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Our File No: 041055.000002

May 11, 2023

BY EMAIL AND RESS

Ms. Nancy Marconi
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

Dear Ms. Marconi:

Re: GrandBridge Energy Inc. ("GrandBridge") Application to dispose of balances in certain deferral and variance accounts (EB-2022-0305) ("Proceeding")
Reply Submission

Further to yesterday's filing of the Reply Submission on behalf of GrandBridge, subsequent to filing we noticed a correction is required in Paragraph 6.

Please find attached an updated Reply Submission. We request that the incorrect version filed yesterday be removed from the EB-2022-0305 webdrawer.

Please contact the undersigned if you require anything further.

Yours truly,

BORDEN LADNER GERVAIS LLP

J Vellone

John Vellone

EB-2022-0305

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 GrandBridge Energy Inc. to the Ontario Energy Board for an Order or Orders approving or fixing just and reasonable distribution rates and other service charges to be effective January 1, 2023.

REPLY SUBMISSIONS
(GROUP 1 DVA BALANCES)

OF
GRANDBRIDGE ENERGY INC.

May 10, 2023

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REPLY SUBMISSIONS
(GROUP 1 DVA BALANCES)

May 10, 2023

A. INTRODUCTION:

1. GrandBridge Energy Inc. ("**GrandBridge Energy**") makes these written reply submissions in response to the Ontario Energy Board Staff ("**OEB Staff**") submissions dated April 26, 2023 (the "**OEB Staff Submissions**") in respect of an Application filed by GrandBridge Energy on February 2, 2023 with the Ontario Energy Board ("**OEB**") under Section 78 of the *Ontario Energy Board Act, 1998*, as amended, ("**OEB Act**") seeking an Order or Orders approving or fixing just and reasonable distribution rates and other service charges to be effective January 1, 2023 (the "**Application**"). The Board assigned file number EB-2022-0305 to the Application.

2. The Application relates to GrandBridge Energy's request to approve the disposal of the balances of the following Group 1 Deferral and Variance Accounts for the Energy+ rate zone that were (at the request of OEB Staff) withdrawn from GrandBridge Energy's 2023 IRM Application (OEB File No. OEB-2020-0017):

   a. Account 1580 – RSVA Wholesale Market Service Charge
   b. Account 1589 – RSVA Global Adjustment
   c. Account 1595 (2018) – Disposition and Recovery / Refund of Regulatory Balances.

3. The result of the request would represent a net recovery from customers in the amount of $456,261 to be recovered through rate riders over a 12-month period with an effective date based on receipt of the OEB's final decision and rate order in respect of the Application.[1]

4. OEB Staff support the proposed disposition of the Group 1 accounts, excluding GrandBridge Energy's proposed correction to the 2018 accounting error.[2] With regards to the 2018 accounting error, OEB Staff argue:

[1] GrandBridge Energy Inc. 2023 IRM Application – Phase 2 dated February 2, 2023 in EB-2022-0305 at p.7-8.
[2] OEB Staff Submissions at p.5.

a. The proposed debit principal adjustment totaling $451,594 to Account 1589 and Account 1580, Sub-account CBR Class B should be denied, but the offsetting adjustment to account 1595 (2018) should be approved so that the impact of the error is absorbed by the distributor; and
b. The debit interest amount of approximately $34,000 that accumulated from the error residing in Account 1595 (2018) should be denied

(collectively, the "**OEB Staff Proposal**").[3]

5. GrandBridge Energy does not agree. GrandBridge Energy submits that the OEB Staff Proposal results in an asymmetrical disposition that is:

a. based on incorrect facts when OEB Staff assert "there is no cost causality relationship between the current customers and the error";

b. inconsistent with the OEB's letter dated October 31, 2019 titled *Adjustments to Correct for Errors in Electricity Distributor "Pass-Through" Variance Accounts After Disposition*;

c. completely unprecedented (based on a review of prior decisions of the OEB dealing with similar accounting errors);

d. punitive in nature, higher than all of the administrative monetary penalties ever imposed by the OEB for breach of enforceable provisions and entirely disproportionate to the facts at issue;

e. inconsistent with the OEB's obligation to establish both just and reasonable rates under Subsection 78(2) of the OEB Act;

f. inconsistent with the maintenance of a financially viable electricity industry and the fair return standard; and

g. not necessary to address the OEB Staff's concerns regarding intergenerational inequity

[3] *Ibid.*

resulting from deferred rate recovery since there has been limited customer growth or turnover during this period, thus nearly all customers are the same.

6. Despite this, GrandBridge Energy is willing to forego the debit interest amount of approximately $34,000 that accumulated from the error residing in Account 1595 (2018) if and only if the OEB approves all the other requested corrections to the accounting error.

7. GrandBridge Energy will address each of these submissions in-turn below.

A. OEB STAFF SUBMISSIONS ERR WHEN THEY ASSERT "THERE IS NO COST CAUSALITY RELATIONSHIP BETWEEN THE CURRENT CUSTOMERS AND THE ERROR"

8. Effective May 2, 2022, Energy+ Inc. and Brantford Power Inc. amalgamated to continue as one corporation under the name "GrandBridge Energy Inc."[4] As required by the OEB, GrandBridge Energy would maintain two separate rate zones for the service territories of the former Energy+ and Brantford Power, until the rebasing for 2032 rates based on the 10-year deferral period.[5]

9. On August 3, 2022, GrandBridge Energy submitted its 2023 IRM Application (EB-2022-0017), where it requested the disposition of Accounts 1580, 1589 and 1595 (2018).[6] GrandBridge Energy withdrew the request to dispose of these accounts in the Energy+ rate zone ("**ERZ**") after identifying an accounting error that impacted these accounts.[7]

10. In the 2018 IRM Application for the Energy+ Rate Zone, Global Adjustment ("**GA**") balances of $432,319 and CBR balances of $52,627 were approved for disposition from four Class A/B transition customers, and the balances approved for disposition were then recorded in Account 1595 (2018).[8]

11. As one customer was issued a final bill prior to the effective date of the approved rates,

[4] GrandBridge Energy Inc. 2023 IRM Application dated August 3, 2022 in EB-2022-0017 at p.8.
[5] *Ibid*.
[6] *Ibid*. at p.9.
[7] GrandBridge Energy Inc. 2023 IRM Application – DVA Claim Request dated November 22, 2022 in EB-2022-0017.
[8] GrandBridge Energy Inc. 2023 IRM Application – Phase 2 dated February 2, 2023 in EB-2022-0305 at p.11.

some GA and CBR amounts were not recovered.[9] Thus, the total GA recovery from Class A/B transition customers in 2018 and 2019 was $402,586, and the total CBR recovery was $49,008, bringing the total amount recovered from transition customers to $451,594.[10]

12. The recovery should have been recorded to Account 1595 (2018). However, it was recorded to Accounts 4007 and 4062, and the balances were eventually transferred to Accounts 1589 and 1580 as part of the monthly RSVA accounting process.[11] As these amounts were not recognized in Account 1595 (2018) to offset the disposition amount,[12] the accounting error resulted in an over-credit of Accounts 1589 and 1580, Sub-account CBR Class B, and an under-credit of Account 1595 (2018). The balances incorrectly recorded in Accounts 1589 and 1580, Sub-account CBR Class B were later approved in EB-2020-0016 for disposition on a final basis in Energy+'s 2020 and 2021 rate applications.[13]

13. GrandBridge Energy identified the accounting error in 2022 when preparing the 1595 Workform to support its 2023 IRM Application – Phase 1,[14] voluntarily notified the OEB of the error and sought to correct it[15], and subsequently withdrew the request for disposition of Accounts 1580, 1589 and 1595 (2018) from the IRM proceeding and clarified that it would file a separate application regarding the disposition of these three accounts.[16]

14. On February 2, 2023, GrandBridge Energy filed the Application which includes a request to correct certain errors in and subsequently dispose of Accounts 1580, 1589 and 1595 (2018) for the ERZ.[17]

15. The facts related to these errors are more fully explained in the Application, the Response to OEB Staff Interrogatories issued on April 13, 2023 (EB-2022-0305), and GrandBridge Energy's 2023 IRM Application Interrogatory Responses dated October 27, 2022 (EB-

[9] *Ibid*. at p.13.
[10] *Ibid*.
[11] *Ibid*.
[12] *Ibid*.
[13] Decision and Rate Order dated December 10, 2020 in EB-2020-0016 at p.11.
[14] GrandBridge Energy Inc. 2023 IRM Application – Phase 2 dated February 2, 2023 in EB-2022-0305 at p.13.
[15] *Ibid*.
[16] GrandBridge Energy Inc. 2023 IRM Application – DVA Claim Request dated November 22, 2022 in EB-2022-0017.
[17] GrandBridge Energy Inc. 2023 IRM Application – Phase 2 dated February 2, 2023 in EB-2022-0305 at p.10.

2022-0017).

16. The evidence is that the error was: i) within the control of former legal entity, Energy+ Inc.; ii) the first occurrence for Energy+ and an isolated issue; iii) inadvertent and not due to lack of guidance from the OEB; and iv) not an issue experienced by other distributors to GrandBridge Energy's understanding.[18]

17. It is worth noting that GrandBridge Energy did not, at any time, financially benefit from any of these errors. There is absolutely no financial incentive for GrandBridge Energy to make errors of this nature. And there is no need to impose a financial penalty to deter GrandBridge Energy from making errors in the future. GrandBridge Energy, much like the OEB, has an inherent interest in ensuring that all of the work it does is correct and free of errors.

18. However, like any institution that is composed of human staff, errors will occasionally occur, despite best efforts to prevent them. The common law of restitution (discussed further below) has arisen in large part because of this universal truth.

19. In this context, GrandBridge Energy has proposed that the OEB should approve the proposed debit and principal adjustments as part of this Application to (i) dispose of Accounts 1589 and 1580, Sub-account Class B to collect from non-RPP Class B customers and non-wholesale market participant Class B customers that were previously undercharged; and (ii) to use those funds to refund via Account 1595 (2018) to the customers the amounts that they were overcharged. The OEB should also approve GrandBridge Energy's recovery of the interest that has been accruing on the debit amount previously recorded in Account 1595 (2018) as a result of the same errors. GrandBridge Energy has not, does not, nor is it proposing to, benefit financially from either of these two corrections.

20. The OEB Staff Proposal, by contrast, argues for an asymmetric treatment where the debit adjustments to accounts 1589 and 1580 should be denied, while the offsetting principal adjustment to Account 1595 should be approved.[19] In support of this OEB Staff argue:

> "*However, allowing GrandBridge Energy to be kept whole will be at the expense of*

[18] *Ibid*. at p.14.
[19] OEB Staff Submissions at p.5.

> *GrandBridge Energy's current customers. GrandBridge Energy's current customers are not responsible for the 2018 and 2019 balances in which the error pertained to. There is no cost causality relationship between the current customers and the error, and therefore, these customers should not be held accountable for the error.*"[20]

21. This is factually incorrect and misleading.

22. As noted in evidence and as summarized above, there is a direct cost causality relationship between current customers and the error. Non-RPP Class B customers and non-wholesale market participant Class B customers all received a windfall benefit in 2020 and 2021 that they were not entitled to. By contrast, all customers suffered a loss as a result of the impact of the error on Account 1595. There is a direct cost causality to the proposed correction and each of these different groups of customers.

23. The error in OEB Staff's submission is obvious when one recognizes that OEB Staff is still recommending that the offsetting principal adjustment to Account 1595 should be approved. If OEB Staff truly believed "there is no cost causality between current customers and the error"[21] then both the debit adjustments to Accounts 1580 and 1589 and the offsetting principal adjustment to Account 1595 should be denied.

B. THE OEB STAFF PROPOSAL IS INCONSISTENT WITH THE OEB GUIDEANCE LETTER

24. On October 31, 2019, the OEB issued a letter to interested parties titled *Adjustments to Correct for Errors in Electricity Distributor "Pass-Through" Variance Accounts After Disposition* (the "**OEB Guidance Letter**").[22]

25. In the OEB Guidance Letter, the OEB indicates that it will determine on a case-by-case basis whether to make restorative adjustment based on the particular circumstances of each

[20] *Ibid.*
[21] *Ibid.*
[22] https://www.oeb.ca/sites/default/files/ltr-Retro-Ratemaking-Guidance-20191031.pdf.

case, including factors such as:

- Whether the error was within the control of the distributor;
- The frequency with which the distributor has made the same error;
- Failure to follow guidance provided by the OEB; and
- The degree to which other distributors are making similar errors.[23]

26. In the present case, GrandBridge Energy found the error itself, self-reported the error, and acknowledged the error was within the control of the former Energy+.[24] However, this is the first and only time GrandBridge Energy (or the former Energy+) has made this or any similar error as it relates to its Group 1 DVAs.[25]

27. Other distributors have made similar inadvertent errors with these pass-through commodity accounts. For example, as was acknowledged in OEB Staff's Submissions,[26] Elexicon Energy Inc. made a similar error and its proposed corrections were approved by the OEB (Partial Decision and Order issued December 8, 2022 in EB-2022-0024).

28. Indeed, the prevalence of similar accounting errors in commodity pass-through accounts ultimately led the OEB to issue the OEB Guidance Letter.

29. The OEB Guidance Letter goes on to say:

"Consistent with the OEB's past practice, an asymmetrical approach to the correction of the error may be appropriate. For example, if a distributor repeats an error, and if correcting the error is solely to the benefit of the distributor, the OEB may not approve part or all of the correction and of any associated carrying charges."[27]

30. As further detailed in Part C of these submissions, OEB Staff Submissions fails to point to a single prior OEB decision to indicate how their proposed asymmetrical disposition is consistent with the OEB's past practice. This is because it is not. It is entirely unprecedented.

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[23] *Ibid*. at p.2.
[24] GrandBridge Energy Inc. 2023 IRM Application – Phase 2 dated February 2, 2023 in EB-2022-0305 at p.13-14.
[25] *Ibid*. at p.14.
[26] *Ibid*. at p.7.
[27] https://www.oeb.ca/sites/default/files/ltr-Retro-Ratemaking-Guidance-20191031.pdf. at p.2.

31. In addition, the OEB Staff Proposal is not consistent with the illustrative example included in the OEB Guidance Letter, where the OEB indicates an asymmetrical disposition may be appropriate. The facts in this case are that GrandBridge Energy did not repeat the error. In addition, GrandBridge Energy's proposed corrections are not solely to the benefit of the distributor. Rather, GrandBridge Energy's proposed corrections are pass-through in nature. They benefit one group of customers at the expense of another group of customers.

C. THE OEB STAFF PROPOSAL IS UNPRECEDENTED BASED ON A REVEIEW OF PRIOR DECISIONS OF THE OEB DEALING WITH SIMILAR ACCOUNTING ERRORS

32. What OEB Staff fails to acknowledge is that the OEB has never once approved an asymmetric disposition of accounts previously disposed of on a final basis to account for errors to a utility's detriment **in the absence of express consent from the utility**.

33. This makes sense. GrandBridge Energy has a legitimate reliance interest in the finality of prior OEB Decisions and Orders. To undermine this reliance interest would undermine the maintenance of a financially viable electricity industry as a whole.

34. In EB-2009-0113, the OEB strictly applied the "no retroactive ratemaking" principle. The OEB did not apply the "no retroactive ratemaking" in an asymmetric way – to some accounts and not to others. North Bay Hydro's reliance interest in the finality of prior OEB Decisions and Orders was not threatened by this Decision.

35. In EB-2014-0043, Enbridge **proposed** to refund $10.1 million and the OEB did permit a retroactive adjustment to Enbridge's QRAM orders that were previously declared as final in EB-2012-0352. The principle that arose from this decision is that "[a]n out of period adjustment can be justified if it ensures that a utility does not profit on account of its own errors".[28] Enbridge's reliance interest on the finality of the OEB's prior Decision and Order was not threatened, because Enbridge consented to the refund (Enbridge proposed it).

36. In EB-2014-0072/EB-2014-0301, Essex Powerlines did not consent to an "asymmetric

[28] Decision and Order dated April 10, 2014 in EB-2014-0043 at pg. 2. See also *MCI Telecommunications v. Public Service Commission*, 840 P. 2d 765 (Utah 1992).

disposition" and based on this the OEB refused to retroactively adjust final approved amounts and instead applied the "no retroactive ratemaking" principle strictly to all accounts. Once again, Essex Powerlines' reliance interest in the finality of prior OEB Decisions and Orders was not threatened.

37. In EB-2016-0090, the OEB also permitted a retroactive adjustment to Accounts 1588 and 1589 in respect of Lakeland's Perry Sound service area arising from an after-the-fact discovery of accounting errors. Specifically, the OEB allowed for a violation of the principle of "no retroactive ratemaking" allowing Lakeland to refund $65,112.46 to customers that overpaid "because the adjustment is in favor of customers **and Lakeland Power consented**."[29] Lakeland's reliance interest in the finality of prior OEB Decisions and Orders was not threatened, because Lakeland consented to the adjustment.

38. In EB-2017-0056, Kitchener-Wilmot Hydro Inc. did not consent to an asymmetric disposition and similar to the Essex Powerlines case the OEB refused to retroactively correct final approved amounts as between Accounts 1588 and 1589 for errors that occurred related to 2013. In that case, the OEB further clarified[30] that:

> *"Although the OEB's powers to set just and reasonable rates are broad, the rule against rate retroactivity is not discretionary (other than with respect to certain exceptions that the OEB does not find apply in this circumstance). As noted in a recent decision of the Ontario Court of Appeal: "It is well established that an economic regulatory tribunal, such as the Board, operating under a positive approval scheme of ratemaking must exercise its rate-making authority on a prospective basis. Generally speaking, absent express statutory authorization, such a regulator may not exercise its rate-making authority retroactively or retrospectively."*
>
> *The Supreme Court of Canada has stated that retroactive rate making "is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive"and "the power to review its own previous final decision on the fairness*

[29] Decision and Order dated December 8, 2016 in EB-2016-0090 at p.10.
[30] Decision and Order dated March 1, 2018 in EB-2017-0056 at p.11-12.

and reasonableness of rates would threaten the stability of the regulated entity's financial situation".The tariff approved by the OEB under which the accounts containing the errors were disposed was final and both the utility and the customers should be able to rely on the finality of rates.

Kitchener-Wilmot Hydro did and does have control of its books and is expected to maintain accurate accounts. They did not in this instance. However, there was no willful misconduct by the Kitchener-Wilmot Hydro, nor has it been enriched by the error. The OEB's audit did not uncover systemic problems with Kitchener-Wilmot Hydro's processes for the RSVA Accounts 1588 and 1589."

39. Similarly, there was no willful misconduct by GrandBridge Energy, nor has it been enriched by the error. Nor has OEB Staff suggested there are any systemic problems with GrandBridge Energy's processes for Accounts 1580, 1589 and 1595.

40. GrandBridge Energy does not consent to an asymmetric disposition of Accounts 1589 and 1580, Sub-account CBR Class B and Account 1595 as proposed in the OEB Staff Submissions.

D. THE OEB STAFF PROPOSAL IS PUNITIVE AND DISPROPOTIONATE IN MAGNITUDE TO ALL PRIOR ADMINISTRATIVE MONETARY PENALTIES ISSUED BY THE OEB

41. The OEB Staff Proposal argues that that the OEB should apply the principle of "no retroactive ratemaking" to the debit principal adjustments of Accounts 1589 and 1580, Sub-account CBR Class B, but that it should ignore the same principle with respect to the credit principal adjustments of Account 1595 (2018).[31]

42. The result of the OEB Staff Proposal would be the imposition of a financial penalty of $451,594, which amount is material to GrandBridge Energy[32] and risks undermining the ongoing financial viability of GrandBridge Energy and may violate the fair return standard.

[31] OEB Staff Submissions at p.5.
[32] Materiality threshold for GrandBridge Energy is $295,000 per OEB Decision and Order on MAADs application at p. 17 dated March 17, 2022

43. A $451,594 penalty is also entirely disproportional to the innocent errors that occurred.

44. By way of comparison, the OEB does have the jurisdiction under Section 112.5 of the OEB Act to impose administrative penalties for violations of enforceable provisions under the OEB Act. These are not mere accounting errors. These are violations of statutory provisions that are so important, the legislative assembly of Ontario deemed them to be "enforceable provisions."

45. GrandBridge Energy has reviewed the administrative penalties imposed by the OEB under Section 112.5 over the past ten years (i.e., going back to January 2013).[33] In those ten years, the OEB has imposed administrative penalties ranging from a low of $1,000 to as high as $450,000.

46. In 2016, a penalty of $75,000 was imposed on SNC Lavlin for operating a generation facility without a generation license for a period ranging over 10 years in contravention of Section 57 of the OEB Act.[34] GrandBridge Energy has done nothing nearly as egregious as operating its distribution business without an OEB license over a ten-year period. Yet the OEB Staff proposes a penalty which is more than 6 times what the OEB fined SNC Lavalin.

47. In 2018, the OEB imposed a large penalty of $155,000 on Planet Energy,[35] because its training and testing regarding the salespersons hired by its marketing contractor were seriously deficient; certain salespersons provided false, misleading or incomplete information to consumers, and failed to conduct contract verification; and Planet Energy

[33] This includes EB-2023-0069, EB-2022-0226, EB-2022-0292, EB-2019-0197, EB-2023-0064, EB-2023-0082, EB-2023-0063, EB-2022-0255, EB-2022-0287, EB-2021-0193, EB-2020-0127, EB-2020-0166, EB-2021-0328, EB-2020-0289, EB-2023-0107, EB-2022-0271, EB-2022-0256, EB-2022-0206, EB-2022-0105, EB-2022-0078, EB-2020-0282, EB-2022-0259, EB-2022-0278, EB-2019-0189, EB-2019-0129, EB-2019-0113, EB-2021-0139, EB-2021-0066, EB-2020-0086, EB-2022-0293, EB-2022-0252, EB-2022-0182, EB-2020-0217, EB-2020-0097, EB-2019-0107, EB-2017-0017, EB-2021-0102, EB-2021-0094, EB-2020-0157, EB-2021-0103, EB-2019-0199, EB-2022-0143, EB-2022-0153, EB-2020-0205, EB-2022-0205, EB-2021-0198, EB-2020-0304, EB-2020-0170, EB-2021-0104, EB-2020-0303, EB-2020-0193, EB-2020-0141, EB-2020-0098, EB-2021-0116, EB-2019-0090, EB-2022-0008, EB-2020-0216, EB-2020-0244, EB-2021-0204, EB-2023-0089, EB-2019-0256, EB-2022-0299, EB-2022-0106, EB-2019-0262, EB-2019-0177, EB-2017-0007, EB-2022-0188, EB-2017-0088, EB-2017-0005, EB-2016-0282, EB-2016-0200, EB-2016-0180, EB-2014-0259, EB-2013-0394, EB-2013-0392/EB-2014-0393, and EB-2012-0443. Full decisions for the enforcement proceedings can be found at https://www.oeb.ca/industry/rules-codes-and-requirements/enforcement-proceedings.

[34] SNC-Lavalin Operations & Maintenance Inc. Assurance of Voluntary Compliance dated October 14, 2016. https://www.rds.oeb.ca/CMWebDrawer/Record/547171/File/document.

[35] Decision and Order dated September 20, 2018 in EB-2017-0007.

itself incorrectly told a consumer that a contract cancellation penalty was required. These acts were in breach of the *Energy Consumer Protection Act, 2010* and associated codes and regulations.

48. GrandBridge Energy's *bona fide* accounting mistake is in no way comparable to providing false or misleading information to consumers. Moreover, unlike Planet Energy which benefited financially from the contracts that consumers entered into without the full protections they were due, GrandBridge Energy did not derive any financial benefit from the error. However, the OEB Staff Proposal results in a penalty which is 2.9 times the Planet Energy fine.

49. This highest penalty ever imposed by the OEB over this ten year period was the $450,000 fine imposed on Just Energy on April 4, 2014 in an enforcement proceeding[36] where: (i) **in 132 cases**, Just Energy breached section 22(2) of the *Energy Consumer Protection Act, 2010* by failing to apply the correct cancellation fee for consumers as prescribed under section 23(1) of Ontario Regulation 389/10; and (ii) **in 2,060 cases** Just Energy misled consumers about their cancelation rights in breach of sections 10, 5(1)(i), (xi) and (14) of the *Energy Consumer Protection Act* and Part B, section 1.1 of the Code of Conduct for Marketers and/or the Electricity Retailer Code of Conduct.

50. Just Energy admitted to breaching enforceable provisions in a total of 2,192 different cases, and yet received a penalty that is less than the amount OEB Staff has proposed to penalize GrandBridge Energy in the OEB Staff Proposal despite the fact that GrandBridge Energy identified, voluntarily reported and is now simply attempting to fix this error.

51. For the absence of doubt, the OEB Staff Submissions do not allege, and GrandBridge Energy has not, violated any enforceable provision of the OEB Act. Yet the OEB Staff appears to believe the OEB may impose a penalty pursuant to its "just and reasonable" rate setting methodology which is neither just nor reasonable.

E. THE OEB STAFF PROPOSAL IS INCONSISTENT WITH THE OEB'S

[36] Just Energy Ontario L.P. Assurance of Voluntary Compliance dated April 3, 2014. https://www.oeb.ca/oeb/_Documents/Compliance/Just%20Energy_AssuranceVoluntaryCompliance_20140403.pdf.

OBLIGATION TO ESTABLISH BOTH JUST AND REASONABLE RATES

"The fundamental and animating general principle of the law of restitution is the principle against unjust enrichment."[37]

52. The modern principle of unjust enrichment states that "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."[38]

> *"The "restitution interest" involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief. If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two."*[39]

53. The underlying moral premise is a familiar one: one ought not to reap what one has not sown. The doctrine of unjust enrichment is premised on the rationale that it is unjust to receive a windfall benefit at another's expense.

54. In the present Application, due to an inadvertent and *bona fide* mistake, two groups of customers received a windfall benefit in 2020 and 2021 that they were not entitled to - non-RPP Class B customers as it relates to the error in Account 1589; and non-wholesale market participant Class B customers as it relates to the error in Account 1580 – while all customers did not receive a benefit they were owed due to an under-credit of Account 1595.

55. In the words of Fuller and Perdue, the resulting discrepancy between the customers that benefited unjustly and those who paid more than what they received is not one unit, but two.

56. In this context, the OEB is tasked with setting rates that are not only reasonable, but are also just.

57. One defense to a claim of unjust enrichment is promissory estoppel (also referred to as the

[37] Maddaugh and McCamus, The Law of Restitution, 2022 Thomson Reuters Canada Limited, at Chapter 3, Section 3:1.
[38] American Law Institute, Restatement of the Law Third, Restitution and Unjust Enrichment (2023 Thomson Reuters US), S. 1.
[39] Fuller and Perdue, The Reliance Interest in Contract Damages, 1936-37, 46 Yale L.J. 52 at p.56.

"reliance interest"). Under the doctrine of promissory estoppel, the parties' dealings must have been on a shared assumption of fact or law, and a party must have conducted itself in reliance on such shared assumption resulting in a detrimental way (the party seeking to establish estoppel must have changed his or her course of conduct by acting or abstaining from acting in reliance upon the assumption, thereby altering his or her legal position, and should the other party subsequently be allowed to abandon the assumption, detriment will be suffered by the estoppel raiser because of the change in his or her assumed position). Finally, it must be "unjust" and 'unfair" to permit a party to resile from the mutual assumption.[40]

58. The OEB's typical policy against retroactive ratemaking can be understood as a particular formulation of the doctrine of promissory estoppel that is applicable in the context of "just and reasonable" rate setting. The rule against retroactive ratemaking is intended to protect the reliance interest.

59. All rate regulated utilities, including GrandBridge Energy, are entitled to rely on the finality of Decisions and Orders issued by the OEB to be able to operate their business. Rate regulated distributors cannot charge rates except through Orders of the OEB.[41] These utilities then expend monies on the operations and maintenance of the local distribution system, relying on the finality of these Decisions and Orders. Because of this reliance interest, any departure from the principle of "no retroactive ratemaking" would risk undermining this reliance interest and consequently the maintenance of a financially viable electricity industry.

60. Despite this, GrandBridge Energy submits that the OEB should depart from its typical policy of no retroactive ratemaking in this Application, to refund under-credited amounts to Account 1595 (2018), and to collect over-credited amounts to Account 1589 and Account 1580, Sub-account CBR Class B, for four reasons:

- First, failing to do so will result in the unjust enrichment of non-RPP Class B customers and non-wholesale market participant Class B customers at the expense of the other

[40] Ryan *v.* Moore, [2005] 2 S.C.R. 53, 2005 SCC 38.
[41] *Ontario Energy Board Act, 1998* at Subsection 78(2).

customers, arising from *bona fide* mistakes of fact that were voluntarily disclosed and proactively addressed by GrandBridge Energy.

- Second, failing to do so will not promote the education of consumers with regards to the true costs of electricity, and will not promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario.
- Third, it could perpetuate a systemic imbalance that could make utilities financially responsible for innocent and *bona fide* errors in respect of large "flow through costs" that are significantly greater in magnitude than a utility's internal financial capabilities, which in turn has the potential of bankrupting utilities and undermining the maintenance of a financially viable electricity industry as a whole.
- Fourth, GrandBridge Energy has not, does not, nor is it proposing to, benefit financially from the errors or the proposed corrections.

61. GrandBridge Energy will also address the asymmetric approach proposed by the OEB Staff Submissions, which shifts the financial harm arising from the unjust enrichment of non-RPP Class B customers and non-wholesale market participant Class B customers from the other customers to GrandBridge Energy's shareholders.[42] This is simply not appropriate.

62. Rather, this results in an unjust penalty of $451,594 being imposed on GrandBridge Energy that would: (i) perpetuate the unjust enrichment of non-RPP Class B customers and non-wholesale market participant Class B customers; (ii) amount to an unjust and disproportionate penalty being imposed on GrandBridge Energy for making *bona fide* accounting errors (which GrandBridge Energy voluntarily disclosed, and has actively attempted to remedy); and (iii) could undermine the financial viability of GrandBridge Energy as the financial markets recognize the OEB making distributors financially responsible for innocent and *bona fide* errors in respect of large flow through costs.

63. GrandBridge Energy recognizes that the OEB applies a policy of "no retroactive ratemaking" to DVA balances that are disposed of on a final basis, subject to some exceptions.

[42] Ontario Energy Board (OEB) Staff Submission dated April 26, 2023 in EB-2022-0305 at p.5.

64. The OEB Staff Submission notes that GrandBridge Energy's accounting error pertains to balances that were approved on a final basis, [43] and that the proposed adjustments to Accounts 1589 and 1580 Sub-account CBR Class B are retroactive in nature.[44] OEB Staff ignore that the proposed adjustment to Account 1595 is also retroactive in nature.

65. But, what OEB Staff fail to clearly explain is that "no retroactive ratemaking" is not a legal requirement. This can be seen in *Bell Canada v. Canada (Canadian Radio Television and Communications)*.[45] Bell Canada failed in its attempt to argue that the CRTC was prohibited by law from retroactively adjusting rates.[46] With regards to the OEB, the Ontario Court of Appeal has ruled that "[s]lavish adherence to the use of interim rates and deferral accounts should not prohibit adjustments in a proper case"[47] and "[t]he critical factor for determining whether a regulator is engaging in retroactive ratemaking is the parties' knowledge that the rates were subject to change."[48]

66. GrandBridge Energy's request for a limited exception to the general rule of "no retroactive ratemaking" should not be mistaken for something it is not. GrandBridge Energy is only proposing an exception if GrandBridge Energy will not be harmed financially from the remedy ultimately approved by the OEB.

67. In general, the OEB's policy on "no retroactive ratemaking" has been tempered over time by the introduction of the principles of unjust enrichment. In particular, in instances where the utility in question would profit as a result of errors, both the CRTC and the OEB have proven willing to correct those errors to ensure the utility does not profit unjustly from an error that the utility itself made.

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[43] Ontario Energy Board (OEB) Staff Submission dated April 26, 2023 in EB-2022-0305 at p.7.
[44] *Ibid*. at p. 4.
[45] [1989] 1 S.C.R. 1722.
[46] This Application is clearly distinguished from the Bell Canada case in three material respects. First, unlike Bell Canada, GrandBridge Energy did not in any way profit as a result of the errors. The CRTC's rationale for allowing retroactive ratemaking was to prevent Bell Canada from profiting as a result of the errors. The same rationale does not apply to GrandBridge Energy. GrandBridge Energy will not profit as a result of the errors. Second, the Bell Canada case dealt with the CRTC and not the OEB. Third, the Bell Canada case did not involve any deferral and variance accounts.
[47] The Ontario Court of Appeal Decision in *Union Gas Ltd. V. Ontario (Energy Board)*, 2015 ONCA 453, citing favourably the Alberta Court of Appeal at para 91.
[48] *Ibid*.

68. As one example, the OEB did permit a retroactive adjustment to Enbridge's QRAM orders that were previously declared as final in EB-2012-0352. The principle that arose from this decision is that "[a]n out of period adjustment can be justified if it ensures that a utility does not profit on account of its own errors".[49]

69. This Application is clearly distinguishable from this line of cases, however. GrandBridge Energy has not, will not, and is not proposing to profit from its error. GrandBridge Energy has not been unjustly enriched as a result of the error.

70. Rather, GrandBridge Energy's proposal to record correcting entries in Accounts 1595, 1589 and 1580 is entirely consistent with the OEB Guidance Letter. The OEB Guidance Letter contemplates retroactive rate making for commodity accounts to correct for errors of this nature.

F. THE OEB STAFF PROPOSAL IS INCONSISTENT WITH THE MAINTENANCE OF A FINANCIALLY VIABLE ELECTRICITY INDUSTRY AND THE FAIR RETURN STANDARD

71. The OEB's discretion is framed by another relevant, and legally binding, requirement, however. In setting "just and reasonable rates" the OEB's discretion is limited by the fair return standard.

72. In the December 11, 2009 *Report of the Board on the Cost of Capital for Ontario's Regulated Utilities* (the "**2009 Report**"), the OEB consulted a range of stakeholders and reviewed the case law (as it was at that time) relating to the Fair Return Standard ("**FRS**") to establish the Board's approach to cost of capital, and more particularly the deemed rate of return on equity ("**ROE**") that is permitted in rates to meet the FRS. In the 2009 Report, the OEB confirmed that:

> "The Board is of the view that the FRS frames the discretion of a regulator, by setting out three requirements that must be satisfied by the cost of capital determinations of

[49] Decision and Order dated April 10, 2014 in EB-2014-0043 at p.2. See also *MCI Telecommunications v. Public Service Commission*, 840 P. 2d 765 (Utah 1992).

the tribunal. **Meeting the standard is not optional; it is a legal requirement.**"[50]

73. The requirement that approved rates must produce a fair return was described by the Supreme Court of Canada as an **absolute obligation**.[51] The OEB summarizes the three legal requirements to ensure a fair return on capital in the 2009 Report by citing the National Energy Board's RH-2-2004 Phase II Decisions:

> "*A fair or reasonable return on capital should:*
>
> - *be comparable to the return available from the application of invested capital to other enterprises of like risk (the comparable investment standard);*
> - *enable the financial integrity of the regulated enterprise to be maintained (the financial integrity standard); and*
> - *permit incremental capital to be attracted to the enterprise on reasonable terms and conditions (the capital attraction standard).*"[52]

74. How would inadvertent and *bona fide* errors, similar in form and substance to the errors that were voluntarily reported by GrandBridge Energy, be treated for "other enterprises of like risk"?

75. The answer can be found in the law of restitution. It is well established law that one who has paid money under a mistake of fact may recover the money paid in a restitutionary claim provided (i) the mistake is honest (it arises from a genuine *bona fide* belief that certain facts exist which really do not exist); (ii) the mistake caused the payment; (iii) the payor did not intend the payee to have the money at all events; and (iv) there has be no change in position (i.e. no promissory estoppel).[53]

76. On the basis of the law of restitution, private Canadian companies including unregulated utilities and major banks, will not generally suffer from a lower return on capital as a result of *bona fide* mistakes. Rather, these enterprises can obtain court orders allowing for the

[50] 2009 Report at p.18.
[51] *British Columbia Electric Railway Co. Ltd. v. Public Utilities Commission of British Columbia et al [1960] S.C.R. 837*, at p.848.
[52] National Energy Board. RH-2-2004, Phase II Reasons for Decision, TransCanada PipeLines Limited Cost of Capital. April 2005. p.18.
[53] Maddaugh and McCamus, The Law of Restitution, 2022 Thomson Reuters Canada Limited, at Chapter 10 "Money paid under a mistake of fact".

recovery of moneys paid or received arising from *bona fide* mistakes.[54]

77. The OEB has recognized that the electricity commodity is a large cash item that distributors are expected to manage on a monthly basis. GrandBridge Energy takes its responsibility in this regard very seriously.

78. By contrast, the asymmetric disposition recommended in the OEB Staff Proposal would have the effect of making a distributor financially responsible for inadvertent errors in wholesale commodity accounts whose balances are often many orders of magnitude greater than a distributor's revenue requirement, which will serve to undermine the financial viability of the electricity industry and the fair return standard.

G. IMPACT ON ERZ CUSTOMERS

79. The OEB Staff submission argues that the proposed debit adjustments requested by GrandBridge Energy would be unfair to prior customers who were erroneously credited a total of $451,594 in 2020 and 2021 if they were charged an additional amount to correct the error two/three years later.

80. OEB Staff also submitted that if the proposed debit adjustments to Account 1589 and Account 1580, Sub-account Class B were approved, current customers would be charged the debit principal adjustments even though they did not cause the error and they are not responsible for the 2018 and 2019 balances in which the error pertained to.

81. GrandBridge Energy does not agree with the distinction of prior and current customers. The customers that were erroneously credited in 2020 and 2021 are largely consistent with the current customers that the proposed debit charges would apply to in GrandBridge Energy's ERZ. These are not two distinct sets of customers. There has been limited customer turnover in GrandBridge Energy's ERZ and growth in the General Service classes has been a nominal 1.8% from 2020 to 2022. These factors have resulted in continuity year over year.

82. The continuity of customers is an inherent concept in the Price Cap IR mechanism for

[54] See as one example, *BMP Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15.

settling retail settlement variances or flow through costs. A two-year lag from the point a distributor accumulates a settlement variance to the point the variance is disposed is the standard timeline. Cost causality in this process is attributed to the customers impacted by the disposition. They are deemed responsible for the variances, despite the two-year lag.

H. CONCLUSIONS

83. For the foregoing reasons, GrandBridge Energy requests that the OEB approve the disposal of the balances of the Group 1 Deferral and Variance Accounts for the Energy+ rate zone as proposed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF MAY, 2023

BORDEN LADNER GERVAIS LLP

Per:

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John A.D. Vellone