Shepherd Rubenstein

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**BY EMAIL and RESS**

Ontario Energy Board
2300 Yonge Street
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August 18, 2023
Our File: EB20230143

**Attn: Nancy Marconi, Registrar**

Dear Ms. Marconi:

**Re: EB-2023-0143 – Locates DVA Account Order – Submissions**

We are counsel to the School Energy Coalition ("SEC"). Pursuant to the Notice of Hearing and Procedural Order No. 1, these are SEC's submissions regarding the request by a group of Ontario natural gas and electricity distribution companies (the "Large Utilities") for a generic sector-wide variance account to track incremental locates arising from the impact of Bill 93.

SEC has reviewed the information filed by the Large Utilities and does not oppose the creation of the proposed generic variance account. However, the appropriate basis for doing so is as a Z-Factor which is available to each of the Large Utilities[1] and all other local distribution companies.

***Application Is A Request For A Z-Factor***

Under both the Price Cap IR and any of the approved Custom IR plans of the Large Utilities, the ability to seek incremental funding above what has already been included in base rates is limited. There is no free-standing ability for any utility to seek a deferral and variance account under any of the OEB's rate-setting approaches, outside of a cost of service or Custom IR application. The initial request letter filed by the Large Utilities cites the Filing Requirements section on new deferral and variance accounts related to cost-of-service applications, but this is not applicable in the current situation. [2]

In the context of the specific direction from the OEB regarding the limited scope of this proceeding, the evidence does demonstrate that the passage of Bill 93 likely reflects a Z-Factor event. The enactment of Bill 93 could indeed meet the criteria for a Z-factor claim, as it represents generally

[1] See for example the Handbook on Utility Rate Applications, p.27. For Large Utilities on Custom IR, see *Decision and Order* (EB-2018-0165), December 19, 2019, p.44; *Decision on Settlement Proposal and Order on Rates, Revenue Requirement, and Charge Determinants* (EB-2021-0110), November 29, 2022, Settlement Proposal, p.25; *Decision and Order* (EB-2019-0261), November 19, 2020, Schedule A, Settlement Proposal, p.46
[2] Large Utilities Letter to the OEB, dated May 11, 2023, p.2, ft 1

unforeseen events outside of management control, and the types of costs that satisfy the requirements of causation. These costs are likely to be material and would be considered prudent. [3]

However, there is one caveat. Utilities that rebased their rates for 2023 and 2024, and have or will incur additional costs because of Bill 93, might have already included them in their base rates for those years. As Toronto Hydro noted in its evidence filing, it incurred additional costs as early as April 2022 when Bill 93 received royal assent. Therefore, for utilities that recently rebased, the question of causation may not have been met. SEC proposes that all utilities be given access to the proposed account, but that this specific question be considered when disposition is sought.

Furthermore, while the variance account should be approved as a Z-Factor, this proceeding is being undertaken on a generic-sector wide basis with limited information available. Individual utilities seeking disposition will need to demonstrate, in addition to proving that any amounts are prudent, that the balance meets the utility-specific materiality threshold, and are a significant influence on its operations.[4] Moreover, their annual ROE must not exceed 300 basis points above the deemed ROE in base rates. [5]

***Scope of the Account***

Consistent with the request made by the Large Utilities, the scope of the account should be limited to "track[ing] the incremental costs of locates in 2023 and future years arising from the implementation of recent Provincial legislation: Bill 93 (*Getting Ontario Connected Act, 2022*)." [6] The evidence filed by several of the Large Utilities references increased locate costs driven by factors other than Bill 93. For example, Alectra cites increased costs due to higher demand for locates caused by government broader policies regarding broadband adoption and home construction, as well as rising contractor labour costs.[7]

While SEC recognizes that pinpointing the specific driver of any given increase in costs may be challenging at this time, the OEB should clarify for utilities that the purpose of any approved account is not to serve as a true-up for all increases in locate costs. It should only cover those costs directly attributable to Bill 93. That is incremental costs related to any meeting any *new obligations* as a result of Bill 93.

Additionally, there should be an expectation that, during a utility's next rebasing application, the impact of Bill 93 will be included in its forecasted budget and incorporated into base rates. Utilities would then no longer have access to the proposed account.

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[3] Filing Requirements For Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications - Chapter 3 - Incentive Rate-Setting Applications, p.23 citing, Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors (EB-2007-0673), July 14, 2008, p. 34

[4] Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors (EB-2007-0673), July 14, 2008, p. v: Materiality is defined as "The amounts must exceed the Board-defined materiality threshold and have a significant influence on the operation of the distributor; otherwise they should be expensed in the normal course and addressed through organizational productivity improvements."

[5] Filing Requirements For Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications - Chapter 3 - Incentive Rate-Setting Applications, p.23

[6] Large Utilities Letter to the OEB, dated May 11, 2023, p.1

[7] Alectra Utilities Evidence Filing, p.2; See also Hydro One Evidence Filing, p.3-4

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***Effective Date***

The Large Utilities are seeking an effective date of January 1, 2023, even though they only filed their request on May 11, 2023.[8] If the OEB determines that the nature of the request qualifies as a Z-Factor, costs can be included as of January 1, 2023, given the current existence of a generic Z-Factor DVA (Account 1572). However, if the OEB concludes that the account can be established through other means, then setting an effective date of January 1, 2023, would constitute impermissible retroactive ratemaking.

The OEB is prohibited from ordering the recovery of amounts from utilities or customers related to a previous period unless it falls under one of the known exceptions to the principle against retroactive ratemaking.[9] Rates have not been interim, there is clearly no existing deferral account, and it cannot be asserted that customers were aware that rates were subject to change before the OEB made the Large Utilities' request letter public.

Only Hydro Ottawa addresses the OEB's jurisdiction to include costs retroactive to January 1, 2023. The rest merely note that they incurred incremental costs from the start of the year, which they believe to be reasonable. However, simply incurring reasonable costs does not justify retroactive ratemaking. In advocating for such treatment, Hydro Ottawa cited two specific instances where it believed the OEB granted retroactive relief through a deferral or variance account. SEC argues that both situations are entirely distinct. Firstly, concerning the change in the pole attachment rate as determined in O.Reg 842/21, Hydro Ottawa itself indicated that the existing pole attachment rate had been set as interim; thus, a retroactive adjustment was permitted.[10] Secondly, when the OEB established the Deferral Account related to the implementation of the Ultra-Low Overnight RPP Option, effective from the date the OEB announced proposed amendments to the SSSC and RPP Manual, the notice explicitly mentioned that the OEB would establish a deferral account for these costs and that an "accounting order will be issued shortly." [11] Unlike in the current scenario, there was clear notice given that rates might be adjusted due to the creation of a deferral account.

Yours very truly,
**Shepherd Rubenstein P.C.**

Mark Rubenstein 2023.08.17 14:21:57-04'00'

Mark Rubenstein

cc: Brian McKay, SEC (by email)
Interested Parties (by email)

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[8] Large Utilities Letter to the OEB, dated May 11, 2023, p.1
[9] *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453, para. 88-89, 91
[10] Hydro Ottawa Response to Letter of Direction to Produce Evidence, p.6
[11] Notice of Proposal to Amend the Standard Supply Service Code and Regulated Price Plan Manuel (EB-2022-0160), p.6