Shepherd Rubenstein

BY EMAIL and RESS

Mark Rubenstein
mark@shepherdrubenstein.com
Dir. 647-483-0113

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

February 25, 2019
Our File: EB20180028

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2018-0028 – Energy+ 2019 Rates – SEC Reply to Board Staff Correspondence

We are counsel to the School Energy Coalition ("SEC"). SEC is in receipt of a letter from Board Staff filed end of day on Friday, February 22, 2019. In its letter, Board Staff noted that the Vulnerable Energy Consumers Coalition ("VECC") in a technical conference question requested Energy+ provide an alternative run of its cost allocation model based on a different methodology, for the allocation of costs to the embedded distributor classes.[1] Board Staff requested direction from the hearing panel, as to "whether the alternative embedded distributor cost allocation raised by VECC is within the scope of the upcoming oral hearing." Board Staff comments that if it was, then notification to Waterloo North Hydro ("WNH") "would be necessary" as they would be impacted and are not an intervenor in the proceeding. The implication of the request is that if the Board is not prepared to require additional notice to WNH, then the issue should be ruled out of scope in this hearing.

Board Staff have cited no legal authority in support of its position, nor provided no analysis of the scope of notice already provided to customers of Energy+. In addition to the direct impact on this case, the broader implications of Board Staff's position on notice are very significant.

Board Staff's position appears to be that anytime an intervenor proposes a change to the applied for cost allocation methodology, notice is required to be given, or the proposal is to be considered out of scope. Since cost allocation is a zero-sum exercise, any change that benefits some customers will have a negative impact on others. For example, Toyota Manufacturing Canada Inc. ("TMMC") has filed expert evidence in this proceeding which proposes a change to the cost allocation of the large distributor class. While the Board directed Energy+ to provide further notice to the other large use customer, it did not require further notice to be provided to any other Energy+ customers, who will also be impacted if the Board accepts TMMC's experts cost allocation proposals.[2] Changes to cost allocation methodology, such as how revenue to cost ratios are adjusted, regularly occur in settlement proposals that are approved by the Board.

SEC is not arguing that additional notice will *never* be required in the midst of a proceeding when an intervenor makes a proposal that differs from the application. But whatever the appropriate line is for when further notice is required, it surely is not a potential change to the cost allocation for an

[1] VECC-TCQ-69
[2] See Appendix A, bill impact table provided in Energy+ clarification question to TMMC, filed on February 22, 2019

embedded distributor. If an embedded distributor cannot be expected to know that during a rate proceeding there maybe changes to what was proposed in an application regarding the approach to allocating costs to each, then how could any other customers be expected to understand that possibility? SEC submits the fact that Energy+'s two other embedded distributors (Hydro One Networks Inc. and Branford Power Inc.), that have intervened in the proceeding, is an indication that they do know that a change is always possible and that the original notice is sufficient.

Board Staff appears to draw a distinction of when further notice, is or is not, required based on if the proposed changes to the application require a departure from what was approved in past rate cases or differ from Board policy. SEC is not convinced that the methodology raised in the VECC technical conference question is a departure from Board policy in the first place, but regardless, the distinction is not only legally irrelevant, but if accepted would itself lead to a legal error.

Similar to Board policy, past decisions are not binding on other Board panels.[3] By severely limiting the proposed changes that an intervenor may propose based on past Board decisions and policy, the Board would be both impermissible fettering its own discretion[4] and would be a breach of procedural fairness. It cannot be that only the applicant in its application can propose changes to cost allocation methodology that was previously, or depart from Board policy.

Board Staff's reliance on the methodology agreed upon in a previously approved settlement proposal in Cambridge and North Dumfries' (now part of Energy+) last cost of service proceeding is not appropriate. Similar to any other Board decision, approved settlement do not bind future panels. Further, the explicit terms of the Settlement Proposal make clear that parties are free to take different positions in subsequent proceedings:

> Unless stated otherwise, the settlement of any particular issue in this proceeding and the positions of the Parties in this Settlement Proposal are without prejudice to the rights of Parties to raise the same issue and/or to take any position thereon in any other proceeding, whether or not CND is a party to such proceeding. [emphasis added][5]

SEC submits while it is permissible as a matter of 'policy' for the Board to decide that it wishes for Energy+ to provide additional notice to WNH before the hearing, it should not decide as a matter of law that it is required to do so to be able to consider issues raised by VECC. Further, if it decides that it will not require additional notice to be provided to WNH, it should also not limit or modify the scope of the already approved Issue 3.2, which asks "[a]re the proposed cost allocation methodology, allocations, and revenue-to-cost ratios appropriate?"[6] The issue is of the appropriate approach to allocating costs to the embedded distributor classes, like all other cost allocation issues, is clearly within scope.

Yours very truly,
Shepherd Rubenstein P.C.

Original signed by

Mark Rubenstein

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[3] *College of Physicians and Surgeons of Ontario v. Peirovy*, 2018 ONCA 420, para 91; *Decision and Procedural Order No.3* (EB-2017-0306/307 - EGD/Union MAAD), March 1 2018, p.8;
[4] *Jackson v. Ontario (Minister of Natural Resources)*, 2009 ONCA 846, para 51; *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, para 66;
[5] EB-2013-0116, Settlement Proposal, dated April 2 2014, p.5
[6] Procedural Order No. 4 and Decision on Issues List, October 31 2018, Schedule A

cc: Wayne McNally, SEC (by email)
Applicants and interested parties (by email)