

John A.D. Vellone
T (416) 367-6730
F 416.367.6749
jvellone@blg.com

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada M5H 4E3
T 416.367.6000
F 416.367.6749
blg.com



July 2, 2019

Delivered by Courier, Email & RESS

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2701
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Energy+ Inc.
 2019 Rate Application (EB-2018-0028)
 Energy+ Inc.'s Notice of Motion**

Please find enclosed Energy + Inc.'s Notice of Motion in this proceeding. Paper copies of this letter and the accompanying Notice of Motion will be delivered to you by courier.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Per:

Original signed by Ewa Krajewska per John A.D. Vellone

John A.D. Vellone

cc: Intervenors of record in EB-2018-0028

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B, as amended (the “Act”);

AND IN THE MATTER OF an Application by Energy+ Inc. under Section 78 of the Act for an order approving just and reasonable rates and other charges for electricity distribution to be effective January 1, 2019.

NOTICE OF MOTION

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide St W.
Toronto ON M5H 4E3

John A.D. Vellone

Tel: (416) 367-6730

Facsimile: (416) 361-2758

Email: jvellone@blg.com

Counsel to the Applicant, Moving
Party, Energy+ Inc.

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

PROPOSED METHOD OF HEARING: Energy+ proposes that the motion be heard by way of a written hearing.

THE MOTION IS FOR:

1. A review and variance of the Board’s Decision and Order dated June 13, 2019 in EB-2018-0028 (the “Decision”) in the matter of an application filed by Energy+ on April 30, 2018 to change its electricity rates effective January 1, 2019, among other matters (the “Application”) with respect to its conclusions regarding the Advanced Capital Module (ACM) and the impact of Bill C-97
2. An order that Energy+ has satisfied the “threshold test” referred to in Rule 43.01 of the *OEB’s Rules of Practice and Procedure*.
3. An order that the motion to review be heard by a differently constituted panel of the OEB.
4. An order that the balance of the Decision not be varied and be implemented as ordered.

THE GROUNDS FOR THE MOTION ARE:

1. On April 30, 2018, Energy+ filed an application to change its electricity distribution rates effective January 1, 2019.
2. The Parties (being, Energy+, Consumers Council of Canada, Hydro One, Toyota Motor Manufacturing Canada Inc., and the Vulnerable Energy Consumers Coalition) reached an agreement on all aspects of Capital Expenditures in a settlement proposal, with the exception of Energy+’s request for an Advanced Capital Module (“ACM”) related to a proposed capital expenditure to renovate and convert an existing heritage building in downtown Cambridge (Southworks) into an administrative office building.
3. In its Decision, the Board found that the first two criteria with respect to the approval of the ACM, being materiality and need, were met. The Board decided that the third criterion, prudence, was not met.

4. In finding that the third criterion was not met, the Board committed three reviewable errors:
 - (a) First, contrary to the rules of natural justice and procedural fairness, the Board relied upon benchmark comparisons that were not filed in evidence by the parties. The comparisons were filed by OEB staff as parts of their submissions. The OEB staff acknowledged in their submissions that these comparators were of limited use. The comparisons were not subjected to being tested on their evidence or relevance to the Southworks project. The Board relied upon these comparisons in making its finding that the estimated Southworks cost is higher than the comparators.
 - (b) Second, having accepted the comparisons from the OEB Staff, the Board committed the further error of fact by extrapolating from these comparisons that the average costs is \$300 per square foot. There was no evidence on the record to substantiate a finding that the appropriate average cost should be \$300 and to apply this cost as a benchmark to measure the Southworks project. The Board further denied the Applicant procedural fairness by failing to provide the Applicant with an opportunity to explore this issue as part of the evidence on the Application.
 - (c) Third, the Board applied an inflation index to the comparisons that was not grounded in the evidence. The Board applied the IRM inflationary factors when it would have been more appropriate to apply inflation factors from the construction industry. The Board further denied the Applicant procedural fairness by failing to provide the Applicant with an opportunity to explore this issue as part of the evidence on the Application.
5. The Parties to the Settlement Agreement also reached an agreement on the overall base revenue requirement for the 2019 test year, which included an amount for Payment in Lieu of Income Taxes (“PILs”). The OEB breached the rules of natural justice and fairness in its consideration and application of the impact of Bill C-97. The OEB did not ask the parties, nor did it hear submissions from the parties, with respect to the impact of

Bill C-97. The OEB did not have any factual foundation to make the findings it did flowing from the application of Bill C-97.

6. Energy+ relies upon:

- (a) Rules 40 through 42 the Board's *Rules of Practice and Procedure*; and
- (b) Such other and further grounds and material as counsel may advise and this tribunal may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- 1. The Decision and Order dated June 13, 2019 as corrected on June 18, 2019;
- 2. The record of this Proceeding, EB-2018-0028, including the previous decisions and orders;
- 3. Affidavit evidence, to be filed;
- 4. Written submissions, to be filed;
- 5. Such further and other documentary evidence as counsel to Energy+ may advise and this tribunal may permit.