EB-2020-0133

ONTARIO ENERGY BOARD

Consultation on the Deferral Account Impacts Arising from the COVID-19 Emergency

REPLY COMMENTS

of

ASSOCIATION OF MAJOR POWER CONSUMERS IN ONTARIO (AMPCO)

and

INDUSTRIAL GAS USERS ASSOCIATION (IGUA)

1. In this submission on behalf of AMPCO and IGUA we respond to some of the written comments filed by other parties.

2. Review and consideration of those written comments has not altered the views of AMPCO and IGUA reflected in our January 25th *Comments on Staff Proposal* regarding the appropriately applied principles, objective and approach to disposition of any balances accumulated in COVID-19 emergency deferral accounts.

3. Those basic principles are:

   (a) The COVID-19 pandemic is not a circumstance envisioned by the conventional rate regulation framework.

   (b) The matter at hand is the disposition within a pre-established rate framework of a generic variance account established on an emergency basis.

   (c) The issue at hand is whether relief from the rates already established is required on an immediate basis to address the exigencies posed to Ontario's regulated utilities by the COVID-19 pandemic.

4. As noted by Ontario Power Generation (OPG) in its January 25th comments (our emphasis)[1]; *"the Account was established to facilitate the need for relief by utilities rather than an industry-wide variance account for all pandemic-related impacts"*.

5. Wataynikaneyap Power LP (WPLP) has aptly noted[2]:

> *Absent the COVID Deferral Account, such utilities would generally be precluded from recovering any incremental COVID-related costs because such costs would not have been included in their existing Rates and the OEB would be prohibited from approving recovery of any such costs retroactively in a future rate proceeding.*

6. The OEB acted early to put the COVID-19 Deferral Account in place, without indicating whether or how recovery of any costs tracked would be allowed, in order to provide a mechanism for future recovery, if appropriate.

7. In the context of a global pandemic affecting customers as well as, and the evidence indicates generally significantly more so, than Ontario's rate regulated utilities, the basic objective in considering whether, and if so how, recovery of any such costs should be allowed, should be to ensure continuation of the provision of essential energy services in a reliable manner at reasonable cost. The objective should not be protection of the status quo of the expected range of utility earnings, nor should it be cost sharing.

8. In accord with these principles and this objective, AMPCO and IGUA's January 25th comments advocated the following approach:

   (a) ***Applicants for recovery of COVID-19 driven costs should be required to demonstrate potential impairment to continuing financial viability should recovery of costs already incurred not be provided for.***

   (b) ***Where the potential for impairment to continuing financial viability absent recovery of costs incurred is demonstrated, then recovery should be permitted to the extent required to remove the demonstrated risk of impairment, no more but no less. It is in the interests of both utility shareholders and utility customers that reliable provision of regulated utility services be maintained until rates can be reset with due consideration for any longer term COVID-19 impacts.***

   (c) ***When recovery is permitted, the regulatory principle that costs should follow benefits directs that qualifying costs be recovered from all customers, as all***

---

[1] OPG comments, page 1, 2nd paragraph.
[2] WPLP comments, page 2, 2nd full paragraph.

customers benefit from achievement of the objective to maintain the financial viability of the regulated utility. (In this circumstance, recovering COVID-19 driven costs from those customers driving them could lead to strikingly regressive impacts.)

9. AMPCO and IGUA continue to advocate that approach, for all of the reasons articulated in our January 25th comments.

Applicability of Existing Regulatory Tools

10. The Electricity Distributors Association (EDA) and the CLD+ proceed on the general premise that conventional ratemaking principles and tools are sufficient and appropriate for the Board to address the impact on regulated utilities and their customers of the unconventional and unprecedented circumstances under consideration in this process.

11. The EDA belies its concern in the statement that the OEB staff proposal *"risks an unintended consequence of barring some LDCs from being able to recover costs that were incurred in providing safe and reliable service under pandemic conditions"*[3]. This is not an unintended consequence. It is one expressly envisioned and intended by the OEB staff in putting forward its proposed framework for recovery of pandemic driven costs/revenue losses.

12. The CLD+ has filed a "report" by Aird & Berlis which generally canvasses conventional utility rate making law and policy.[4] That report does not, however, really draw any conclusions or advocate any positions. (In so stating, we do not intend to cast aspersions on the document, it seems to have been commissioned to do what it does.) While we find nothing material to disagree with *per se* in the Aird & Berlis report, we also find nothing to commend its application to the matter at hand.

---

[3] EDA, page 7.

[4] We note that the Aird & Berlis report was prepared at the request of the Ontario Energy Association (OEA) "on behalf of the CLD+". We further note that while there is an OEA cover sheet on the CLD+ submission, the OEA itself does not appear to be advocating any particular positions or offering any of its own comments. We thus assume that the submission is on behalf of the cited CLD+ members (Hydro One Networks, Alectra, Toronto Hydro, Hydro Ottawa, Elexicon Energy and Enbridge Gas Inc.) and does not necessarily reflect an OEA position.

13. We do note that in its discussion of the "regulatory compact" the Aird & Berlis report does indicate that the law provides no guarantee of recovery of reasonably incurred costs of providing utility service (which costs include a return of and on equity). Rather what is required of utility regulatory commissions is to provide a "reasonable opportunity" to recover such costs, and to do so, as the report does point out[5], over the long run.

14. As explained in our January 25th comments, and reiterated above, in the circumstances at hand rates were set in a manner so as to provide a *"reasonable opportunity"* for the regulated utilities to recover their costs of providing utility service, subject to the risks allocated to them as part of the *"regulatory compact"* referred to in the Aird & Berlis report.

15. The Board is now considering whether ratepayers or utility shareholders, or both, should bear pandemic risks. AMPCO and IGUA, and others, have argued that the principle which best balances these particular, singular, risks, in the near term (i.e. pending the rate rebasing that all of the regulated entities will pursue in the coming year years), is the *"financial viability"* principle included as one of the OEB's statutory objectives.

16. It is also important to remember that as long as the regulated utility earns at least some return on equity it has not suffered any denial of return of equity. That is, there is no capital cost "disallowance" in issue (which is what the "fair return standard" discussed in the Aird & Berlis report actually addresses in requiring that rates be set to provide an opportunity, not a guarantee, to earn a return of and on equity). Rather we are considering a potential variability of earnings relative to those assumed when *"just and reasonable"* rates were set.

17. The legal standard in setting rates includes the concept of a "fair" return on capital, which necessitates consideration of what is "fair" in the circumstances.

18. Conventionally, "fair" return on capital invested has been examined through the 3 "standards" mentioned in the Aird & Berlis report; i) comparable investment; ii) financial integrity; and iii) capital attraction.

---

[5] Aird & Berlis report, page 6, 3rd paragraph (citing *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 (CANLII), [2015] 3 SCR 147 at paragraphs 16-17).

(a) In respect of "comparable investment", London Economics Inc. (LEI) compiled data on earnings performance by sector illustrates that even with pandemic related revenue impairments utilities have been faring exceptionally well.

(b) In respect of "capital attraction", in addition to the still relatively "safe haven" of a regulated utility investment, there has been no basis presented upon which the Board can conclude that application of a "financial integrity" standard to determining if, and if so what, pandemic related costs/revenue losses should be recovered would undermine the ability of Ontario's regulated utilities to attract capital. Indeed, the opposite is instinctively true; in a global context of reduced earnings and potential capital impairment, sometimes severe, a regulatory backstop that protects financial integrity would reinforce the ability of Ontario's regulated utilities to attract sufficient capital.

(c) In respect of "financial integrity", this is exactly the standard which AMPCO, IGUA and other parties have suggested should be applied in the singular circumstances of addressing near term (under existing rates) COVID-19 driven costs.

19. Further, in respect of the "fair return standard" the Aird & Berlis report asserts that the Supreme Court of Canada's guidance (our emphasis) *"of course, does not mean that the OEB must accept every cost that is submitted by the utility, nor does it mean that the rate of return to equity investors is guaranteed, <u>in the short run</u>, return on equity may vary. But the majority observed that any disallowance of costs to which a utility has committed itself has an effect on equity investor returns and this effect must be carefully considered in light of the <u>long-run</u> necessity that utilities be able to attract investors and retain earnings in order to survive and operate efficiently and effectively"*.

20. This assertion highlights two factors relevant for the Board's current considerations, both elaborated on elsewhere in these responding comments:

(a) First, in its distinction between short-run and long-run.

(b) Second, in its focus on disallowance of costs as distinct from ex-post facto recovery of variance in revenues relative to those assumed in setting rates.

21. The EDA's expression of concern regarding the impact of application of a "financial viability" standard to COVID-19 near term cost/revenue loss recovery on the continuing ability of Ontario's regulated utilities for *"accessing capital on an ongoing basis on favourable terms"* is without foundation. Will capital and debt markets really view a solid regulatory backstop ensuring continued financial viability as insufficient in the context of this singular global pandemic and its economic fallout and associated ongoing uncertainty?

22. Unregulated “essential services” businesses have no such backstop and can fail (and have failed). Regulated utilities with financial viability regulatory support cannot. Where would you put your money right now?

23. The EDA’s characterization of the issue now as being[6] *“how to recalibrate rates so that the LDC can recover all the costs incurred to provide safe, reliable service and continue to have an opportunity to earn the Allowed Rate of Return”* completely ignores the singularity of this global pandemic and its impact on all stakeholders, not to mention the salient fact that the Board is not in this process considering how to set rates. Rather it is considering whether, and if so how, to grant relief to the utilities from the rates already set and the risk balance thereby already struck.

24. While the CLD+ reference conventional ratemaking principles of “fair return standard” and setting rates in order to provide an “opportunity to recover” prudently incurred costs, it also acknowledges that *“the COVID-19 pandemic is quite literally a once-in-a-century occurrence, and extraordinary measures may be reasonably warranted for this exceptional circumstance”*[7]. The CLD+ position recognizes these exceptional current circumstances in its advocacy of a threshold for any recovery of pandemic driven costs/lost revenues (though one which, in AMPCO and IGUA’s view, does not go far enough in recognition of the singularity of the current circumstances and its impacts on customers), despite *“potential conflict with the Fair Return standard”*. The CLD+ proceeds to assert that its proposed 100 basis point threshold for recovery *“aligns more closely with a more principled approach to establishing a Threshold [sic] than OEB Staff’s proposal”*[8]. The CLD+’s proposal is not “more principled”, rather it is based on <u>different</u> principles, and, in AMPCO and IGUA’s view, not the appropriate ones in the circumstances at hand.

25. A number of parties suggest that the Board should reject development of a unique policy to address COVID-19 impacts, and rely instead on a conventional z-factor mechanism. This suggestion fails to recognize that while z-factors are designed to deal with external events not reasonably contemplated by utility management, and the COVID-19 pandemic certainly is an external event not reasonably contemplated by utility management, it is also

---

[6] EDA, page 10, first full paragraph, and see also discussion at pages 12 (bottom) – 13 to the effect of adjusting for pandemic impacts to provide for recovery of all prudently incurred costs to serve.
[7] CLD+ comments, page 7, last full paragraph.
[8] CLD+ comments, page 8, 2nd last full paragraph.

unprecedented in its universality and severity, and in the breadth of its impacts. Further, COVID-19 impacts are most significantly on revenues, rather than (as with conventional z-factors) costs. Revenue protection is most often not part of the "regulatory compact".

26. We do agree with the Society of United Professionals (SUP)[9] that the policy adopted by the Board to address the singular circumstances of the COVID-19 global pandemic should be expressly limited to the particular circumstances of this pandemic. It is these particular circumstances which dictate that the *"tried and true regulatory concepts"* and the objective of remaining *"consistent with past regulatory practice"* advocated by a number of parties[10] should not constrain and dictate the Board's approach.

Guidance from Other Jurisdictions?

27. The SUP notes that only 22% of the commission *"opinions"* considered by LEI in its jurisdictional scan consider "necessity" as a principle guiding recovery in the context of the pandemic, and on this basis indicates that it is *"not convinced"* that it should be considered for Ontario.

28. We do not read LEI's jurisdictional scan as presenting principles adopted by utility regulatory commissions in other jurisdictions. On the contrary, what the LEI scan indicates is that, to date, no such principles have been generally adopted.

29. LEI does not present commission *"opinions"*, rather it canvasses preliminary directions provided by utility commissions in authorizing the recording of costs. While SUP[11] refers to *"regulatory principles reported in use"* in reference to LEI's reports (such as *"just and reasonable"*, *"prudently incurred"*, *"appropriate"*, *"extraordinary"*, *"necessary"*, *"regulatory certainty"*), in fact these are simply references in commission documents authorizing the recording of costs, and are not reflective of commission determinations in respect of eventual recovery of such costs. The Scott Madden report filed by CLD+ similarly indicates

[9] SUP, page 9.
[10] SUP refers to these concepts and to consistency as well, and the position advocated by CLD+ is premised on this approach.
[11] SUP, page10, bottom.

very few decisions have been taken to date either authorizing or denying recovery of pandemic driven costs/revenue losses.

30. The Scott Madden report presents a myriad of statistics presented in a myriad of what appear to be often overlapping ways. Unfortunately this material was provided in such a fashion as to render us and other interested parties unable to explore precisely what conclusions the authors would have us draw and the veracity of such conclusions.

31. Given the provision of the LEI report far in advance of the Stakeholder Conference, it is completely inappropriate for the CLD+ members to have waited until January 25th to make public its own responding report. Without an opportunity to better understand and explore the assertions offered in that report, all we draw from the report is that most COVID-19 related cost recovery processes in other North American jurisdictions remain undecided, and of those that have been decided it seems that there have been as many denials of recovery as there have been recovery allowances.[12]

32. Assertions by Scott Madden like *"no instances where cost recovery…has been subject to being "necessary" to maintain a utility's financial viability"*[13] and *"no examples of cost-sharing or earnings tests"*[14] seem, in this context of very few decisions at all, of limited value to the Board's deliberations (though in isolation are made to appear as stronger statements than, considered in context, they really are).

33. Further, the various interim directions and, and in the few applicable cases findings, on these issues in the jurisdictions considered by Scott Madden are clearly very jurisdiction specific, made within a particular regulatory context, which parties have not been provided an opportunity to fully explore or understand. We note, for example;

    (a) It appears that the commission in Maine was attempting with the cited order to correct an inequity as between customer classes arising from the existing regulatory framework, rather than addressing the issues which the OEB is attempting to address in this process; see page 21 of the report.

[12] See summary table on page 28.
[13] Scott Madden materials, page 8.
[14] Scott Madden materials, page 9.

(b) There is mention of *"guiding principles for cost recovery provisions in future proceedings"* in a Washington State commission order, but no indication of what these *"guiding principles"* were; see report page 23.

(c) It is not apparent to us what the table provided at pages 24 and 25 of the report is intended to convey, as it seems to juxtapose existing, conventional procedural rules to COVID specific commission interim directions.

(d) It is not apparent to us how the "Case Study – Texas" relates to COVID, or the matters being considered in the OEB's consultation; see report page 26.

34. Given the manner in which the Scott Madden report was presented by CLD+, and the (seemingly intended) lack of opportunity for other stakeholders (including the Board itself) to explore and understand this presentation, this work unfortunately provides limited if any value to this consultation.

Costs of Mandated Customer Support

35. The position provided in the CLD+ comments on Board Staff's proposal entails consideration of COVD-19 driven costs/revenue losses in two buckets;

(a) costs/revenue losses related to customer relief programs, including government or OEB mandated measures as well as voluntary measures, for which 100% recovery is advocated; and

(b) all other costs and revenue losses, which CLD+ submits should be subject to recovery at 50%, up to a threshold of a 100 basis point shortfall in earnings from Board approved ROE.

36. CLD+ proposes that within this suggested framework, all incremental bad debt should be added to the eligible for 100% recovery bucket, on the basis that all of that incremental (to normal course) bad debt can be attributed to the result of extension of the disconnection ban, government mandated customer relief actions, and any utility specific relief actions. The CLD+ asserts that to not permit 100% recovery of these costs would be creating a financial disincentive for utilities to provide assistance to their customers *"at a time when they need it most"*.[15]

---

[15] CLD+ comments, page 9, top.

37. Considering the CLD+ acknowledgement that this is a time when customers need assistance most, its position on recovery is strikingly unabashed and overreaching. For example, even if recovery for customer support measure costs were to be entertained:

   (a) On what basis should bad debt not related to such measures be considered? In a reality littered with business failures and personal financial strains, on what basis can it be concluded that all incremental bad debt relates to disconnection bans and extended payment plans?

   (b) How is it fair that recovery of any COVID driven costs be permitted, for mandated customer support activities or otherwise, which would result in a utility overearning at all, let alone up to as much as 300 basis points as CLD+ advocates?

38. AMPCO and IGUA continue to view a simple, clear, "financial viability" standard as the appropriate one to apply to all costs/revenue impairments in the singular circumstances facing all stakeholders as a result of the COVID-19 pandemic.

"Greenfield" Utilities

39. In our January 25th Comments on the Staff Proposal we expressed AMPCO and IGUA's view that the "financial viability" standard for recovery of COVID-19 driven costs/revenue losses should in principle apply equally to "greenfield" utilities or those under development (like EPCOR South Bruce) as to those already in full operation.

40. Having considered EPCOR South Bruce's (ENGLP's) January 25th comments AMPCO and IGUA remain of that view.

41. We agree with EPCOR South Bruce that the considerations in this consultation are time limited considerations. They relate to whether incremental revenue should be provided for in order to defray COVID-19 driven utility costs during the currency of the pandemic and the regulated utility's current rate plan. As we have repeatedly noted, the issue at hand is recovery of any balances in a variance account, not allowances or disallowances for rate making purposes. There is no permanent rate making implication of any such recovery determinations. As noted by Ontario Power Generation (OPG) in its January 25th

comments, the matter under consideration is *"a temporary relief mechanism for affected utilities"*.[16]

42. In particular, there are no issues in play regarding capital cost disallowances. Rather the issue related to capital expenditures is whether incremental revenue should be recoverable, under existing rate plans, to address, pending rebasing of rates, any immediate revenue requirement impacts of COVID-19 driven capital expenditures.

43. The "financial viability" standard advocated by AMPCO and IGUA would be applied in the current rate year to assess the sufficiency of the utility's actual revenue collected in that year to maintain financial viability. There is no resulting risk to EPCOR South Bruce of capital disallowance.

44. There is a risk that EPCOR South Bruce will not earn its full OEB approved ROE in the year in which costs have been increased and/or revenues have been impaired by COVID-19 specific impacts, including the revenue requirement impacts of any COVID-19 driven incrementally required capital investment. This time limited risk is one that should apply no differently to EPCOR South Bruce in the context of its "CIP" and associated approved rate stability period than to any other regulated utility.

45. If EPCOR's South Bruce suffers cost increases (capital or otherwise) or revenue impairments to the extent that its continuing financial viability may be compromised, pending rebasing at the end of its committed to rate stability period it can and should seek recovery through a rate rider of sufficient incremental revenue to preclude such a result.

46. EPCOR South Bruce is not the only regulated Ontario utility that has committed to a significantly deferred rebasing.

47. In any event, no information has been provided that would enable the Board to conclude that applying the same standard to EPCOR South Bruce as to other Ontario regulated utilities would result in inappropriate long-term revenue impairment relative to its "CIP" reference case. Should such information be brought forward, it would be appropriate for the Board to consider it.

---

[16] OPG Comments, page 2, top.

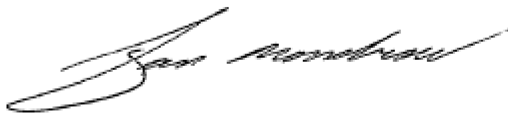
Conclusion

48. In considering whether, and if so to what extent, to adjust a regulated Ontario utility's recovery of revenue to address the allocation of risk embedded in rates in light of the singular COVID-19 pandemic, at the expense of utility customers similarly, and in many cases more severely, impacted, the Board should adopt a "financial viability" standard.

49. Maintenance of the financial viability of Ontario's regulated essential energy services providers is in everyone's interest.

50. In the event that application of this standard results in incremental recovery from utility customers, that recovery should be allocated to all customers, as all customers would benefit from the achievement of the objective of maintaining the financial viability of the regulated utility (and, in this circumstance, recovering COVID-19 driven costs from those customers driving them could lead to strikingly regressive impacts).

ALL OF WHICH IS RESPECTFULLY SUBMITTED by:



GOWLING WLG (CANADA) LLP, per:
Ian A. Mondrow
Counsel to AMPCO and IGUA

February 11, 2021

ACTIVE_CA\ 43957717\1