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February 25, 2019

VIA E-MAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge St.
Toronto, ON
M4P 1E4

Dear Ms. Walli:

Re: EB-2018-0028 – Energy + Inc. – 2019 Cost of Service Application – VECC Reply to Board Staff Correspondence

We are writing today in reply to Board Staff's letter of February 22, 2019 regarding the unsettled issue of cost allocation in the above-noted proceeding. VECC has serious concerns regarding the implication that alternative cost allocation methods to those currently approved or proposed by the Applicant cannot be considered by the Board unless sufficient notice has been given to all parties indirectly affected. Board Staff's letter raises concerns both with the functioning of the overall regulatory process and the substance of the issue at hand.

With respect to the functioning of the regulatory process, VECC notes that the initial formal "Notice" of a Board proceeding is one of the very first steps in the process of reviewing an Applicant's rate application. As such it is issued before any review by parties outside of Board Staff has taken place. VECC also notes that the review of a specific Application can involve a number of subsequent steps (including interrogatories, technical conferences, intervenor evidence, settlement discussions and oral hearings) all of which contribute to the parties' and Board's understanding of the Application and the alternatives to be considered.

In VECC's view, the suggestion that questions in interrogatories or otherwise, proposing hypothetical or alternative approaches (be they with respect to cost allocation or other aspects of the Application) may well affect parties who have, until this point, not chosen to not formally participate in the process. However, these alternative approaches and hypothetical arguments are not out of scope unless in

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presenting them, the rights of third parties are directly affected and they are neither notified of the possible change, nor have they had a reasonable opportunity to inform themselves of public proceedings that might potentially affect these rights or arrangements.

To adopt a more stringent rule, namely that any party indirectly affected by a proceeding, or that is directly affected but has chosen to ignore, to that point, a relevant and related public proceeding, must be brought into the proceeding or that such a hypothetical or alternative approach may not be raised, creates a significant implication for the regulatory process. Accepting such a position will lead to either: a) additional procedural steps and significant delays in the review of most, if not all, applications; or, b) a severe limitation on the ability of intervenors and other parties involved to promote alternatives and hypotheticals, or that the Board Panel be effectively restricted from making any determinations that vary from the proposals put forward by Applicants. Neither of these results is acceptable, fair, nor in the public interest.

VECC finds the possibility of the latter result as being particularly troubling as it would severely fetter the discretion of individual Panels for whom past practice and guidelines are currently not considered to be binding. In this respect, the OEB staff appear to be falling into the error of being overly concerned with the potential rights of the indirectly involved embedded distributor, Waterloo North Hydro. First, this public regulatory proceeding, as noted, is public, and presumably, since the other embedded distributors did participate, such proceeding came to the notice of Waterloo North Hydro, who chose not to participate. To our knowledge, WNH has not to date requested to participate. Thus Board staff in its letter is seemingly concerning itself with WNH's possible "rights" as if the present proceeding were a civil "*lis inter partes*" and not a public regulatory proceeding. With respect, this position, if maintained, will fetter the Board Panel's discretion in much the same way as the Canadian Transportation Agency fettered its discretion in the recent Supreme Court of Canada decision in *Delta Air Lines Inc.* v. *Lukács*.[1]

VECC notes also that such limitations on alternative proposals would clearly arise in the area of cost allocation which is a zero-sum game such that any changes result in winner and losers. However, it could also affect other aspects of an Application if the alternative being considered has negative impacts on a particular class/group of customers.

In terms of the substance of the issue, it is clear from the record to date (including the Settlement Agreement) that cost allocation is a contentious issue. Furthermore, the fact that the cost allocation issue was unsettled is a clear indication that alternatives were under consideration. It is also clear that

[1] *Delta Air Lines Inc.* v. *Lukács*, [2018] 1 SCR 6, 2018 SCC 2, at para. 18.

the thinking and view of parties was evolving throughout the process – as demonstrated by the updated evidence filed by TMMC. With respect to the particular issue of the cost allocation to embedded distributors raised by Board Staff, VECC notes that the Board's Decision regarding Cambridge and North Dumfries 2014 Cost of Service Application (EB-2013-0116) was based on a Settlement Agreement which means it should not be viewed as precedent in terms of Board policy or binding on parties in terms of future Applications. Furthermore, VECC notes that with respect to Board policy, Chapter 2 of the Filing Requirements For Electricity Distribution Rate Applications for 2019 Rate Applications states[2]:

> • *If the host distributor proposes to establish a new embedded distributor class, the host distributor must include that class in its cost allocation study and in the RRWF and provide rationale and supporting evidence for the establishment of an Embedded Distributor class, as applicable. The host distributor must provide the costs of serving the embedded distributor(s), load served, information regarding ownership of relevant assets involved in the connection(s), whether assets are dedicated to the embedded distributor(s) or shared to serve other customers, and the distribution charges levied. (*Emphasis Added)
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> • *If the host distributor proposes to bill the embedded distributor(s) as if it/they were General Service Class customers, the costs and revenue must be included with that class in the cost allocation study and the RRWF. In this case, the host distributor must also complete Appendix 2-Q, which shows details on how much of the host's facilities are required to serve the embedded distributor(s), regardless of the fact that they are not treated as a distinct rate class elsewhere. The host must provide the cost of serving the embedded distributor(s), load served, information regarding ownership of relevant assets involved in the connection(s), and the distribution charges levied. Additionally, the host distributor must provide evidence supporting the continued appropriateness of the rates for the general service class for recovering the costs of providing low voltage distribution services to the embedded distributor(s). (*Emphasis Added)

In Energy+'s case, the utility has established customer classes for its embedded distributors and, as result, the Guidelines do not require the use Appendix 2-Q. Therefore, in VECC's view, the request for the results of a cost allocation scenario where embedded distributors are included in the Board's cost allocation model was reasonable and, indeed, reflected the Board's current practice. VECC would also note that this request arose as result of the intensified scrutiny that was placed on the issue of cost allocation subsequent to the filing of TMMC's initial evidence and that the January 2019 Technical Conference was the first opportunity VECC had to formally raise the question with Energy+ on the record.

In any event, VECC notes that the Guidelines are not binding on the Board which is required to assess the evidence and arguments put before it.

[2] Pages 45-46

Finally, VECC notes that, with respect to the proposed changes in TMMC's updated evidence, Procedural Order No. 8 only required Energy+ to notify the other Large Use customer of TMMC's proposals. However, customers in other classes (not represented by the intervenors currently participating) are also likely to be impacted if such proposals were adopted and therefore, based the position put forward by Staff in its letter, should also have been notified.

In light of the above points, VECC requests that the Board formally dismiss or disavow Staff's suggestion that alternative cost allocation for embedded distributors be excluded from the scope of the oral hearing and to inform the parties of its decision without delay.

Yours truly,

Original signed

John Lawford
Counsel for VECC

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