

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF Notice of Intention to Make an Order for Compliance and Payment of an Administrative Penalty against Active Energy Inc. (ER-2012-0045).

NOTICE OF MOTION

Active Energy Inc. (Active) will make a motion to the Ontario Energy Board (OEB or Board) on a date and at a time to be determined by the Board.

PROPOSED METHOD OF HEARING: Orally, to be heard at 2300 Yonge Street, 27th Floor, Toronto, Ontario.

THE MOTION IS FOR:

An order directing OEB Enforcement Staff to respond to the following interrogatories:

1. *The Complaint File Summary included as Attachment 1 to the Agreed Statement of Facts (ASF) indicates that the OEB Staff who engaged with Active's customer C.C. in respect of the complaint which led to the investigation which has ultimately led to this proceeding considered that the Ontario Energy Consumer Protection Act, 2010 (ECPA) applied to a customer with 3 low volume meters on one property.*

Based on the fact that C.C. is not one of the customers included in the lists of customers attached to the Notices of Compliance, Active assumes that OEB Staff have now determined that aggregation of multiple meters on one premises is permitted in determining whether the ECPA applies to a particular retail energy customer.

Active would like to better understand what standard or standards OEB Staff has, and is now, applying to determine whether the ECPA applies to retail energy customers with multiple meters. Active would also like to understand whether, and to what extent, this topic has been given attention by the Board internally.

- (a) *Please advise if OEB Staff taking customer inquiries/complaints are trained on the ECPA.*
 - (b) *If so, please provide copies of any training materials provided for such training.*
 - (c) *Please provide copies of any other internal OEB training or briefing materials not addressed in response to part 1.b. which address ECPA requirements.*
2. *In support of its position on the permissibility of aggregation of a customer's multiple accounts/premises in determining applicability of the ECPA, OEB Staff refers (paragraph 25 of the ASF) to the FAQ posted by the Board on January 17, 2011 and included as Attachment 19 to the ASF.*

Active would like to determine whether any other Board published materials exist addressing this topic, and if so how this topic has been addressed.

- (a) *Please advise whether that FAQ has changed since its initial posting.*
 - (b) *If the FAQ has changed in any respect since its initial posting, please file copies of all versions of the posting, or if not available please explain in detail what the various changes have been.*
 - (c) *The FAQ includes reference (Q&A 3 under the hearing "Verification and Renewal Scripts") to the potential to accommodate a request for a verification call to verify all locations for a multi-location customer in one verification call.*
 - (i) *Please advise whether any such script was ever produced by the OEB, and if so please provide a copy of any such script.*
 - (ii) *Please advise whether any other materials or notifications were ever produced or published by the OEB in relation to aggregation of meters/premises in determining ECPA eligibility, and if so please provide copies of all such materials or notifications.*
3. *Please advise whether OEB Staff have had any previous inquiries from, or discussions with, any Ontario energy retailers or other external parties other than Active regarding the practice of aggregating customer volumes across multiple meters and/or premises in determining applicability of the ECPA. If so, please:*
- (a) *Indicate which retailers the OEB has had any such discussions with, and approximately when such discussions were had.*
 - (b) *Advise, in each case, by whom the discussions were initiated (i.e. by OEB Staff or the external party) and whether the discussions resulted from a*

customer complaint or inquiry or some other initiating factor (and if another initiating factor, please explain what that initiating factor was).

- (c) *Provide copies of any correspondence or other materials received by the OEB or OEB Staff from, or sent by the OEB or OEB Staff to, any retailer or third party in respect of such previous discussions.*
- (d) *Advise what the outcome of such discussions was in each case in respect of OEB Staff's advice, position or feedback on the practice of aggregating customer volumes across multiple meters and/or premises in determining applicability of the ECPA.*

THE GROUNDS FOR THE MOTION ARE:

1. In respect of interrogatory 1, as set out above:
 - (a) The disclosure provided by OEB Enforcement Staff when indicates that as recently as the complaint by Active's customer which has ultimately given rise to this proceeding, OEB Staff have been inconsistent and unclear in their application of the ECPA to electricity customers with multiple low-volume meters whose annual aggregate consumption exceeds the legislated low-volume threshold.
 - (b) Further, Active's evidence will be that it remains unclear precisely how OEB Staff are seeking to apply the ECPA to such electricity customers.
 - (c) Active wishes to explore the extent to which additional internal OEB materials relevant to this issue exist, or not, and if they do exist how they address application of the ECPA to electricity customers with multiple low-volume meters whose annual aggregate consumption exceeds the legislated low-volume threshold.
 - (d) The inconsistency of OEB Staff on this matter is relevant to;
 - (i) determination of precisely what OEB Staff's position is;
 - (ii) the veracity and persuasiveness of such position; and
 - (iii) should OEB Staff's current position ultimately be found to be persuasive, the degree to which Active should be penalized for its conduct in this area which has historically been unclear to, and inconsistently applied by, even OEB Staff.
 - (e) Active would also like to assess the extent to which the degree of attention paid to this issue internally by the Board and externally in Board publications

is consistent, a matter going to the appropriateness of the Board proceeding in the manner in which it has in this enforcement proceeding at this time.

2. In respect of interrogatory 2, as set out above:

- (a) OEB Enforcement Staff rely on the FAQ posted by the Board on January 17, 2011, and included as attachment 19 to the ASF, in support of the statement in the Notices of Intention that “[t]he OEB’s guidance on this issue [of applicability of the ECPA to an electricity consumer with multiple meters] has been available to Active and the rest of the electricity retailer sector since the ECPA took effect in 2011” as included in each of the Notices of Intention issue by the Board herein and leading to this proceeding (paragraphs 4 of the Notices of Intention).
- (b) Active’s evidence will be that it was not aware of such guidance. Active will further argue that this one FAQ statement was insufficient to provide proper notice and guidance to the industry of the Board’s interpretation of the applicability of the ECPA to electricity customers with multiple meters.
- (c) In light of the anticipated reliance by OEB Enforcement Staff on the cited FAQ, and Active’s position that this FAQ provides insufficient notice to the electricity retail sector of the Board’s position on this issue, the extent to which the FAQ is the only reference to the issue at hand in the public domain is relevant to consideration of the extent to which Active should be found culpable, and penalized, should the Board ultimately accept OEB Enforcement Staff’s interpretive position.

3. In respect of interrogatory 3 as set out above:

- (a) Active’s evidence herein will describe its understanding that the issue of ECPA applicability to electricity customers with multiple meters has been raised with the Board by retailers in the past, and that the Board has neither indicated that such practice is unacceptable and contrary to the ECPA, nor has it taken any enforcement or other compliance related actions in respect thereof, in spite of its awareness of such practices.
- (b) The extent to which the issues herein have been engaged in by OEB Staff in the past, and the conduct and outcome of any such engagements, is relevant both to:
 - (i) the veracity and persuasiveness of OEB Enforcement Staff’s current position; and
 - (ii) should OEB Enforcement Staff’s current position ultimately be found to be persuasive, the degree to which Active should be penalized for its conduct in this area which has historically been unclear to, and inconsistently applied by, even OEB Staff.

THE FOLLOWING MATERIALS WILL BE RELIED ON BY ACTIVE:

1. The Notices of Intention issued by the Board herein (copies of which are included as Attachment 15 to the ASF).
2. The Complaint File Summary and Consumer Complaint Response forms included as Attachment 1 to the ASF.
3. The ASF.
4. The Joint Witness Statement of Michael Stedman and Chris Waddick to be filed by Active.

September 25th, 2017.



Gowling WLG (Canada) LLP
Suite 1600, 100 King Street West
Toronto, ON, M5X 1G5

Ian A. Mondrow
Counsel for Active Energy Inc.
416-369-4670
ian.mondrow@gowlingwlg.com

TO: Justin Safayeni
Stockwoods LLP
Suite 4130, 77 King Street West
Toronto, ON, M5K 1H1
416-593-3494
justins@stockwoods.ca

TOR_LAW\9273127\2