



Ontario
Energy
Board | Commission
de l'énergie
de l'Ontario

DECISION AND ORDER

EB-2019-0180

ENERGY+ INC.

**MOTION TO REVIEW AND VARY THE ONTARIO ENERGY
BOARD'S DECISION AND ORDER DATED JUNE 13, 2019 RE
ENERGY+ INC.'S 2019 DISTRIBUTION RATE APPLICATION (EB-
2018-0028)**

BEFORE: Susan Frank
Presiding Member

Emad Elsayed
Member

Robert Dodds
Member

December 5, 2019

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1 INTRODUCTION AND SUMMARY

This is a motion brought by Energy+ Inc. (Energy+) to review and vary portions of the Decision and Order in EB-2018-0028 of the Ontario Energy Board (OEB) dated June 13, 2019 (Decision) in which the OEB determined Energy+'s request for an Advanced Capital Module (ACM).

Energy+ asserts that the Decision contained three errors with respect to the ACM that are grounds for a motion to review:

- i. The OEB relied upon benchmarking comparisons that were not filed in evidence by the parties
- ii. There was no evidence on the record to substantiate a finding that the appropriate average cost for an administration only facility should be \$300 per square foot
- iii. The OEB applied the incentive rate-setting mechanism (IRM) inflation index to the comparators when it would have been more appropriate to apply an inflation index specific to the construction industry

Rule 43.01 of the OEB's *Rules of Practice and Procedure* (Rules)¹ provides that the OEB may, in respect of a motion to review, determine a threshold question of whether the matter should be reviewed before conducting any review on the merits of the motion. The OEB made provision for submissions on both the threshold question and the merits of the motion.

The OEB finds that the motion does not meet the threshold test and is dismissed without proceeding with a review on the merits.

¹ Ontario Energy Board *Rules of Practice and Procedure*, revised October 28, 2016

2 THE PROCESS

On April 30, 2019, Energy+ filed a Cost of Service application for 2019 distribution rates (Rate Application) which included an ACM related to the cost of a proposed new administrative facility known as Southworks. Energy+ requested approval for an \$8.1 million expenditure on the Southworks facility.²

The OEB issued its Decision on the Rate Application on June 13, 2019 (with a correction later being issued on June 18, 2019) in which it approved \$6.5 million of the requested \$8.1 million for an ACM for the proposed Southworks facility.

On July 2, 2019, Energy+ filed a Notice of Motion to review and vary the Decision (Motion). The OEB issued a Notice of Hearing and Procedural Order (PO) No. 1 relating to the Motion on August 16, 2019. The OEB adopted all parties in the Rate Application as parties to the Motion proceeding.

In PO No. 1, the OEB made provision for the filing of any further documentation by Energy+ and invited submissions on both the threshold question and the merits of the Motion with respect to the ACM issue.

On August 20, 2019, Energy+ requested an extension until September 13, 2019, to file further evidence in support of the Motion. Energy+ stated that it has retained an expert, CBRE Limited (CBRE), to provide an opinion in respect of the matters at issue in the Motion.

In PO No. 2, issued on August 22, 2019, the OEB approved Energy+'s request to extend the time to file its evidence, and provided additional steps for a discovery process in respect of that evidence.

On September 13, 2019, Energy+ filed the written evidence of Mr. Neil Kelsey, Director Cost Consultancy for the Central and Eastern Region of CBRE (CBRE Evidence).³

² EB-2018-0028

³ Written Evidence of Mr. Neil Kelsey, filed September 13, 2019

On September 23, 2019, OEB staff, the School Energy Coalition (SEC), and the Vulnerable Energy Consumers Coalition (VECC) filed interrogatories on the CBRE Evidence.

On October 3, 2019, Energy+ filed its Argument-in-Chief (AIC) on the Motion, along with responses to interrogatories on the CBRE Evidence.

OEB staff, SEC and VECC filed written submissions on the threshold question and merits of the Motion on October 17, 2019. Energy+ filed a reply submission on October 30, 2019.

3 THE THRESHOLD TEST

The OEB threshold test associated with motions for review requires that the motion applicant identify grounds that raise a question as to the correctness of the decision and demonstrate that there is enough substance to the issues raised such that a review based on those issues could result in the OEB varying, cancelling or suspending the decision.⁴

Energy+ alleged three grounds that raise such questions. Energy+ also asserted that the OEB denied Energy+ procedural fairness by not providing notice to Energy+ that it would be relying on the comparators, benchmark and inflationary factor that it used and by not providing Energy+ an opportunity to file evidence or submissions on their appropriateness.

For the reasons set out below, the OEB finds that there was no denial of procedural fairness. The OEB finds that it was reasonable that the OEB considered the costs for the PowerStream and Enersource facilities, derived a benchmark cost from those comparators and applied an appropriate inflation factor.

A summary of the three areas identified by Energy+ and the corresponding OEB findings are provided in the following sections.

I. The OEB relied upon benchmarking comparisons that were not filed in evidence by the parties

The benchmarking comparisons that the Decision relied on in determining the prudence of the Southworks facility were introduced as part of OEB staff's submissions in the Rate Application. OEB staff prepared a comparison of the estimated cost of the Southworks facility with two other, administrative-only facilities, PowerStream Inc. (PowerStream) and Enersource Hydro Mississauga Inc. (Enersource).⁵ Energy+ stated that the comparisons were not part of the evidence on the record or tested by any of the parties in the Rate Application proceeding.⁶ In its AIC, Energy+ also stated that the OEB

⁴ Natural Gas Electricity Interface Review Decision with Reasons, EB-2006-0322/0338/0340 (May 22, 2007) (NGEIR Review Decision) at page 18

⁵ EB-2018-0028, OEB Staff Submission, page 9

⁶ Energy+ AIC, page 12

failed in its duty of procedural fairness by failing to provide notice to Energy+ that it would be relying on this benchmark and failing to ask for evidence and/or submissions on whether the benchmark is appropriate.⁷

In its submission, SEC noted that it is regular practice for parties during submissions to refer to publicly available information and Energy+ was given an opportunity to comment on the Enersource and PowerStream comparators during its reply submission.⁸ In its reply submission in the Rate Application, Energy+ accepted OEB staff's comparison for the OEB's consideration.⁹ SEC stated that the fact that the OEB did not agree with either OEB staff's or Energy+'s conclusion regarding the PowerStream and Enersource comparisons is not a basis for a motion to review. SEC also submitted that the comparison information itself is uncontroversial because the information that OEB staff used is the exact same type of information Energy+ included in the Rate Application with respect to four other comparators.¹⁰ VECC agreed with SEC and adopted SEC's arguments.

OEB staff noted that Energy+'s pre-filed evidence first introduced comparisons to other distributors' facilities. Energy+ considered including Hydro Ottawa Ltd. and PowerStream facilities in the comparison but deliberately excluded them on the basis that "these distributors are significantly larger than Energy+."¹¹ OEB staff's submission on the Motion also noted Energy+'s comments on the Enersource and PowerStream comparisons in its reply submission in the Rate Application. OEB staff submitted that Energy+'s argument that the Decision improperly considered evidence not filed on the record is incorrect given that this information was readily available to all parties in the proceeding and Energy+ did not object to the use of the data until after the Decision was issued.¹²

In its reply submission, Energy+ stated that permitting parties to introduce evidence after the close of the evidentiary record does not provide the applicant an opportunity to

⁷ Energy+ AIC, page 14

⁸ SEC Submission, page 6

⁹ EB-2018-0028, Energy+ Reply Submission, page 10

¹⁰ SEC Submission, page 7

¹¹ OEB Staff Submission, pp. 7-8

¹² OEB Staff Submission, page 10

conduct any meaningful discovery on the relevance or applicability of the benchmarking comparison.¹³

Findings

Both the Powerstream and Enersource administrative building comparators, and the suggestion that an inflation adjustment was required to these comparators, were raised by OEB staff in their submission in the Rate Application.¹⁴ The OEB decisions on both of the PowerStream and Enersource facilities are publicly available.

Consistent with OEB's normal approach to assessing capital projects, Energy+ had provided benchmark costs in the Rate Application on combined administrative and operations facilities in Waterloo North Hydro Inc., InnPower Corporation, Milton Hydro Distribution Inc. and PUC Distribution Inc.

In its reply submission in the Rate Application, Energy+ thanked OEB staff for providing the Powerstream and Enersource comparators and "for ensuring that this additional benchmarking evidence is available for the Board panel's consideration". Energy+ expressed no concern about these comparators (other than they did not account for inflation) or their consideration by the OEB until it filed the Motion. What has changed since Energy+'s reply submission in the Rate Application is the Decision by the OEB.

The OEB finds that it was reasonable that the OEB considered the benchmark costs for the PowerStream and Enersource facilities which, being only administrative buildings, were more comparable to the proposed Southworks facility. In the circumstances, there was no denial of procedural fairness.

¹³ Energy+ Reply Submission, page 3

¹⁴ EB-2008-0244 and EB-2012-0033

II. There was no evidence on the record to substantiate a finding that the appropriate average cost for an administration only facility should be \$300 per square foot

Energy+ argued that the Decision contains an error of fact in that there was no evidence on the record to substantiate a finding that the appropriate average cost should be \$300 per square foot for the Southworks facility.

OEB staff submitted that it was appropriate for the Decision to consider proper comparators, i.e. administration only facilities, rather than the comparisons provided by Energy+ for combined administration and operations facilities, and that considering cost per square foot is a common and accepted benchmark by which the OEB has compared the costs of other local distribution company facilities.¹⁵

SEC argued that regardless of the appropriateness of using the PowerStream and Enersource comparators, the inclusion was to the benefit of Energy+. SEC noted that the average of the four comparators¹⁶ that Energy+ selected and provided in its evidence was \$225 per square foot and Energy+ did not include an inflation adjustment to increase those costs to 2022 dollars so as to be comparable with the proposed Southworks facility. If the OEB had only used the benchmarking evidence provided by Energy+, it would have resulted in a greater reduction to the proposed ACM amount.¹⁷

In its reply submission, Energy+ reiterated that if the OEB had the benefit of facts on the relevance and applicability of the Enersource and PowerStream comparators, such as the CBRE Evidence, it would have concluded that the forecasted cost of \$8.1 million for the Southworks facility was in-fact prudent.¹⁸

¹⁵ OEB Staff Submission, page 10

¹⁶ Waterloo North Hydro Inc. (EB-2015-0108), InnPower Corporation (EB-2014-0086), Milton Hydro Distribution Inc. (EB-2015-0089) and PUC Distribution Inc. (EB-2012-0162)

¹⁷ SEC Submission, pp. 8-9

¹⁸ Energy+ Reply Submission, page 2

Findings

The OEB does not categorize the OEB's finding regarding average cost per square foot as an error of fact. The \$300 per square foot directly resulted from the use of the OEB's benchmark costs for administrative facilities. Energy+ agreed that OEB staff's submission on the comparators and the need for an inflation adjustment would be helpful to the OEB. The \$300 per square foot is based on these factors and is not an error of fact.

III. The OEB applied the IRM inflation index to the comparators when it would have been more appropriate to apply an inflation index specific to the construction industry

Energy+ claimed that the OEB erred by choosing to use the IRM inflation index, which understated the cost pressures in the construction industry. Energy+ provided the CBRE Evidence to support the use of the inflation index from the construction sector, the non-residential building construction price index (BCPI) from Statistics Canada, as the most appropriate escalator for the purpose of benchmarking costs for the Southworks facility.¹⁹

OEB staff stated that the IRM inflationary factor is relatively stable over time and familiar to OEB staff and stakeholders. This factor was considered, after extensive consultation and expert evidence as a more appropriate and less volatile index than an industry specific price index. OEB staff submitted that the IRM inflation factor is one appropriate factor that may be applied to costs that will be incurred by a utility during an IRM period (as is the case with respect to the Southworks facility) and there is no identifiable error in the Decision on that basis.²⁰

OEB staff also noted that Energy+ did not file any evidence or make submissions regarding an appropriate inflationary factor that should be applied to any benchmarking comparators in the Rate Application. Instead of proposing a different inflationary factor that should be applied to the cost per square foot comparison to the PowerStream and Enersource projects, Energy+ referred to the OEB's IRM inflationary measures for the previous 10-year period in its reply submission in the Rate Application. OEB staff submitted that, given the apparent acceptance of the IRM inflation factors in Energy+'s

¹⁹ Energy+ AIC, page 15

²⁰ OEB Staff Submission, page 15

reply submission, it was reasonable for the OEB to apply the IRM inflation factors to the comparators as a proxy, especially since there was no evidence or submission made that another inflation factor would be more appropriate.²¹

SEC also noted that Energy+ did not propose a construction industry specific inflation index during the Rate Application. In its interrogatories, SEC asked Mr. Kelsey to re-run the comparators using BCPI. The average of the four comparators that Energy+ selected and provided in its evidence increased from \$225 to \$278 per square foot. This benchmark is still below the Enersource and PowerStream average used in the Decision. SEC submitted that, on that basis Energy+ has not met the threshold test and correction of the claimed error would likely lead to an even greater reduction in the approved amount.²²

In its reply submission, Energy+ reiterated that if the OEB had used an appropriate construction sector inflationary index, BCPI, using the OEB's methodology to assess the prudence of the Southworks facility would have resulted in an average cost of \$346 per square foot.

Findings

Neither of the benchmark costs for the facilities proposed by Energy+ or OEB staff were adjusted for inflation in the submissions in the Rate Application. While both Energy+ and OEB staff observed that inflation should be included in the cost comparisons, the only specific inflationary measures referenced in the Rate Application were the OEB-approved IRM factors mentioned in Energy+'s reply submission. Although Energy+ referred to inflation in the construction sector, it did not suggest that the IRM inflationary factors are inappropriate nor did it propose a different inflationary measure.

As noted by Energy+ in its AIC, a motion to review is not an opportunity for the party to reargue its case. In its reply argument in the Rate Application, Energy+ clearly indicated that inflation should be included in the benchmark used. To argue now that the OEB IRM inflation factors were the wrong measure is an attempt to re-argue the Rate Application.

²¹ OEB Staff Submission, pp. 12-13

²² SEC Submission, pp. 8-9

CBRE Evidence

In the CBRE Evidence, Mr. Neil Kelsey indicated that there was insufficient detail on the apportionment of costs in the PowerStream and Enersource facility costs to comment on why the costs were low. Mr. Kelsey suggested that using an independent Class C Estimate for the Southworks facility was the preferred approach. Mr. Kelsey did not comment on the benchmark facilities that Energy+ proposed as comparators, which had a lower cost per square foot than those proposed by OEB staff.

Mr. Kelsey's Class C Estimate for the Southworks facility was \$7.8 million. Mr. Kelsey attributed the difference between his estimate and Energy+'s latest estimate of \$8.1 million to the fact that the construction manager's fees were too high by \$259,000 compared to Energy+'s previous estimate.

When the OEB made provision for Energy+ to file additional evidence, the OEB expected that the evidence would address the issues raised in the Motion. The CBRE Evidence did not address the Motion issues. The evidence that was provided by Mr. Kelsey could have been provided in the Rate Application if Energy+ had sought input from a cost consultant. Once again, a motion to review is not an opportunity for the party to reargue its case. The opinion of Mr. Kelsey has not convinced the OEB that the threshold test has been satisfied.

Conclusion

The OEB finds that the Motion does not pass the threshold test. Energy+ has not identified grounds that raise a question as to the correctness of the Decision such that a review based on those grounds could result in the OEB varying, cancelling or suspending the Decision. The Motion is therefore dismissed at the threshold stage.

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Energy+'s motion to review and vary the OEB's Decision and Order in EB-2018-0028 is denied.
2. Intervenors eligible for cost awards shall file with the OEB and forward to Energy+ their respective cost claims by December 12, 2019.
3. Energy+ shall file with the OEB and forward to intervenors any objections to the claimed costs by December 19, 2019.
4. Intervenors shall file with the OEB and forward to Energy+ any responses to any objections for costs claimed by January 3, 2020.
5. Energy+ shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

All materials filed with the OEB must quote the file number, EB-2019-0180, be made in a searchable/unrestricted PDF format and sent electronically through the OEB's web portal at <https://pes.ontarioenergyboard.ca/eservice>. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and email address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <https://www.oeb.ca/industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have computer access are required to file seven paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date. With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Shuo Zhang at Shuo.Zyang@oeb.ca and OEB Counsel, Djurdjevic, Ljuba at Ljuba.Djurdjevic@oeb.ca.

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DATED at Toronto December 5, 2019

ONTARIO ENERGY BOARD

Original Signed By

Christine E. Long
Registrar and Board Secretary