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September 1, 2023

RE: EB-2023-0143 – Generic Variance Account for Locates – Reply Submission

On August 1, 2023, the OEB issued a Notice of Hearing and Procedural Order No. 1, in response to the request by Toronto Hydro and several other large distributors (the “Large Utilities”) for a new, generic variance account available to all distributors to track the legislatively-driven, incremental costs related to locates, effective January 1, 2023.

The OEB ordered any written submissions by intervenors and OEB Staff be filed with the OEB and served on Large Utilities and all other parties by August 18, 2023. Large Utilities’ reply submissions shall be filed with the OEB and served on all other parties by September 1, 2023.

Enclosed please find the Reply Submission of Toronto Hydro requested by the OEB.

Sincerely,

A handwritten signature in blue ink, appearing to read "Andrew J. Sasso", written in a cursive style.

Andrew J. Sasso



Introduction:

On May 11, 2023, Toronto Hydro-Electric System Limited ("Toronto Hydro"), Alectra Utilities Corporation, Elexicon Energy Inc., Enbridge Gas Inc., Hydro One Networks Inc., Hydro Ottawa Limited, and Oakville Hydro Electricity Distribution Inc. (collectively, the "Large Utilities") sent a letter to the OEB requesting a generic, sector-wide variance account to track the incremental cost of locates of recent legislative and regulatory amendments. On May 15, 2023, the Electricity Distributors Association submitted a similar request on behalf of its members. The Large Utilities submitted evidence on July 7 and July 25, 2023 to demonstrate that the criteria for establishing a variance account, namely causation, materiality and prudence, were met. In their submissions filed on August 18 and August 21, 2023, five out of six intervenors, and OEB Staff, all agreed that the above criteria are met and that a variance account should be established.

There is broad consensus amongst stakeholders that the creation of a variance account is a prudent and appropriate regulatory measure to facilitate attainment of the Government of Ontario's public policy imperatives that underpin the legislative amendments that triggered the request for a variance account: timely and safe locates to support new construction and development—especially of housing and mass transit—in Ontario.

1) Energy Probe Submission

While there is near unanimous consensus that a variance account is an appropriate regulatory measure, Energy Probe objected on several grounds. Toronto Hydro submits that Energy Probe's submission reflects a misapprehension of the regulatory frameworks pertaining to locates and variance accounts, as well as the evidence of the Large Utilities.

Part of the Energy Probe submission argued against the inclusion of overhead costs. Conversely, OEB Staff supports the inclusion of these costs as may be prudently incurred. Respectfully, the OEB Staff position reflects the regulatory framework for cost recovery, while the Energy Probe submission does not. Toronto Hydro submits that it is necessary to incur overhead costs to carry out locates, including to comply with the legislatively elevated requirements.

An OEB order permitting overhead costs is essential to providing utilities with the flexibility to optimize their efforts to meet the new standards. As an example from Toronto Hydro's case, a shift from a manual tracking system to an automated tracking system is required to meet the strict compliance requirements introduced by Bill 93. Implementing a more efficient and technologically advanced system would be to the benefit of ratepayers by removing time consuming and expensive manual processes. Toronto Hydro submits that limiting the variance account to direct costs will jeopardize Toronto Hydro's ability to meet the compliance target and the goals of the legislative and regulatory amendments. Investments in "indirect" and "overhead" costs, in conjunction with the



direct costs of training new locators and increasing their salary to boost retention and locators' skillset, will drive cost-effective compliance with the new legislation.

Another part of the Energy Probe submission asserted that "Toronto Hydro did not provide evidence on the total costs of locates that are included in base rates". This is a misapprehension of the evidence. Toronto Hydro's evidence identified the funding related to locates year to year, as detailed in its approved revenue requirement and base rates. The estimated cost of the operational segment for locates was \$4.5 million in the utility's OM&A funding request for the 2020 test year and would have grown to \$4.8 million in 2023 under the funding model of Toronto Hydro's Custom Incentive Rate framework. While the other utilities presented similar information about their base rate funding in a chart, Toronto Hydro presented this information in a line graph. A line graph provides an easy to read visualization of how the total costs of locates has grown year to year and complies with the OEB's original request.

A third part of the Energy Probe submission misapprehended the evidence in attempting to compare the Large Utilities' locates portfolios between 2020 and 2023. The evidence reflects different types of utilities (i.e. gas and electric), operating in different service areas (e.g. some in dense urban cores with subways and other extensive non-utility infrastructure and some in predominantly suburban or rural areas), with varying amounts of utility underground infrastructure, and untold additional variables that will naturally drive variances. The OEB is used to these variances, as they are common in any and every application brought by different applicants. It may well be that upon disposition some commonalities in expense type, quantum, and timing emerge, and are incorporated into the prudence review. In this proceeding, those considerations are out of scope. Toronto Hydro recognizes that misapprehensions happen, especially in the context of a nuanced aspect of the distribution system, such as locates. It is important, however, that these misapprehensions not cloud the OEB's consideration of this matter.

2) Z-Factor

In its submission, School Energy Coalition did not oppose the creation of a variance account. The School Energy Coalition ("SEC") and the Consumers Council of Canada ("CCC") both recommended that a Z-Factor mechanism be applied for the locates variance account. This is inconsistent with OEB precedent. Previous deferral and variance accounts created in response to legislative changes were not tied to a Z-Factor. Toronto Hydro submits that SEC and CCC have not justified departing from that instructive precedent, which is an important element of regulatory predictability.

There are several examples where the OEB created a deferral and variance accounts in response to legislative changes. None of these accounts were created with a Z-Factor. These include:

- **Ultra-low overnight (ULO) time of use pricing plan** - the implementation was accompanied by a deferral account to track the revenue requirement impacts of their material costs of implementing the ULO option;
- **Monthly Billing** – accompanied by OEB approved deferral account;
- **Customer Choice Initiative (between Regulated Price Plan options)** – accompanied by OEB approved deferral account, and
- **Green Button** - accompanied by a deferral account to record the incremental costs attributable to its implementation.

All of these DVAs are similar in nature to a prospective locates variance account, in that they are driven by changes in legislation, regulation, and/or OEB codes.

In contrast to the examples below, the OEB has not tied a Z-Factor mechanism for a DVA for legislative changes. In *Algoma Power Inc. Re.*, Algoma attempted to characterize certain costs incurred by a legislative change as suitable for a Z-Factor. The OEB found that the costs did not meet the eligibility criteria set out by it.

The OEB has found that the Z-Factor mechanism may be appropriate for situations unlike the present case, such as a natural disaster (for example, see *Canadian Niagara Power Inc. – Fort Erie Re.*, where it was used by several utilities to recover costs related to a severe storm.).

Therefore, Toronto Hydro submits that the OEB should approve the variance account in accordance with past practice, and not introduce a Z-Factor component.

3) Revenue Offset

On page 7 of its submission, under the heading “Scope of the Accounts - Incrementality of Costs”, OEB Staff made a submission that was not raised by any of the intervenors. OEB staff submitted that the variance account should include a cost recovery offset based on unrelated revenues (i.e. growth of customer connections).

Respectfully, this proposal conflicts with the OEB’s established framework for funding Toronto Hydro through Custom Incentive Ratemaking, which factors in growth in a specific manner.

Moreover, locates costs are driven by projects by other parties (e.g. housing development, transit expansion) that potentially come into conflict with utilities’ infrastructure. Locates costs are not tied to customer expansion or load growth.

Finally, Toronto Hydro submits that this proceeding is not the appropriate forum to introduce, on a generic sector-wide basis, a new methodology for variance account entries for legislation-driven costs. Methodology changes typically occur in sector-wide policy-making consultations, or in exhaustive utility-specific rate-making proceedings. In the normal course, as part of promoting



regulatory certainty, and to protect against unintended consequences, the OEB preserves long-standing methodologies and applies them, including when introducing variance accounts associated with legislative changes.

4) Duration of the Variance Account

CCC raised the issue of the duration of the variance account, noting that some distributors are rebasing in 2023 and 2024, while Enbridge's rate application is presently ongoing. SEC and OEB staff submitted that the specific question of the duration of access to the variance account should be considered when each distributor seeks disposition of their incremental costs. OEB Staff noted that it is not necessary or efficient at this stage to parse the individual situations of each utility, including the duration of the variance account in relation to when each utility is rebasing.

Toronto Hydro submits that it is clear at this time that the new legislative and regulatory amendments will drive incremental costs, which is a sufficient basis for the OEB to establish a variance account. If at the time of disposition, it is the view of OEB Staff, an intervenor, or the utility that the variance account should be extended for an additional duration—as is or on a modified basis—it is standard practice for the party to bring forward such a proposal at that time. Respectfully, in this present proceeding, Toronto Hydro submits that it would be prudent for the OEB to avoid making unnecessary pronouncements with respect to duration, beyond the Large Utilities' proposal that the variance account be brought forward for disposition (and potential reconsideration) at each utility's next rebasing.

5) Effective Date & Retroactivity

In their submissions, a number of intervenors suggested that an effective date must be subsequent to the date the DVA was requested. This is incorrect. There is clear court and OEB-approved precedent that an effective date preceding the request date is not only permitted, but may be the most just, reasonable, and fair outcome. Toronto Hydro submits that is the case here. Instructive precedent-setting cases that are relevant to the case at hand, including but not exclusively on this issue, are set out below.

The Ontario Court of Appeal in *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453, recognized deferral and variance accounts as an exception to the rule against retroactive ratemaking. Relying on the guidance of the Supreme Court of Canada, the court stated that DVAs are "accepted regulatory tools to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year."



There are also ample examples where the Ontario Energy Board has acknowledged that an effective date can precede a request date. For example, in *Ontario Power Generation Inc. Re*, EB-2018-0085, it was stated that “the approved June 1, 2017 effective date precedes the filing of OPG's reply argument in the 2017-2021 proceeding, which was filed on June 19, 2017.” Likewise, in *EPCOR Natural Gas Ltd. Partnership - South Bruce, Re*:, the OEB stated that a retroactive date is permitted when justified by the circumstances specific to the case.

In *Enbridge Gas Inc v. Ontario Energy Board*, 2020 ONSC 3616, the Divisional Court of Ontario provides guidance as to what circumstances should be considered when setting a retroactive date. In the case, the Divisional Court considered how a public utility regulator, in deciding the matter of retroactivity, may consider the fairness of asking present customers to pay for the expense incurred by past customers, and whether there is hardship caused when rates are raised retroactively.

Similarly, in *Chapleau Public Utilities Corp., Re*, the OEB accepted a retroactive effective date as most appropriate, rather than make the effective date the same as the Decision and Order. In this case, the OEB stated that it can consider whether the order would have been granted had it been sought on an earlier date, as a matter of fairness.

Toronto Hydro submits that a retroactive date is permissible, and January 1, 2023 is a fair and prudent start date for the variance account. Bill 93, containing the legislative amendments that triggered Large Utilities’ request for a variance account, received royal assent on April 14, 2022. As stated in Toronto Hydro’s evidence, it was reasonable for Toronto Hydro to use the time between the royal assent and the coming into force of the legislation, to take necessary action—including incurring prudent costs—to prepare for the increased compliance requirement. Accordingly, precedent supports Toronto Hydro and other utilities seeking effective dates in April 2022. Toronto Hydro and the other Large Utilities made the choice to not seek cost recovery for the full period of potential eligibility; opting for a more limited period beginning in the current fiscal year.