to ascertain the reason for this and no programs established to try to increase the load by new customers. Instead, EPCOR seems to believe that having been granted its franchise and having it rates established based on the premise of a certain rate of return – then all that could be done was done.

Appropriate Effective Date

28. EPCOR's arguments with respect to effective date of the CVVA are essentially the same as those raised in the original proceeding. The Board addressed the issue of retroactive rate making in detail in its Decision. Fundamentally, it is clear that had the Board agreed to the earlier implementation of the CVVA it would negatively impact customers who

[9] ENGLP Affidavit of Susannah Robinson, par 29.
[10] VECC Argument EB-2022-0184, January 27, 2023, page 10

have already attached to the distribution system under a different set of expectations. The account would clearly impose negative retroactive costs on these customers.

Conclusions

29. Frankly we are surprised at the Board hearing this Motion. It offers nothing new on interpretation of the law or in the facts. It is made up of entirely of regurgitations of the original evidence, argument and reply argument. We invite the reviewing panel to compare EPCORs argument -in-chief with the Motion argument. Has it made a more compelling argument in its Motion than it did in its original application? Perhaps – its certainly longer than the original efforts. But multiple “kicks at the can” or “panel shopping” are not the test for revising a Board decision. We submit the Board should dismiss the motion as it is without merit.

VECC submits that it has acted responsibly and efficiently during this proceeding and requests that it be allowed to recover 100% of its reasonably incurred costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED