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October 30, 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.
Motion to Review and Vary 2019 Distribution Rate Application Decision and Order (EB-2018-0028) dated June 13, 2019
EB-2019-0180
Energy+ Inc.'s Reply Submissions

Pursuant to Procedural Order No. 2, please find enclosed Energy + Inc.'s Reply Submissions in this proceeding. Paper copies of this letter and the accompanying response will be delivered to you by courier.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Per:

Original signed by John A.D. Vellone

John A.D. Vellone

cc: Sarah Hughes, Energy+ Inc.
Ian Miles, Energy+ Inc.
Intervenors of record in EB-2019-0180

EB-2019-0180

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B;

AND IN THE MATTER OF motion by Energy+ Inc. pursuant to Rules 40 through 42 of the Ontario Energy Board's *Rules of Practice and Procedure* for an order or orders to vary the OEB's EB-2018-0028 Decision and Order dated June 13, 2019 as corrected on June 18, 2019.

REPLY SUBMISSIONS OF ENERGY+ INC.

October 30, 2019

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Counsel for the Applicant,
Energy+ Inc.

I. Introduction

1. Energy+ Inc. ("Energy+" or the "Applicant") makes these reply submissions in accordance with Procedural Oder No. 2 in reply to the submissions made by Ontario Energy Board ("OEB" or the "Board") Staff and the interveners the Vulnerable Energy Consumers Coalition ("VECC") and the School Energy Coalition ("SEC") (collectively the "Responding Submissions"). Since there is substantial overlap in the Responding Submissions, Energy+ responds to the points by theme instead of to each party.

2. Energy+ reiterates and relies upon the submissions made in its Argument-in-Chief filed October 3, 2019 (the "AIC"). Specifically:

   (a) The Board panel breached the rules of procedural fairness by relying on benchmark comparisons that were not filed in evidence by the parties. As a consequence, the Board panel erred in finding that an appropriate benchmark to assess the prudence of the Southworks cost estimate was $300 per square foot.

   (b) If the Board panel had used an appropriate construction sector inflationary index, as explained by the construction industry expert Mr. Kelsey, and even if all other aspects of the Decision remained exactly the same, the Board panel's methodology to assess prudence would have resulted an average cost per square foot of $346.50, which when multiplied by the total square footage of the Southworks facility would have resulted in an amount that was $1 million higher than the amount approved in the Decision.

   (c) In addition, if the Board panel had the benefit of facts on the relevance and applicability of the Enersource and PowerStream comparators, like the expert evidence of Mr. Kelsey, it would have significantly moderated the Board panel's reliance on these comparators. Had the Board panel conducted a proper assessment of prudence, using a retrospective factual inquiry, and had the Board panel had the benefit of the relevant facts, it would have concluded that the forecasted costs of $8.1 million for the Southworks facility were in-fact prudent.

3. The purpose and intent of the Board's ACM is to advance "the reviews of eligible discrete capital projects", to "preserve the regulatory efficiency of IR applications", and to provide "greater assurance of recovery for prudent and appropriately prioritized capital projects regardless of when the investments might be made."[1]

4. None of these objectives are achieved when the Board makes a finding on prudence of a project that is not based upon facts that have been filed in evidence and tested by all of the parties, including the Applicant.

5. Indeed, the Applicant's fundamental right to know the case they must meet is put at risk when parties (including OEB Staff) are permitted to introduce evidence long after the evidentiary record of the proceeding has closed, giving the Applicant no opportunity to conduct any meaningful discovery on the relevance or applicability of those specific benchmarks. This is what happened in this case.

6. Decisions based on evidence that has been tested ensures that the decisions are just and reasonable. It is in the public interest for the Board to follow a process that ensures that its decisions regarding rates are grounded in evidence that has been tested by the Board and the parties. To do otherwise, casts a shadow on the Board's decision-making process, and leaves the impression that decisions can be made in the absence of evidence and based simply on written submissions.

II. Test on a Motion for Review and Evidence on Motion

7. The parties appear to agree on the test for a Motion to Review, as set out by Energy+ at paragraphs 18 and 19 of its AIC.

8. The Responding Submissions take issue with Energy+ filing expert evidence on this motion.

[1] Report of the Board, "New Policy Options for the Funding of Capital Investments: The Advanced Capital Module" (EB-2014-0219) dated September 18, 2014, at pp. 10-12, available online at: https://www.oeb.ca/oeb/_Documents/EB-2014-0219/Board_ACM_ICM_Report_20140918.pdf.

9. Energy+ disagrees. The independent expert evidence is necessary and relevant to the Board determining whether the Order and Decision were "just and reasonable."

10. Had the OEB provided notice to the parties that it intended to rely on an inflationary index to extrapolate from the comparators, each of the parties would have no-doubt filed evidence and submissions on the appropriate rate of inflation. Energy+ has filed such evidence as part of the motion to show that had the correct inflation index been selected, the result would have been different, and had the limitations on the Board's chosen benchmark been known, a different result would have been concluded.

11. In this context, the Responding Submissions each argue that the OEB should ignore and disregard the independent expert evidence of Mr. Kelsey.

A. Characterization of the Reasons

12. The Responding Submissions attempt to minimize the extent to which the Decision and Order relied upon the findings extrapolated from the two comparators in coming to the decision. However, a close reading of pages 13 and 14 of the Decision and Order shows that, at the foreground of the OEB's conclusion, was their reliance upon these two comparators. In particular, while Energy+ filed evidence with respect to other facilities, the OEB found that the "comparison provided by OEB Staff in its final submission was more relevant as it used administration only facilities as comparators".[2]

B. Applicable Inflation Index

13. The Responding Submissions' main thrust is that Energy+'s failure to suggest an inflationary index is fatal to the motion for review. However, the problem with that submission is that none of the parties, interveners, or the OEB, provided any notice about which inflationary index would be applied, even though both Energy+ and OEB Staff cautioned that the analysis may be impacted by inflation. Energy+ has a legal right to know the case it must meet in advance.

[2] EB-2018-0028, Decision and Order, June 13, 2019 (corrected June 18, 2019) at page. 13.

14. Furthermore, the OEB did not provide notice to the parties and the interveners that it intended to rely upon a specific inflationary index. Had Energy+ had notice that the OEB would proceed in this fashion, at the very least, Energy+, OEB Staff and the interveners could have provided submissions on what would be the appropriate inflation index.

15. When introducing the two comparators in their responding submissions on the Application, OEB Staff expressly noted the limitation of the comparisons to the Enersource and PowerStream projects without considering the presence of inflation:[3]

> OEB staff notes the following limitations in this comparison:
>
> - The presence of inflation in the construction sector since 2008 and 2012 was not recognized.
> - The cost of land/building can vary significantly depending on the location and the market conditions at the time the transaction was done.

16. Energy+ in its reply submissions highlighted this problem as well. Energy+ wrote in its submissions: "Energy+ agrees with OEB Staff's reservation on the use of these comparators**, in particular the fact that they do not account for the presence of inflation in the construction sector since 2008 or 2012**." (emphasis added)[4]

17. Energy+ could not be faulted for not leading evidence on inflationary indices at the reply stage of its submissions. OEB Staff introduced benchmarking comparisons in their final submissions long after the evidentiary record of the proceeding had closed. The Applicant had no opportunity to conduct any meaningful discovery on those benchmarks. **It would not have been permitted to do so at this stage of the proceedings.**

18. In a dramatic twist from its original submissions recommending the recognition of inflation in the construction sector specifically, in the Responding Submissions OEB Staff now suggest that the IRM inflationary factor is appropriate as it is a macro-economic index that is relatively stable over time and familiar to OEB Staff and stakeholders.[5] However, it is

[3] EB-2018-0028, OEB Staff Submissions, March 29, 2019 at page. 10.
[4] EB-2018-0028, Energy+ Reply Submissions, April 23, 2019 at para. 29.
[5] OEB Staff Submissions at page 15, footnote 38.

far from clear that the IRM inflationary index is appropriate when reviewing the costs in the construction industry, and OEB Staff have cited absolutely no evidence to support that assertion. The construction industry is susceptible to micro and macro-economic inflation.[6] As explained by CBRE, there are specific micro-economic factors that are taken into account in the construction context that make it the most relevant and appropriate factor:

(a) as a result of the tariffs imposed on steel, raw steel and aluminum prices have increased between 20 to 40%.[7]

(b) the local labour supply and demand has also caused an increase in prices.[8]

(c) the change in office design layout since 2008 to be more towards open plan concepts has also changed labour demands.[9]

19. There is some dispute in the Responding Submissions about what would be the appropriate inflation index that demonstrates that it is not evident that the IRM index should have been chosen. VECC appears to suggest that a different geographical construction index may be appropriate, without any evidence in support, that the construction index for Ottawa may be more appropriate than the Toronto construction index.[10] In this context, the Board panel does have access to evidence of both the Ottawa area and Toronto area construction inflation index. Notably, the results are largely similar regardless of which is used (the use of the Ottawa index actually results in a higher benchmark).

20. Lastly, OEB Staff submit that Melloul-Blamey did not specify inflation factors when preparing the original $8.1 million estimate. It did not do so because Melloul-Blamey's estimate of costs was in today's dollars (thus inflation is not a relevant consideration).

[6] CBRE evidence at para. 22.
[7] CBRE at para. 23.
[8] CBRE at para. 24.
[9] CBRE at para. 24.
[10] VECC Submissions at pages 3-4.

C. Evidence of Comparators is different from submissions about comparators

21. The Responding Submissions misconstrue and mischaracterize Energy+ submissions with respect to comparators and benchmarks. Energy+'s complaint is not that the OEB relied upon comparators and benchmarks. Rather it is that the OEB relied upon comparators and benchmarks that were not filed in the evidence, and the Board extracted information from those comparators in its Decision without providing Energy+ with notice of how those comparators would be treated and what information would be inferred.

22. As noted by OEB Staff, Energy+ introduced comparisons in its pre-filed evidence.[11] Energy+ agrees with OEB Staff that it is appropriate to benchmark the Southworks cost estimate against costs of other local distribution companies. The issue is how this should be done. In Energy+'s submission, and in accordance with the rules of natural justice and procedural fairness, if information is to be extrapolated and inferred from those comparators in order to apply a benchmark, the comparators should be filed in the evidence and the basis of the comparison made known.

23. By filing the evidence from comparators as part of Energy+'s evidence, the parties and interveners would be able to ask questions with respect to that evidence, and to make submissions. When OEB Staff relied upon the 2008 PowerStream comparator and the 2012 Enersource comparator in its responding submissions, probing this evidence was not possible given the stage of the proceedings.

D. Energy+ did not unreservedly endorse the comparators

24. OEB Staff introduced benchmarking comparisons in their final submissions long after the evidentiary record of the proceeding had closed. The Applicant had no opportunity to conduct any meaningful discovery on those benchmarks.

25. Energy+'s reply submissions on the application on the use of the Enersource and PowerStream comparators must be circumscribed to their appropriate narrow context. The Responding Submissions attempt to hold it against Energy+ that in its reply submissions

[11] OEB Staff Submissions at p. 7 and footnote 17.

Energy+ relied upon the 2008 PowerStream building and the 2012 Enersource building. Energy+ endorsed those comparators on the limited basis that they demonstrated that other similar types of investments had been approved by the OEB.

26. Energy+ expressly noted its reservation with respect to the use of these comparators. In particular, Energy+ noted that these comparators do not account for the presence of inflation in the construction sector.[12] As such, to the extent that the OEB was going to extrapolate from these comparators and apply an inflation index, the OEB should have provided notice to Energy+ of its intention to do so and what inflation index it intended to apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

Original signed by John A.D. Vellone

John Vellone
Counsel for Energy+ Inc.

[12] EB-2018-0028, Energy+ Reply Submission, April 23, 2019 at para. 28-29.