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

DECISION ON MOTION

EB-2023-0140

EPCOR NATURAL GAS LIMITED PARTNERSHIP (SOUTH BRUCE)

Motion to Review and Vary the EB-2022-0184 Decision and Order (Phase 2) relating to the Customer Volume Variance Account

BEFORE: **Michael Janigan**
Presiding Commissioner

Fred Cass
Commissioner

David Sword
Commissioner

October 12, 2023

1 OVERVIEW AND PROCESS

On April 6, 2023, the Ontario Energy Board (OEB) issued a Decision and Order[1] (IRM Decision) in the Phase 2 proceeding for EPCOR Natural Gas Limited Partnership's (EPCOR) South Bruce 2023 incentive rate-setting mechanism (IRM) application. The primary issue in the Phase 2 proceeding concerned EPCOR's proposal for a Customer Volume Variance Account (CVVA). The IRM Decision approved such an account, but not in accordance with the terms requested by EPCOR. On May 10, 2023, EPCOR filed a notice of motion (Motion) to review and vary the terms of the CVVA in the IRM Decision. For the reasons set out herein, the OEB dismisses the Motion.

The Motion is based on EPCOR's position that the terms of the CVVA dealing with the cost allocation of volume variances established by the IRM Decision conflict with previous decisions of the OEB. EPCOR maintains that the OEB's Common Infrastructure Plan (CIP) Decision (CIP Decision)[2] established that the volume variances that are to be recorded in the CVVA would be the responsibility of ratepayers, not the utility. The CIP Decision awarded the relevant certificates of public convenience and necessity for the previously unserved South Bruce service territory (Certificates) to EPCOR[3] after a competition with Union Gas Limited[4]. The CIP Decision also provided the components that were to be used in the actual rate-setting framework determined in the Custom Incentive Rate-Making (CIR) Decision (CIR Decision)[5]. The proponents' proposals in the CIP proceeding were evaluated by the OEB based largely on three comparison criteria which the utilities had agreed to be bound to if they were granted the Certificates[6]:

1. Cumulative 10-year revenue requirement per unit of volume ($\$/m^3$);
2. Customer years; and,
3. Cumulative 10-year volume.

[1] EB-2022-0184, Phase 2 Decision and Order, April 6, 2023
[2] EB-2016-0137/0138/0139
[3] EB-2016-0137/0138/0139, Decision and Order, April 12, 2018
[4] Union Gas has since amalgamated with Enbridge Gas Distribution Inc. with the resulting entity now operating under the name Enbridge Gas Inc.
[5] EB-2018-0264
[6] EB-2016-0137/0138/0139, Decision on Preliminary Issues and Procedural Order No. 8, p. 4.

Both EPCOR and Union Gas used a common assumption concerning the projection of volumes associated with mass market customers. Although the CIP Decision awarded the Certificates, it did not set rates.[7]

Rates for 2019-2028 rate term were set in accordance with the framework approved by the OEB in the CIR Decision[8]. Subsequently, annual updates to EPCOR rates were made by way of IRM applications. The EPCOR Motion in this proceeding arises as a result of the IRM Decision concerning EPCOR's application for a CVVA in its 2023 IRM application. The CIR Decision itself had not established a CVVA for variances in average use per customer, and EPCOR did not request such an account in that proceeding.

The IRM application request was for a CVVA that 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 South Bruce area; and (b) the actual average customer volume. EPCOR proposed that the account would be effective from January 1, 2021, until December 31, 2028. The reason for this request was that the actual average use of mass market 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 (ROE) that was notionally embedded in its base rates during the 2019-2022 period, and EPCOR expected that this under-earning would continue throughout the rate term established in the CIR Decision.

In the IRM Decision, the OEB approved EPCOR's request to establish a CVVA to track certain variances in revenue resulting from the difference between the average mass market customer (Rate 1 and Rate 6 customers) volume forecast set out in the CIP Decision and the actual average customer volume. However, the OEB modified EPCOR's proposed CVVA in the following ways:

a. EPCOR proposed an effective date of January 1, 2021. The OEB approved an effective date of January 1, 2023.
b. EPCOR proposed that the CVVA be applicable to all Rate 1 and Rate 6 customers who are subject to EPCOR's South Bruce rates, including future community expansions. The OEB determined that the account should be applicable only to the South Bruce distribution system and not any future

[7] EB-2016-0137/0138/0139, Decision on Preliminary Issues and Procedural Order No. 8, p. 3.
[8] EB-2018-0264

community expansions. However, for future community expansions, EPCOR can seek rate approvals to be applied at the time it seeks leave to construct approval.

c. EPCOR proposed full recovery of the CVVA. The OEB applied a 50/50 risk-sharing mechanism until such point that EPCOR's recovery from the CVVA enabled EPCOR's actual earnings to reach 300 basis points below the ROE that underpinned EPCOR's rates established in the 2019-2028 CIR proceeding.[9]

The Motion requests that the IRM Decision be varied as follows:

a. Set aside the 50/50 risk-sharing mechanism until the point where EPCOR South Bruce's actual earnings reach 300 basis points below its ROE.
b. Make EPCOR eligible to recover the full balance in the CVVA from January 1, 2021, until December 31, 2028.

On June 7, 2023, the OEB issued a Notice of Hearing, Procedural Order No. 1, and Decision on Threshold Question and Request for Stay (Procedural Order No. 1) which set out a schedule for written argument in chief, submissions, reply submission and a tentatively scheduled virtual hearing (Virtual Hearing). Further to EPCOR's request, the OEB also stayed the Accounting Order process and customer communications direction as set out in the IRM Decision pending the outcome of the hearing of the Motion. The IRM proceeding was also placed in abeyance in accordance with the OEB's Protocol for Adjusting Adjudicative Timelines pending the outcome of the Motion. Intervenors from the 2023 IRM proceeding - School Energy Coalition (SEC) and Vulnerable Energy Consumers Coalition (VECC) - were approved as intervenors for this proceeding.

On July 6, 2023, EPCOR filed its argument-in-chief.

The OEB issued Procedural Order No. 4, on August 22, 2023, formally scheduling the Virtual Hearing to allow for the OEB to ask questions of the parties. The Virtual Hearing was held on August 24, 2023.

For the reasons set out below, the OEB finds that the IRM Decision does not contain any errors of fact, law or fact and law. The Motion is therefore dismissed, and the stay ordered in Procedural Order No. 1 is lifted.

[9] EB-2018-0264

2 DECISION

Regulatory Framework

EPCOR in its Motion asserts that the OEB made errors of fact and/or law in the IRM Decision with respect to the OEB's approval of a modified Customer Volume Variance Account (CVVA). These errors were stated to include:

1. The IRM Decision ignores the CIP as the basis for just and reasonable rates.
2. The IRM Decision fails to follow previous binding OEB decisions.
3. The IRM Decision amounts to a review and variance of the CIP proceeding; and,
4. The IRM Decision is based on inapplicable and incorrect findings.

EPCOR's central argument is that, over the course of several regulatory proceedings, the OEB determined that EPCOR would not bear any risk in respect of volume variances for its mass market customers (i.e., Rate 1 and Rate 6). EPCOR's position is that the OEB determined that all risk associated with these volumes would be at the risk of the ratepayer, and that therefore the OEB erred by approving a CVVA that split that risk between EPCOR and the ratepayer.

EPCOR argued that the IRM Decision is inconsistent with the rate-setting structure and incentives established by decisions in the prior proceedings; primarily, the CIP Decision.

It is EPCOR's view that these decisions created the regulatory compact that binds the OEB's future decisions regarding the South Bruce service territory – including the IRM Decision.[10]

EPCOR discussed the regulatory compact as not being a static concept but as one that must be applied "in the specific legislative and policy forces" that govern the specific context. EPCOR referenced the Supreme Court of Canada's description of the regulatory compact as "a well-balanced regulatory arrangement" that follows the object of the statutes to protect both the customer and the investors".[11]

EPCOR argued that the CIP Decision and the CIR Decision established that it is only at risk for the "competitive" factors that were established through the CIP proceeding. Average customer volumes for mass market customers (and the revenues associated with those volumes) were not competitive factors and were instead "common"

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[10] EPCOR Argument-in-Chief, paras. 9-11.
[11] Atco Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4, para. 64

parameters that were used by both EPCOR and Union Gas in the CIP proceeding. According to EPCOR, in future rates proceedings all risk associated with average customer volumes for mass market customers would be borne by ratepayers, and not the utility.

In the Virtual Hearing, when asked what was included in the cumulative volumes proposal in the CIP, EPCOR answered that the cumulative volumes included the volumes associated with mass market customers (Rates 1 and 6), and industrial customers based on forecasted attachments and associated projected CIP volumes.[12] Furthermore, EPCOR acknowledged that it did not make a submission during the CIP Proceeding that Rates 1 and 6 volumes should be excluded when reviewing the comparison criteria (i.e. Cumulative 10-Year Throughput Volume).[13] EPCOR also acknowledged that there was a commitment to throughput volumes which were used in the calculations to set rates. However, EPCOR maintained that "the forecast for the mass market, our smaller customers, which was Enbridge's [Normalized Average Consumption] on adjacent service territories, that was not to our risk".[14]

EPCOR also argued that had Union Gas been the successful proponent, its existing Normalized Average Consumption Variance Account (NACVA) would have likely captured the same type of volume variances that EPCOR intends to record in the CVVA and it would have been inconsistent for Union Gas to agree in the CIP process that it should bear some or all of the variance in customer consumption.

EPCOR further submitted that it could theoretically have brought forward a proposal at the time of the CIR application to implement a CVVA but did not since it did not have the required data or information to support the implementation of such an account.

OEB staff submitted that nothing in the IRM Decision is inconsistent with any previous decisions of the OEB and the allocation of risk in respect of average customer volumes had not been determined by the OEB prior to the IRM Decision. OEB staff noted that although the OEB awarded Certificates in the CIP proceeding, 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). OEB staff further submitted that at no point did the OEB state, either in the CIP Decision or anywhere else, that risk associated with average customer volumes would be borne by ratepayers.

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[12] Virtual Hearing Transcript, August 24, 2023, pg. 22
[13] Virtual Hearing Transcript, August 24, 2023, pg. 25
[14] Virtual Hearing Transcript, August 24, 2023, pg. 27

OEB staff submitted that the first time that the issue of allocation of risk with respect to average customer consumption volumes was directly before the OEB was in the proceeding which gave rise to the IRM Decision. OEB staff stated that the IRM 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.

SEC argued that there is a difference between the CIP proceeding and plan and the CIR processes. The CIP Decision determined the rules regarding the scope of the rate application and the CIR Decision determined the rates framework and allocation rules of what customers would have to pay in rates for natural gas service during the rate stability period. The CIP process was thus not a rate proceeding. SEC also noted that, in the CIR Decision, the OEB 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."[15] SEC noted that this was a finding that EPCOR did not challenge.

SEC also challenged EPCOR's contention that a CVVA was not requested in the CIR proceeding because EPCOR lacked the information or the data by noting that data was not required for the proposed Municipal Tax Variance Account.

VECC submitted that the Motion should be dismissed, arguing that the Motion provides no new facts nor do any of the reasons EPCOR sets out in the Notice of Motion or its Argument-in-Chief rely on new facts or facts which were unknown during the original proceeding. VECC further stated that EPCOR's argument regarding the regulatory compact had been heard and was already addressed in the IRM Decision.

In the Virtual Hearing, VECC disagreed with EPCOR on the NACVA-Normalized Average Consumption Variance Account stating there was no OEB-referenced evidentiary support that a NACVA-like account would have captured the same type of volume variances that EPCOR intended to record in its CVVA.

In its reply argument, EPCOR stated that the IRM Decision is not consistent with the regulatory compact as established by the CIP Decision and the CIR Decision. The reasons in the IRM Decision do not recognize the importance of the CIP proceeding in setting the framework rates.

[15] EB-2018-0264, Decision and Order, November 28, 2019, pg.8

EPCOR further submitted that even if reviewed on a “reasonableness” standard, as advocated by SEC, the IRM Decision fails to meet this threshold. EPCOR stated that the reasoning of the hearing panel must be “justified, intelligible and transparent”[16] and an administrative decision-maker must “meaningfully grapple with key issues or central arguments raised by the parties.” [17] EPCOR submitted that the hearing panel did not do so in the IRM Decision.

EPCOR stated that, although both SEC and OEB staff argued that the IRM Decision hearing panel appropriately exercised its discretion in setting just and reasonable rates, the IRM Decision fails to explain its rationale for rejecting EPCOR’s position as to the binding nature of the risk framework established in the CIP Decision and simply states that the hearing panel was “not persuaded by EPCOR’s characterization.”[18]

Return on Equity

EPCOR argued that the IRM Decision altered the regulatory compact by modifying the ROE allowed to EPCOR by the CIP Decision by limiting the collection of rates to meet volume shortfalls from expected levels of consumption by mass market customers and altering the risk profile upon which the CIP Decision was based. Since setting a new ROE was not available to EPCOR in the CIR proceeding, EPCOR submitted that it was not open to the OEB to set a new ROE for EPCOR in the IRM Decision.

EPCOR argued further that the CVVA as approved in the IRM Decision materially impacts its ROE; from allowing for the potential achievement of an ROE of -0.2% (proposed CVVA) reduced to -1.8% (modified CVVA) over a ten-year period.

EPCOR also submitted that there is no connection between the approved risk-sharing mechanism and incentivizing improved capital asset utilization. Therefore, the risk-sharing mechanism is punitive and is not consistent with the CIP.

SEC argued that the OEB is not required to solely rely on the CIP in adjudicating the need for a variance account. SEC noted the Supreme Court of Canada has held that in the context of setting just and reasonable rates, the *Ontario Energy Board Act, 1998*, requires that over the long run, a utility is given an opportunity to earn a fair return on its investment[19] and there is no requirement that in the short-term, a utility be guaranteed a set return. SEC stated that the variance may be material but the evidence suggests it

[16] Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, para. 95.
[17] Ibid, para. 128.
[18] EB-2022-0184, Phase 2 Decision and Order, April 6, 2023, p. 7.
[19] Ontario Energy Board v. Ontario Power Generation Inc., 2015 SCC 44, paras. 16-17

does not harm EPCOR's financial viability or its long-term ability to earn a fair return, and also noted that the sharing mechanism is not punitive, rather the CVVA allows the incremental recovery of additional funds that were not part of EPCOR's approved CIR Decision.

In its reply argument, EPCOR stated that it was not asking for a guaranteed return but to have the opportunity to earn a near-zero ROE by collecting the full balance of the CVVA.

EPCOR noted that for a variety of factors its ROE is expected to be well below the 8.78% notionally approved in rates even if it gets full recovery for volume variances through the CVVA. EPCOR stated that it is a stand-alone entity and the financial impact will be borne by the utility (and that EPCOR's parent company will not shoulder the financial impacts).

VECC submitted that EPCOR restricted its own ability to achieve the allowed ROE by its inability, or resistance, to innovate and address the issue of customer consumption. VECC argued that EPCOR did nothing to mitigate the situation of a lower-than-expected consumption and the OEB found that an incentive was needed to engage EPCOR's shareholders.

EPCOR reiterated that it had little control over the behind-the-meter consumption and customers' personal choices. EPCOR noted that it had previously provided a list of proactive activities intended to address the lower-than-expected consumption.

In the Virtual Hearing, EPCOR further stated that the OEB's rationale for a risk-sharing mechanism as an incentive for EPCOR to act to improve capital asset utilization and the resulting ROE is not logically connected to performance and operational costs within its control.

Effective Date

EPCOR stated that the IRM Decision incorrectly set an effective date for the CVVA of January 1, 2021, on the basis that an earlier date would amount to impermissible retroactive ratemaking. EPCOR argued that the OEB erred in fact and law by failing to consider other relevant precedents[20] regarding the broader circumstances in which retroactive ratemaking is permissible and failing to correctly apply that law to EPCOR's unique circumstances. EPCOR also referenced an Alberta Court of Appeal decision that

[20] Union Gas Limited v Ontario Energy Board, 2015 ONCA 453 and Capital Power Corp. v. Alberta Utilities Commission [Capital Power] 2018 ABCA 437

identified a list of exceptions to the prohibition against retroactive ratemaking and further noted that the list was not an exhaustive one.[21]

EPCOR asserted that the OEB should have considered all of the unique circumstances pertaining to EPCOR's rates, including the nature of the application filed in the CIP proceeding, EPCOR's entry into a previously unserved area, the calculation of customer common assumptions and the rationale behind the timing of EPCOR's CVVA application.

SEC argued that EPCOR did not provide customers with any expectation, prior to the 2023 IRM application, that rates would change during the CIR period due to average volume variance. SEC stated that customers made consumption decisions based on EPCOR's approved delivery rates and incurred upfront costs based on the expectation of a rate framework and rates approved in the CIR decision.

OEB staff argued that it is not clear what legal or factual error EPCOR is alleging in respect of the effective date. OEB staff argued that while there are exceptions to the rule against retroactive ratemaking, there is certainly no requirement that the OEB make a retroactive order, and that the reasons provided in the IRM Decision were sufficient to justify the effective date of January 1, 2021.

In its reply argument, EPCOR reiterated that the IRM Decision failed to consider EPCOR's unique circumstances.

Findings

The OEB dismisses the Motion.

The OEB finds that the IRM Decision does not contain any errors of fact, law or of mixed fact and law. EPCOR's contention that the IRM Decision made such errors will be dealt with under headings that address the issues in the IRM Decision that EPCOR submitted were wrongly decided.

Regulatory Framework

The central contention put forward in the Motion is that the IRM Decision is contrary to previous OEB decisions and, in particular, the regulatory framework that EPCOR contends was established by the CIP Decision. According to EPCOR the CIP Decision provided that the risk of variances associated with the projection of natural gas volumes

[21] Capital Power at para 57.

consumed by mass market customers by the successful proponent, EPCOR, would solely lie with those customers. EPCOR's conclusion is that the OEB erred when it modified the proposed CVVA by imposing a 50/50 risk-sharing mechanism and limiting recovery to the point where EPCOR's actual earnings reached 300 basis points below its approved ROE.

EPCOR's conclusion is not correct.

The CIP proceeding that resulted in the awarding of the Certificates for the South Bruce Municipalities to EPCOR was a competitive process with two participants: Union Gas (now amalgamated with Enbridge Gas Distribution Inc.) and EPCOR.

A set of parameters to be included in the proposal of each proponent was set out in Procedural Order 8 (P.O. 8) of the CIP proceeding.[22] These parameters were used by the OEB to assess which utility should be granted the Certificates for the South Bruce service territory.

The parameters considered by the OEB in the CIP proceeding included both common parameters (which were common between the two utilities, and included average volumes for mass market customers), and competitive parameters where the utilities could file different proposals (for example, revenue requirement per m^3). Contrary to the submissions made on the Motion by EPCOR, the use of a common assumption by EPCOR and Union Gas regarding average consumption by mass market customers (Rate classes 1 and 6) for the purposes of comparison in the CIP proceeding did not allocate the risk associated with the achievement of the assumed consumption levels to ratepayers in any subsequent rate proceeding.

The same procedural order (P.O. 8) established what was to be the three "comparison criteria" for the determination by the OEB of the successful proponent. These were revenue requirement measured by $/m3, number of customer years and cumulative volume.

> The proponents agreed to three comparison criteria: $/m3, number of customer years and cumulative volume. The OEB accepts this aspect of the proponents' CIP agreement. These comparison criteria should be included in proponents' proposals. **The successful proponent will be held to the**

[22] EB-2016-0137/0138/0139, Decision on Preliminary Issues and Procedural Order No. 8

> **comparative criteria agreed to when filing its rates application**. (Emphasis added)[23]

In accordance with these provisions of P.O. 8, the cumulative volume comparison criterion that was submitted by each proponent was composed of two components. These were a “mass market” volume amount (Rate Classes 1 and 6) and an industrial customer volume amount. The mass market customer component that was submitted by both proponents was derived from the agreed-upon use of Normalized Average Consumption (NAC) values from Union Gas.

The OEB chose the revenue requirement ($/m^3) as the most significant comparison criterion but did not discard the requirement set out in P.O. 8 to incorporate EPCOR’s cumulative volume comparison criterion estimate in its subsequent rates application. The use of a common NAC assumption by the competing proponents did not transfer the risk of variances in mass market customer consumption from the successful proponent to ratepayers. EPCOR’s proposed cumulative volume estimate was made in fulfillment of the provision of comparison criteria used by the OEB in the CIP proceeding. Those criteria were to be incorporated into rates. This conclusion arising from the wording of P.O. 8 in the CIP proceeding is confirmed by a further review of the regulatory record.

EPCOR’s final submission in the CIP proceeding made no mention of a necessity to exempt Rate 1 and Rate 6 customer volumes from EPCOR’s requirement to reflect its cumulative volume estimate in rates if chosen as the successful proponent. The decision in the CIP proceeding also did not distinguish between mass market and industrial customer volumes such that a distinction would be required to be recognized in future rates.

In its updated application filed in the CIR proceeding, EPCOR stated the following:

> As detailed below, within the common assumption framework as confirmed by the Board, there are a number of components in EPCOR’s CIP that were determinative factors in the selection of EPCOR as the successful proponent in the Board’s Southern Bruce Expansion Decision. These components include controllable elements of the revenue requirement including capital expenditures and OM&A expenses, customer attachments and throughput volume of gas over the 10-year rate stability period established by the Board. **An underlying principle of the competitive**

[23] EB-2016-0137/0138/0139, Decision on Preliminary Issues and Procedural Order No. 8, p. 4

> **process was that, within the common assumption framework as established by the Board, the winning proponent would bear the risk of achieving commitments made related to these components**.(Emphasis added) This treatment is symmetrical, if the utility exceeds the values of those components during the rate stability period this would be to the benefit, or in the case of expenses, detriment, of the utility.[24]

As well, in its Reply Argument in the CIR proceeding, EPCOR noted:

> In the South Bruce Expansion proceeding, the OEB approved a set of common assumptions, including a 10-year rate stability period, upon which each proponent was to base its CIP proceeding. The OEB also established the selection criteria it would use to determine the successful proponent. EPCOR's- CIP proceeding proposal included a commitment to values for those selection criteria as set out below.

Metric	Value
Cumulative 10-year revenue requirement per unit of volume	$0.2209/m^3
Customer Years	42,569
Cumulative 10-Year Throughput Volume	342,186,741 m^3

As outlined in the table above, the commitment cited by EPCOR was for a throughput value that included all customer volumes, with no mention made of possible or potential volume variances.

EPCOR did not apply for a CVVA in the CIR proceeding notwithstanding its contention in the subsequent 2023 IRM proceeding[25] that the risk of volume variances for mass market customers in Rate Classes 1 and 6 lay completely with those customers. However, EPCOR did apply for the approval of some 13 variance accounts reflecting potential risks that had been identified by the utility in the CIR proceeding, The OEB notes that there was no discussion of most of these variance accounts in that proceeding, indicating that there was no prohibition on seeking such variance accounts.

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[24] Ibid at Updated evidence Ex 1 Tab2 Sch. 1 p.10
[25] EB-2022-0184

The examination of the history of the regulatory treatment of the cumulative volume comparison criterion provides no support for the proposition advanced by EPCOR that the risk of volume variance for mass market customers of Rate Classes 1 and 6 must be attributed entirely to ratepayers.

The OEB also agrees with OEB staff, VECC and SEC that the 50/50 risk-sharing mechanism put in place through the establishment of a Customer Volume Variance Account or CVVA and its terms of operation in the IRM Decision under review was not a breach of the regulatory compact. Given the economic consequences to the utility of EPCOR's CIP proceeding or CIP-based cumulative volume commitment, the OEB sought to balance the interests of ratepayers and the utility. In doing so, the IRM Decision advanced the OEB's statutory objective of ensuring just and reasonable rates and was in fulfillment of the OEB's regulatory responsibilities. There was no error of law or fact or mixed fact and law that arises as result of such balancing by the OEB.

Return on Equity

The OEB also finds that the 300-basis point limitation on EPCOR's financial relief is consistent with the use of a 300-basis point dead band as a threshold in a range of OEB regulatory mechanisms. These include Advanced Capital Module and Incremental Capital Module applications to determine the need for adjustments to ongoing rate frameworks. As determined in the IRM Decision, 300-basis points is a reasonable limitation on recovery in the modified CVVA, while providing EPCOR the opportunity to earn a fair rate of return. Thus, the establishment of the 300-basis point limitation is in keeping with the OEB's balancing of interests to fashion just and reasonable rates.

Effective Date

In support of its proposed January 1, 2021 effective date for the CVVA, EPCOR submitted that there are circumstances where retroactive rate orders are legally permitted. The OEB accepts that retroactive rate orders can be permitted under certain other circumstances, but there is no legal requirement for the OEB to make rate orders retroactive. Retroactive rate orders are exceptions to the general principle that rates should be set prospectively, for the purposes of rate certainty. There was no expectation given to EPCOR's customers that rates might increase during the 10-year rate stabilization period because of a failure to meet estimated gas volumes consumed by mass market customers.

The OEB finds that the IRM Decision gave proper consideration to the effective date for the CVVA and made a determination that is consistent with the OEB's statutory obligations and regulatory practice. As stated in the IRM Decision, an earlier effective

date than January 1, 2023, cannot be justified given the circumstances specific to this case. EPCOR did not put forward its position that Rate 1 and Rate 6 customers are at risk for variances in average consumption volumes in either the CIP proceeding or the CIR proceeding. Further, a retroactive order was not appropriate because of considerations that include the requirement for rate certainty and intergenerational equity.

3 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The Motion to vary the IRM Decision is denied.

2. The stay of the Accounting Order process and customer communications direction as set out in the IRM Decision, ordered on June 7, 2023, is lifted.

3. The IRM proceeding is taken out of abeyance in accordance with the OEB's *Protocol for Adjusting Adjudicative Timelines*.

4. Intervenors shall submit their cost claims to the OEB and forward a copy to

   EPCOR Natural Gas Limited Partnership by October 26, 2023.

5. EPCOR Natural Gas Limited Partnership shall file with the OEB and forward to intervenors any objections to the claimed costs by November 9, 2023.

6. Intervenors to which EPCOR Natural Gas Limited Partnership filed an objection to the claimed costs, shall file with the OEB and forward to EPCOR Natural Gas Limited Partnership any responses to any objections for cost claims by November 23, 2023.

7. EPCOR Natural Gas Limited Partnership shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

Parties are responsible for ensuring that any documents they file with the OEB, such as applicant and intervenor evidence, interrogatories and responses to interrogatories or any other type of document, **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's.

Please quote file number, **EB-2023-0140** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the OEB's online filing portal.

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address.
- Please use the document naming conventions and document submission standards outlined in the Regulatory Electronic Submission System (RESS)

Document Guidelines found at the File documents online page on the OEB's website.

- Parties are encouraged to use RESS. Those who have not yet set up an account, or require assistance using the online filing portal can contact registrar@oeb.ca for assistance.
- Cost claims are filed through the OEB's online filing portal. Please visit the File documents online page of the OEB's website for more information. All participants shall download a copy of their submitted cost claim and serve it on all required parties as per the Practice Direction on Cost Awards.

All communications should be directed to the attention of the Registrar at the address below and be received by end of business, 4:45 p.m., on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Arturo Lau at Arturo.Lau@oeb.ca.

Email: registrar@oeb.ca

Tel: 1-877-632-2727 (Toll free)

DATED at Toronto October 12, 2023

ONTARIO ENERGY BOARD

Nancy Marconi
Registrar