

# ÉNERGIR LIMITED PARTNERSHIP

## R-3867-2013 – PHASE 3B

### COMMENTS OF WILLIAM PEREA MARCUS AND BRIGID ROWAN

#### ON BEHALF OF

#### OPTION CONSOMMATEURS (OC)

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## 1 Impact of Decree 789-2019: Context and Concerns

Our comments are limited to the impact of Decree 789-2019 on the methodology for determining the cost-effectiveness of the development (i.e., line extension) projects of Énergir Limited Partnership (“Énergir”) as set out in D-2018-080.

The Régie de l’énergie (the “Régie”) was charged in R-3867-2013 Phase 3B with evaluating methods and parameters for determining the cost-effectiveness of the development (i.e., line extension) projects of Énergir Limited Partnership under \$1.5 million through comparison of the projects’ costs and revenues. On July 9, 2018, following the hearings in Phase 3B, the Régie, in Decision D-2018-080, set out the methodology for determining the cost-effectiveness for Énergir’s development projects under \$1.5 million. At the time, individual Énergir development projects above \$1.5 million required specific authorization from the Régie.

Decree 789-2019, which came into force July 17, 2019, changes the threshold for which a development project requires specific authorization from the Régie from \$1.5 million to \$4.0 million (“new threshold”). On September 5, 2019, Énergir informed that Régie of how it plans to allocate corporate and overhead expenses given the new threshold of \$4.0 million (B-0462). On October 31, 2019, in response to an IR 1.1 from the Régie (B-0467), Énergir confirmed that the principles and presentation (in its proposal for the authorization of investments under \$1.5 million following D-2018-080 (B-0449)) remain unchanged under the new threshold.<sup>1</sup>

Our understanding therefore is that Énergir is not proposing to make any further changes to its proposal for the authorization of investments under the new threshold.

We have a number of interrelated concerns regarding the impact of Decree 789-2019 on the methodology for determining the cost-effectiveness of the development (i.e., line extension) projects. These concerns fall into the following categories:

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<sup>1</sup> On October 17, 2019, Énergir filed a revised version of its proposal (B-0464) in which it changed references to the old threshold of \$1.5 million to the new threshold of \$4.0 million.

1. **Increased Potential and Incentive for Inappropriate Project Segmentation:** The new threshold would make it easier to split very big projects into multiple parts (either over time or over geography) in order to avoid the enhanced regulatory scrutiny required for an individual project above \$4.0 million. (Section 2)
2. **Increased Potential for Very Large Industrial and Commercial Projects to be Subsidized by Smaller Projects and Vice Versa:** Énergir will now include all development projects under \$4.0 million in the same development plan. The change in threshold could significantly increase the potential that very large projects could be subsidized by smaller projects and vice versa. To prevent this cross-subsidization, projects that cost between \$1.5 and \$4 million should be considered in a separate portfolio from projects under \$1.5 million. Moreover, the change in treatment of distribution reinforcements required with the new threshold (discussed in Section 3.1) supports the establishment of these separate portfolios of projects under the new threshold. (Section 3)
3. **Treatment of Distribution Reinforcements:** In D-2018-080, the Régie accepted Énergir's proposed methodology for the calculation of distribution reinforcements at the level of the portfolio, based on the average annual cost of reinforcement; but this methodology is based on a proxy method for distribution reinforcements for projects under \$1.5 million. Now that larger projects are being included in the portfolio to be evaluated, this proxy is not valid under the new threshold. (Section 3.1)

## 2 Increased Potential and Incentive for Inappropriate Project Segmentation

The new threshold would make it easier to split very big projects into multiple parts (either over time or over geography) in order to avoid the enhanced regulatory scrutiny required for an individual project above \$4.0 million.

Inappropriate segmentation of projects is well documented in environmental assessment (EA) and such “piecemealing” is often done to avoid more rigorous regulatory scrutiny that is triggered by a bigger more expensive and higher impact project. The classic example of inappropriate project segmentation in EA is the division of a highway project into smaller segments or phases in order to avoid analyzing its total effects. Another example is splitting each side of a highway into a separate project to avoid analyzing impacts to a park located in the middle. A specific Canadian example of inappropriate project segmentation is the case of the Red Chris Mine Project in BC. In 2010, the Supreme Court of Canada ruled that it is unlawful to artificially segment projects into smaller parts to avoid a more rigorous EA.<sup>2</sup>

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<sup>2</sup> According to Caitlin Mitchell of the Canadian Environmental Law Association:

“The Supreme Court of Canada’s January 2010 decision in *MiningWatch Canada v. Canada (Fisheries and Oceans)* has significant implications for federal environmental assessments (“EAs”) and public

Ontario's Guide to Environmental Assessment Requirements for Electricity Projects also cautions that "it is inappropriate for proponents to break up or "piecemeal" a larger project into separate components or phases, with each part addressed as a separate project."<sup>3</sup>

Under the old threshold of \$1.5 million, there was limited potential to segment very large industrial projects over time or by geography. The new threshold of \$4.0 million provides significantly more leeway (*marge de manoeuvre*), potential and incentive to split very big projects into multiple parts (either over time or over geography) in order to avoid the enhanced regulatory scrutiny required for an individual project above \$4.0 million.

An example of how a very large industrial development project could be segmented over time would be the construction of an \$8 million industrial park split in two phases of \$4 million with each phase constructed over two years. This kind of inappropriate segmentation over time could allow each phase of the project to be considered with all the other development projects under the new threshold (and therefore subject to less regulatory scrutiny).

An example of how a very large development project could be segmented over geography could be three new and proximate industrial parks or large commercial developments (in a territory without gas service) that would require a significant investment in gas and would be connected to the same feeder main. These three large projects should not be artificially segmented, but considered part of one project.

## 2.1 Recommendations

In light of our concerns with the increased potential and incentive for inappropriate project segmentation, we recommend that:

1. A large development project built within a three-year period cannot be split into multiple projects for the purpose of review by the Régie (and particularly in order to avoid the specific authorization required for an individual project of over \$4.0 million).<sup>4</sup>
2. Several nearby projects connected by the same feeder main built within a three-year period cannot be split into multiple projects for the purpose of review by the Régie (and particularly in order to avoid the specific authorization required for an individual project of over \$4.0 million).

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participatory rights in Canada. In essence, the Court held that federal officials can no longer split projects into small parts and avoid the rigorous EA requirements, including meaningful public consultation, intended by Parliament for the major industrial projects listed on the Comprehensive Study List ("CSL")." Mitchell, Caitlin, "Supreme Court of Canada Refines Environmental Assessment Law in British Columbia Mining Case," Ontario Bar Association Environews 19(3) March 2010. <https://www.cela.ca/article/red-chris-mine-intervention/SCC-refines-EA-law-BC-mining-case>

<sup>3</sup> Guide to Environmental Assessment Requirements for Electricity Projects, Section B 2.2. Ontario Government website. <https://www.ontario.ca/page/guide-environmental-assessment-requirements-electricity-projects>

<sup>4</sup> Given that Énergir has a five-year development plan, it would not be unreasonable to restrict the building period, during which an individual project cannot be split, to a minimum of five years. However, given the uncertainty of plans in later years, it is also reasonable, on balance, for the Régie restrict the building period, during which an individual project cannot be split, to a minimum of three years.

3. In summary, a project that is built over three years and/or has several nearby locations connected by the same feeder main should be considered a single project for the purposes of authorization.

### **3 Increased Potential for Very Large Commercial and Industrial Projects to be Subsidized by Smaller Project and Vice Versa**

Énergir will now include all development projects under \$4.0 million in the same development plan. The change in threshold could significantly increase the potential that very large commercial and industrial projects could be subsidized by smaller projects and vice versa.

In Mr. Marcus' evidence in Phase 3B (under the old threshold), he recommended a "narrower definition" of the portfolio of projects to be evaluated to ensure the profitability of projects being constructed to serve new residential and business customers. Furthermore, he cautioned about the subsidization of very large industrial projects (*VGÉ*) by smaller projects and vice versa:

First, I would recommend requiring each very large industrial project to stand on its own and meet the portfolio threshold P.I. independently (including its assigned share of portfolio costs). There are very few of these large projects in any year, and they appear quite specialized. Industrial projects should neither be subsidized by smaller customers (if they did not individually meet a portfolio P. I. threshold themselves) nor mask the fact that smaller residential and business projects did not meet a P.I. threshold (if, on the other hand, the industrial projects were very profitable).<sup>5</sup>

OC supported Mr. Marcus' recommendation in its final argument (C-OC-0062, ¶ 14). In D-2018-080, the Régie agreed with Énergir's proposal that all the projects under \$1.5 million should be included in the same development plan.

However, now that the threshold has increased to \$4.0 million, Mr. Marcus' concerns regarding subsidization of one group of customers' projects by the other (and consequential masking of one group of customers' projects not being profitable) are even more serious. The change in the threshold from \$1.5 million to \$4.0 million could significantly increase the potential that very large industrial and commercial projects could be subsidized by smaller customers and vice versa.

As we will discuss below in our recommendations (Section 3.2), to prevent this cross-subsidization between big and small projects, projects that cost between \$1.5 and \$4 million should be considered in a separate portfolio from projects under \$1.5 million

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<sup>5</sup> C-OC-0049, p. 7, l 163-169.

This consideration of such a wide range of projects in a single portfolio (i.e. all projects under \$4 million) becomes more problematic given the treatment of distribution reinforcements approved in D-2018-080, discussed in Section 3.1 below.

### 3.1 The Treatment of Distribution Reinforcements

In D-2018-080, the Régie accepted Énergir's proposed methodology for the calculation of distribution reinforcements, at the level of the portfolio, based on an average annual cost of reinforcement; but this methodology is based on a proxy method for distribution reinforcements for projects under \$1.5 million. Now that larger projects are being included in the portfolio to be evaluated, this proxy is not valid under the new threshold. This treatment of distribution reinforcements is therefore not reasonable under the new threshold.

The application of the same method to a larger group of projects (all under \$4 million) effectively reduces the impact of reinforcements: the same numerator (average annual cost of reinforcement) is used with a much larger denominator (projects under \$4 million instead of projects under \$1.5 million).

This information has two implications. First, for the portfolio of projects between \$1.5 million and \$4 million, distribution reinforcements were previously treated differently and should continue to be treated differently. In particular, for some of these projects, specific reinforcements might be identified.

Second, and more importantly, the separation of projects into two portfolios (smaller projects up to \$1.5 million and larger projects between \$1.5 million and \$4 million, discussed above) would prevent the amount of distribution reinforcements included in the portfolio from being underestimated.

### 3.2 Recommendations

1. **Establishment of a separate portfolio for projects between \$1.5 million and \$4 million:**

Development projects that cost between \$1.5 and \$4 million should be considered in a separate portfolio from development projects under \$1.5 million. By establishing this separate bucket (\$1.5 million - \$4 million), the Régie can significantly reduce the increased risk that very large industrial projects (*VGÉ*) and similarly sized commercial projects will be subsidized by smaller projects and vice versa. The creation of this new bucket will ensure that the portfolio of large projects (between \$1.5 million and \$4 million) will stand on its own and meet the portfolio threshold P.I. independently from the small project portfolio.

The same methodology for determining the cost-effectiveness for the portfolio of development projects under \$1.5 million can be used for the new bucket of projects (\$1.5 million - \$4 million) – with the exception of the treatment of distribution reinforcements as outlined in the following recommendations.

**2. Treatment of Distribution Reinforcements:**

- a. Distribution reinforcements should be calculated in the same way for projects under \$1.5 million as set out by the Régie in D-2018-080.
- b. Distribution reinforcements should be calculated using additional more granular information on larger projects for the portfolio of projects between \$1.5 million and \$4 million.
- c. The difference in treatment of distribution reinforcements is one more reason to use two portfolios for evaluation (up to \$1.5 million and \$1.5 million to \$4 million).