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October 3, 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 Argument-in-Chief**

Procedural Order No. 1 of the proceeding included a direction, which allowed Energy+ Inc. ("Energy+") to make written submissions and any documentation in support of the threshold question and the merits of the motion with respect to the ACM issue by August 29, 2019 ("Written Submissions"). Subsequently, Energy+ made a request for time extension for the purpose of filing expert evidence and consequently the Board issued Procedural Order No. 2 on August 16, 2019 providing further procedural steps in the proceeding. However, in Procedural Order No. 2, the direction for Energy+ to make Written Submissions appears to be missing.

To maintain the integrity of the balance of the directions in Procedural Order No. 2 and to ensure that all the parties who will be making submission on the motion understand the full basis of Energy+'s motion, Energy+ is accompanying its interrogatory responses with its Argument-in-Chief.

Please find enclosed Energy + Inc.'s Argument-in-Chief in this proceeding.

Paper copies of this letter and the accompanying Argument-in-Chief 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+
Ian Miles, Energy+
Intervenors of record in 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.

ARGUMENT-IN-CHIEF OF ENERGY+ INC.

October 3, 2019

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Energy+ Inc.

I. INTRODUCTION

1. Energy+ Inc. (“Energy+”) brings this motion to review the Ontario Energy Board’s (“OEB” or the “Board”) decision on the basis that the Board relied upon comparisons and benchmarks that were never submitted into evidence to ground its conclusions. This error was compounded by the Board using the wrong inflationary index to extrapolate from those benchmarks the cost of the Energy+ Southworks project. This caused a fundamental flaw in the Board’s prudence analysis and the Board should give Energy+ the opportunity to revisit these conclusions with a proper evidentiary record.
2. The Board failed to give notice to the Parties that it was going to rely upon these comparators, and then extrapolate from these comparators a benchmark and an inflationary index to compare the Southworks project and ground its prudence analysis. Had the Board provided Energy+ with notice that it intended to do so, Energy+ would have been able to file expert evidence and submissions to address these issues. It is now doing so on this motion. Had the Board had the benefit of this evidence and submissions at the hearing, Energy+ respectfully submits that it would have come to a different conclusion.

A. Background

3. On April 30, 2018, Energy+ filed an application with the Ontario Energy Board for electricity distribution rates and other charges beginning January 1, 2019 under EB-2018-0028 (“Application”).
4. As part of the Application, Energy+ requested for an Advanced Capital Module (“ACM”) related to a proposed capital expenditure to renovate and convert an existing heritage building in downtown Cambridge (Southworks) into an administrative office building (“Southworks Facility”) and this formed part of Energy+’s facilities plan (“Facilities Plan”).
5. On June 13, 2019 the Board issued its Decision and Order in respect of the Application, including in respect of the Southworks ACM request (the “Decision”).¹ In the Decision,

¹ EB-2018-0028 – Decision and Order dated June 13, 2019 corrected June 18, 2019.
<http://www.rds.oeb.ca/HPECMWebDrawer/Record/645169/File/document>

the Board found that Energy+ did not meet the prudence test with respect to the approval of the ACM. The Board also made directions and findings flowing from the application of Bill C-97.

6. The Board has a well-established set of principles regarding the conduct of a prudence review (**emphasis added**):

- Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
- To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
- Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
- Prudence must be determined in a **retrospective factual inquiry**, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time.

7. In its Decision, the OEB reduced the capital cost amount for the Southworks project from \$8.1 million to \$6.5 million (a 20% reduction) without any reasonable factual basis to do so. Assuming Energy+ rebases in 2024, this will result in a total revenue requirement shortfall of \$266,000.²

8. These amounts (a \$1.6 million reduction in capital expenditures, and a \$266,000 loss in revenue requirement) are material to Energy+ and its ongoing business operations.

9. The stated purpose of the Board's ACM policy³ includes:

² Response to Interrogatories, EB-2019-0180, VECC-8.

³ Report of the Board *New Policy Options for the Funding of Capital Investments: The Advanced Capital Module*, EB-2014-0219, Page 12.

https://www.oeb.ca/sites/default/files/uploads/Report_of_the_OEB_Capital_Funding_Suppl_20160122.pdf

- providing "greater assurance of recovery for prudent and appropriately prioritized capital projects regardless of when the investments might be made"; and
- assisting to "preserve the regulatory efficiency of IR applications" by advancing the review of eligible discrete capital projects.

10. However, as a direct result of the Board's Decision:

- Energy+ has no assurance of recovery of its prudently chosen and appropriately prioritized Southworks project; and
- The regulatory efficiency of a future IR application will not be preserved, because of an arbitrary disallowance of 20% of the Southworks project costs.

11. For this reason, on July 2, 2019, Energy+ filed a Notice of Motion (EB-2019-0180)⁴ on the following grounds:

- (a) the Board, in its findings, relied upon benchmark comparisons that were not filed in evidence by the parties, which is contrary to the rules of natural justice and procedural fairness;
- (b) the Board committed an error of fact by extrapolating facts from non-evidence that the average cost is \$300 per square foot when there was no evidence on the record to substantiate such finding and to apply this cost as a benchmark to measure the Southworks project;
- (c) the Board applied an inflation index to the comparisons that was not grounded in evidence; and
- (d) the Board breached the rules of natural justice and fairness in its consideration and application of the impact of Bill C-97 without asking hearing submissions from the parties, with respect to the impact of Bill C-97.

⁴ EB-2018-0028 – Notice of Motion dated July 2, 2019.
<http://www.rds.oeb.ca/HPECMWebDrawer/Record/646315/File/document>

II. BILL C-97 ISSUE

12. On July 25, 2019, the Board issued a letter to all electricity distributors, including Energy+, to record the full revenue requirement impact of changes in CCA rules in a sub-account of Account 1592. The practical effect of this letter made the motion to review the Bill C-97 aspects of the Decision moot.
13. On August 16, 2019, the Board issued a Notice of Hearing and Procedural Order No. 1 in this proceeding. In this Procedural Order, the Board noted that under the Accounting Procedures Handbook, electricity distributors are required to record the impact of any differences that result from legislative or regulatory change to the tax rates or rules. As such, the Board determined that it will dismiss the Bill-C97 portion of the motion to review at the threshold stage without a hearing pursuant to Rule 43.⁵

III. EXPERT EVIDENCE OF MR. NEIL KELSEY

14. Energy+ filed the written expert evidence of Mr. Neil Kelsey (“Mr. Kelsey”) of CBRE Limited (“Expert Evidence”).
15. Energy+ submits that Mr. Neil Kelsey is a qualified construction industry professional with expert knowledge on construction costs and contracts in Ontario. Energy+ submits that the Board should accept Mr. Kelsey as an expert in construction costs and contracts in Ontario in this proceeding. In support of this request, Energy+ notes:
 - a. Mr. Kelsey trained as a Quantity Surveyor and gained his Member of the Royal Institution of Chartered Surveyors qualification in the United Kingdom.
 - b. He obtained his Professional Quantity Surveyor designation from the Canadian Institute of Quantity Surveyors and currently leads the CBRE Cost Consultancy service delivery in the Project Management division within CBRE in Eastern and

⁵ EB-2019-0180 Notice of Hearing and Procedural Order No. 1 dated August 16, 2019.
<http://www.rds.oeb.ca/HPECMWebDrawer/Record/649979/File/document>

Central Canada regions. CBRE Limited is the Canadian operating company of CBRE Group, Inc., the world's largest real estate services firm (in terms of 2017 revenue).

- c. As a cost consultant, Mr. Kelsey provided cost estimates for major projects throughout Ontario, such as Parsons Headquarters, 321 Silver Star Boulevard Office, Metrolinx Union Station platform, Centennial College Student Accommodation, Union Pearson Express, and GTAA Toronto Pearson International Airport.
 - d. Throughout his career, Mr. Kelsey prepared numerous estimates ranging from Class D to Class A for the commercial sector and has significant experience in civil infrastructure and commercial sectors in Canada.⁶
 - e. Mr. Kelsey has signed the Board's Form A acknowledgement of expert duty, pursuant to which Mr. Kelsey has agreed to assist the Board impartially by giving fair, objective and non-partisan evidence.
16. On October 3, 2019, Energy+ filed written responses to the interrogatories received in respect of the Expert Evidence. Concurrently with the filing of those interrogatory responses, Energy+ is filing this Argument-in-Chief.

IV. **THRESHOLD TEST**

17. Energy+ submits that its motion meets the threshold test and the Order of the Board should be reviewed for the reasons set out herein.
18. Rule 42.01 provides that on a motion to review, the applicant must establish that there are grounds to question the "correctness" of the order or decision. The *OEB Rules of Practice and Procedure* set out as examples of such grounds (**emphasis added**): **errors in fact**, change in circumstances, new facts, or **facts that were not previously on the record**.

⁶ EB-2019-0180 Written Evidence of Mr. Neil Kelsey dated September 13, 2019 at Appendix A.
<http://www.rds.oeb.ca/HPECMWebDrawer/Record/652521/File/document>

19. Energy+ submits that the test in Rule 42.01 is met where there is an identifiable error in the decision and that the error is material and relevant to the outcome of the decision. The OEB's decision in Natural Gas Electricity Interface Review ("NGEIR Review Decision") provides useful guidance on when the threshold test is met:

(...) the grounds must "raise a question as to the correctness of the order or decision." In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of correctness of the decision, the Board agrees with the parties who argued that **there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.** (emphasis added)

V. **IDENTIFIABLE ERRORS IN THE DECISION**

20. In the Decision, the OEB found that Energy+ did not meet one of the criteria with respect to the approval of the ACM, that criterion being prudence. In deciding that Energy+ did not meet the prudence criterion, the Board committed three identifiable errors:
- (a) The OEB breached procedural fairness by relying on benchmark comparisons that were not filed in evidence by the parties;
 - (b) The OEB erred in finding that an appropriate benchmark to assess the prudence of the Southworks cost estimate was \$300 per square foot, which finding was not substantiated by evidence on the record; and
 - (c) The OEB erred in applying the IRM inflation index to the comparators when it would have been more appropriate to apply a more appropriate inflation index specific to the construction industry.
- A. The OEB breached the rules of procedural fairness by relying on benchmark comparisons that were not filed in evidence by the Parties**
21. It is a fundamental principle of natural justice and procedural fairness that the Board's findings should be based on evidence filed and tested by the parties.

(a) The evidence that was on the record

22. In the Application, Energy+ provided an abundance of evidence to demonstrate their core commitment to and focus on prudence in reaching the decision to select the option of the Southworks Facility and submitting the ACM application for the forecasted capital expenditure.
23. As demonstrated by evidence on the record, Energy+ completed a comprehensive, multi-year long review of various alternatives including renovating/rebuilding currently owned buildings, purchasing/renovating alternative facilities, leasing alternative facilities and construction of new facilities.⁷ Management rejected numerous options because they were too costly in favour of continuing to search for a better option. This entire process extended over a 4-year long period.⁸
24. Over this time, extensive efforts were made by Energy+ to ensure that the most cost-effective and viable option was chosen:
- a. Energy+ engaged MTE Consultants Inc. to prepare two detailed third-party feasibility assessments to assess two of the options⁹ and retained CBRE Limited, a real estate firm, to conduct a detailed market analysis to assess the viability of the other three options¹⁰.

⁷ EB-2018-0028 Exhibit 2, Appendix 2-1: Distribution System Plan, Appendix B: Facilities Business Plan at page 1037-1039

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/607900/File/document>

⁸ EB-2018-0028 Exhibit 2, Appendix 2-1: Distribution System Plan, Appendix B: Facilities Business Plan at page 1027-1029.

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/607900/File/document>

⁹ EB-2018-0028 Exhibit 2, Appendix 2-1: Distribution System Plan, Appendix N – Facilities Business Plan at pg. 1037-1038 and Appendix B.

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/607900/File/document>

¹⁰ EB-2018-0028 Exhibit 2, Appendix 2-1: Distribution System Plan, Appendix N – Facilities Business Plan at pg. 1038-1039 and

Appendix D.

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/607900/File/document>

- b. An independent third party advisor, Melloul-Blamey Construction Inc., prepared cost estimates for each viable option to ensure a like-for-like comparison.¹¹
25. In the end, Energy+ chose by far the least-cost option, which was to renovate the Southworks Facility for administrative functions and retain their existing Bishop Street building for operations.¹² The combined cost of this option to meet the Energy+ facilities needs was by far the cheapest: at \$8.1 million for Southworks, this option is approximately \$18.5 million less than the next cheapest alternative of renovating their Bishop Street building and is approximately \$21.4 million less than the costs of building a new operations centre.¹³
26. Prior to proceeding with the identified least-cost option, Energy+ also conducted benchmarking against publicly available information of other local distribution companies and the results indicated that Energy+'s Southworks Facility option was appropriately sized for its work force and measured fairly against the other available benchmarks.¹⁴
27. All of the above was detailed in the evidence filed with the Application and through subsequent interrogatory responses.¹⁵

¹¹ EB-2018-0028 Exhibit 2, Appendix 2-1: Distribution System Plan, Appendix N – Facilities Business Plan at pg. 1037-1038 and Appendix C.

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/607900/File/document>

¹² EB-2018-0028 Exhibit 2, Appendix 2-1: Distribution System Plan, Appendix N – Facilities Business Plan at pg. 1048-1049.

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/607900/File/document>

¹³ EB-2018-0028 Exhibit 2, Appendix 2-1: Distribution System Plan, Appendix N – Facilities Business Plan at pg. 1041 Table 1: CND Option Summary.

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/607900/File/document>

¹⁴ EB-2018-0028 Exhibit 2, Appendix 2-1: Distribution System Plan, Appendix N – Facilities Business Plan at pg. 1054 Table 6: Cost and Utilization Comparison to Other Distributors.

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/607900/File/document>

¹⁵ EB-2018-0028 Exhibit 2, Appendix 2-1: Distribution System Plan, Appendix B – Facilities Business Plan, Section 6, pages 1035-1041.

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/607900/File/document>

and

EB-2018-0028 Update to Evidence dated December 13, 2018

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/628875/File/document>

(b) Information that was not on the evidentiary record

28. Despite Energy+ having provided detailed evidence in its Application, the Board chose in its Decision at pages 13 and 14 in its assessment of prudence to rely upon benchmark comparisons that were not filed in evidence by any of the Parties.
29. Rather, the comparisons that the Board relied on were only introduced as part of OEB Staff's submissions filed in the proceeding.¹⁶
30. The OEB Staff cited the prior OEB approval of a 2008 PowerStream Inc. ("2008 PowerStream") administrative building and a 2012 Enersource Hydro Mississauga Inc. ("2012 Enersource") administrative building as comparators in its submissions. The comparison was presented in the form of a table without any background or context apart from the description that the comparators were administrative office buildings approved in OEB decisions and references to the source of the information.
31. OEB Staff specifically noted in their submissions that these comparisons had limitations, as it did not recognize the presence of inflation in the construction sector since 2008 and 2012 and the cost of land/building can vary significantly depending on the location and market conditions at the time of transaction¹⁷. Moreover, OEB Staff relied on these comparators to suggest that Energy+'s project was prudent.
32. In its reply submissions, Energy+ agreed with OEB Staff's reservation about the usefulness of these comparators. Energy+ expressly noted that they did not account for the presence of inflation in the construction sector since 2008 or 2012.¹⁸
33. The Board did not give the Parties the opportunity to make submissions on what would be the appropriate inflationary index to use in the event the Board decided to rely upon these comparators.

¹⁶ EB-2018-0028 – OEB Staff Submissions dated March 29, 2019.

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/638530/File/document>

¹⁷ Ibid at page 10.

¹⁸ EB-2018-0028 Energy+ Reply Submissions dated April 23, 2019.

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/640086/File/document>

34. Despite these clear reservations on the usefulness of these benchmarks, the Board panel erred by relying on unsubstantiated facts which were not part of the evidence on the record.

35. The OEB stated in the Decision:

“If the costs for the two comparators presented in the OEB staff submission are adjusted for inflation [using OEB’s IRM inflationary factors], the cost range of these facilities would be approximately between \$250 and \$350 per square foot. If one is to consider the average of these costs (\$300 per square foot) and apply this average cost to the area to be developed at the Southworks facility (21,892 square feet), the cost estimate would be \$6.5 million compared to Energy+’s current estimate of \$8.1 million.”¹⁹

36. The OEB extrapolated from OEB staff submissions that the cost range is approximately \$250 to \$350 per square foot based on IRM inflation, then took the average of these numbers and decided on \$300 per square foot as being the basis of their decision on the prudence of the Southworks facility.

37. There was absolutely no evidence on the record that substantiated a finding that the appropriate average cost to benchmark the Southworks Facility should be \$300 per square foot.

38. If the Board was going to rely upon these comparators, the Board erred in failing to give the Parties an opportunity to make submissions on what would be the appropriate average cost to benchmark against the Southworks Facility.

(c) Shortcomings of Relying on Evidence Not on the Record

39. Mr. Kelsey explains in detail the shortcomings of using 2008 PowerStream and 2012 Enersource as comparators.²⁰ Particularly, Mr. Kelsey noted that there was insufficient detail on construction cost breakdown and separation of costs for new build construction

¹⁹ EB-2018-0028 Decision and Order dated June 13, 2019 corrected June 18, 2019 at page 13.

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/645169/File/document>

²⁰ EB-2019-0180 Written Evidence of Mr. Neil Kelsey dated September 13, 2019 at pages 9 to 12.

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/652521/File/document>

elements and renovation elements for the 2008 PowerStream and 2012 Enersource comparators.²¹ The detail and cost build-up within the total cost was not available in either of the two prior proceedings, which is required to facilitate a clearer benchmarking that is more reliable as a result.²²

40. He was also unable to find a separation of professional fees associated with the building renovation.²³
41. Mr. Kelsey further stated that renovation projects can differ vastly in type of work, scope of work and conditions.²⁴
42. In order to perform a more reliable benchmarking, Mr. Kelsey explained that the separation of renovation costs, new build costs and costs applicable to the site is necessary to facilitate benchmarking of such elements and allow for appropriate adjustments for abnormal or higher specification items that affect costs.²⁵
43. In addition, based on Mr. Kelsey's opinion and experience, the cost for the Enersource project was extremely low.²⁶
44. However, there was insufficient detail on apportionment of costs to be able to comment as to why the costs are low. In other words, there are likely other factors present that the Board is not aware of. This alone should limit the use of the 2012 Enersource data as a comparator.
45. In his evidence filed as part of this Motion, Mr. Kelsey explained how to perform a reliable benchmarking comparison by performing an independent Class C Estimate to assess the reasonableness of the Melloul-Blamey estimate.²⁷ This independent benchmarking assessment was filed at Appendix "B" of the Expert Evidence.

²¹ Ibid at page 11.

²² Ibid at page 12.

²³ Ibid at page 11.

²⁴ Ibid at page 10.

²⁵ EB-2019-0180 Written Evidence of Mr. Neil Kelsey dated September 13, 2019 at page 10.

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/652521/File/document>

²⁶ Ibid at page 11.

²⁷ Ibid at Appendix B, Pages 23 to 53 of pdf.

46. If the 2008 PowerStream and 2012 Enersource comparators were filed as evidence and tested, it would have been made evident that they are not appropriate comparators with which to assess the prudence of the Southworks facility.
47. Energy+ submits that:
- a. The Board erred in relying on the 2008 PowerStream and 2012 Enersource as benchmark comparators, as those comparisons were not submitted into evidence or tested by any of the parties; and
 - b. Once the Board had decided to rely upon the 2008 PowerStream and 2012 Enersource benchmarks comparators, the Board should have given the Parties the opportunity to make submissions on what, if anything, could be extrapolated from those comparators.
 - c. If the Board had the benefit of Mr. Kelsey's evidence at the time they made their Decision, the Board would not have relied so heavily on these flawed comparators and would have come to a different conclusion in the Decision on the prudence of the costs of the Southworks facility.

B. Material Error of Relying Upon Facts Not in Evidence

(a) Error in Relying Solely on Cost Per Square Foot as Measure of Prudence

48. After management undertook an exhaustive 4 plus year long assessment of options to arrive at a cost effective and prudent result, the Board's Decision focused solely on the cost per square foot of the Southworks facility without regard to the broader aspects of the cost savings included elsewhere in the Energy+ Facilities Business Plan.
49. Specifically, they Board failed in its assessment of prudence to:
- a. Factor in the savings associated with eliminating the Thompson Drive lease²⁸; and

²⁸ EB-2018-0028 Exhibit 2, Appendix 2-1: Distribution System Plan, Appendix N – Facilities Business Plan Table 5: Land and Buildings – Capital and Lease Cost Summary at pg. 1053
<http://www.rds.oeb.ca/HPECMWebDrawer/Record/607900/File/document>

- b. Factor in the significant savings of more effectively utilizing the Bishop Street Facility space at a very low incremental cost (which required the shift of administrative employees to Southworks)²⁹.
50. In its Argument-in-Chief, Energy+ explicitly noted that “It would not be appropriate to consider the proposed Southworks facility, without also accounting for the efficiencies gained at Thompson Drive and the Bishop Street Facility.”³⁰
51. Prudence of the broader Facilities Plan are not fairly assessed by ignoring efficiency gains and savings associated with the very low cost Bishop Street Facility renovation and the savings from eliminating the Thompson Drive lease.
52. In addition, by focusing solely on the cost per square foot, the Board also ignored the efficiencies achieved by Energy+ in right-sizing its Southworks facility to exactly meet its space needs (which is reflected in a cost per FTE, or FTE per square foot basis).
53. For example, the Ontario Energy Board previously criticized Milton Hydro, where it was able to achieve by-far the lowest capital cost per square foot (\$136.33), for acquiring a facility that was larger than what it actually needed. It has been clearly depicted in the Milton Hydro case that prudence cannot be demonstrated solely by using cost per square foot. Yet that is exactly what the Board did in its Decision for Energy+.
54. To properly assess whether the costs forecasted by Energy+ for the Southworks Facility was reasonable, CBRE Limited performed its own independent Class C Estimate. This involved a line-by-line independent assessment of the project, performing like-for-like analysis to ensure an appropriate benchmark comparison was developed.
55. Notably, Mr. Kelsey’s independent Class C Estimate does differ from the \$8.1 million forecast prepared by Energy+.

²⁹ EB-2018-0028 Exhibit 2, Appendix 2-1: Distribution System Plan, Appendix N – Facilities Business Plan Table 5: Land and Buildings – Capital and Lease Cost Summary at pg. 1029

³⁰ EB-2018-0028 Argument-In-Chief dated March 15, 2019 at page 16.

<http://www.rds.oeb.ca/HPECMWebDrawer/Record/637077/File/document>

56. Mr. Kelsey explained that the main cost difference between Energy+'s Class C Estimate, which was prepared by Melloul-Blamey, was a difference in construction managers fee of \$259,000, as seen in the table below (an excerpt from Mr. Kelsey's written evidence).³¹

Item	CBRE	Melloul Blamey	Difference	Comments
Construction Managers Fee	161,000	420,000	259,000	The CM Fee seems on the high side. We have allowed for 3%, which is closer to current market conditions. The Melloul Blamey cost refers to a letter dated March 28, 2017. The fee is fixed and includes for management of changes that occur during construction are not subject to mark-up by Melloul Blamey
Sub-Totals	161,000	420,000	259,000	

(b) Conclusion

57. The OEB erred in relying on the benchmark of \$300 cost per square foot, which was not evidence that was filed or tested by any of the parties, to determine prudence of the Southworks facility. By doing so, the OEB failed in its duty of procedural fairness to the applicant Energy+ 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 this benchmark is appropriate.
58. Had the Board given notice to Energy+ that it intended to rely upon this benchmark, then Energy+ could have filed further expert evidence, such as that by Mr. Kelsey, which demonstrates that the Board's assumption of \$300 per square foot was derived from

³¹ EB-2019-0180 Written Evidence of Mr. Neil Kelsey dated September 13, 2019 at page 17.
<http://www.rds.oeb.ca/HPECMWebDrawer/Record/652521/File/document>

fundamentally unreliable comparators. There is simply not enough evidence on the record about either building to conclude that they are appropriate cost comparators.

59. In addition, the expert evidence of Mr. Kelsey explains that the Enersource project was extremely low, which should cause serious reservation prior to using this project as a comparator.

C. Material Error in Applying the Incorrect Inflation Index

60. The Board also erred in the Decision by applying the wrong inflation index to its benchmarking comparators. Specifically, the Board erred by choosing to use the IRM inflationary factors, which systematically understated the cost pressures in the construction industry, when the more accurate inflation index would have been a construction specific inflation index.
61. In OEB Staff's submissions, OEB Staff indicated that there is **inflation in the construction sector** that was not recognized in the comparison of 2008 PowerStream and 2012 Enersource.³² Energy+ also explained in its submissions that there is **inflation in the construction sector** that was not recognized in the comparison of 2008 PowerStream and 2012 Enersource decisions.³³
62. Mr. Kelsey's written evidence supports the fact that the inflation index from the construction sector is most appropriate to properly escalate 2008 and 2012 construction costs for the purposes of benchmarking to the costs of the Southworks Facility. Mr. Kelsey stated that the Non-Residential Building Construction Price Index is the most appropriate index to use as it covers for the construction escalation within the sub-sector of non-residential work, which is inclusive of commercial and office projects.³⁴ This index was applied to the 2008 PowerStream and 2012 Enersource comparators, which resulted in the following table:

³² EB-2018-0028 – OEB Staff Submissions dated March 29, 2019 page 10.
<http://www.rds.oeb.ca/HPECMWebDrawer/Record/638530/File/document>

³³ EB-2018-0028 Energy+ Reply Submissions dated April 23, 2019 at page 10.
<http://www.rds.oeb.ca/HPECMWebDrawer/Record/640086/File/document>

³⁴ EB-2019-0180 Written Evidence of Mr. Neil Kelsey dated September 13, 2019 at page 15.
<http://www.rds.oeb.ca/HPECMWebDrawer/Record/652521/File/document>

Year	% Difference	Powerstream 2008 \$301 / sf	Enersource 2012 \$228 / sf
2008 Q1		301	
2009 Q1	4.5	315	
2010 Q1	-2.4	307	
2011 Q1	3.4	317	
2012 Q1	3.3	328	228
2013 Q1	0.8	331	230
2014 Q1	0.8	333	232
2015 Q1	2.1	340	237
2016 Q1	1.7	346	241
2017 Q1	3.8	359	250
2018 Q1	3.2	371	258
2019 Q1	5.2	390	271
2020 Q1	2.4*	399	278
2021 Q1	2.4*	409	284

* Assumed Rate of 2.4%

63. For the purposes of comparison to the Decision, Mr. Kelsey used an assumed rate of 2.4% for 2020 and 2021 – where no actual historical data is available – which is the same as the assumptions made by the Board panel in the Decision.
64. As seen in the table above, by applying the appropriate index, for 2021 Q1, the 2008 PowerStream costs would be at \$409 per square foot and 2012 Enersource costs would be at \$284 per square foot.

65. Using the Board's own logic in the Decision - this results in an average cost per square foot of \$346.50, which when multiplied by the total square footage of the Southworks facility would result in a cost of \$7,585,578 (i.e. $\$346.50 \times 21,892 \text{ sq ft}$).
66. If the Board were to acknowledge the fact that the Enersource project costs are extremely low by any objective measure, the Board could still assess the Prudence of the Southworks Project costs against the PowerStream comparator.
67. Using the \$409 per square foot approved PowerStream cost, this would result in a total cost benchmark of \$8,953,828 (i.e. $\$409 \times 21,892 \text{ sq. ft}$). That cost is more than \$800,000 more than the forecasted costs for the Southworks facility.

IV. CONCLUSION AND RELIEF SOUGHT

68. Based on the foregoing, Energy+ submits that:
 - (a) The Board panel breached the rules of procedural fairness by relying on benchmark comparisons that were not filed in evidence by the parties. Through this motion to review process, Energy+ has introduced the Expert Evidence of Mr. Kelsey which provides factual and opinion evidence that is directly relevant to these benchmark comparisons. Had the Board panel had the benefit of Mr. Kelsey's evidence, the Board would have arrived at a different conclusion with regards to the prudence of the Southworks facility.
 - (b) 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, which finding was not substantiated by evidence on the record and the Board panel also erred in applying the IRM inflation index to the comparators when it would have been more appropriate to apply an inflation index specific to the construction industry to estimates of construction costs.
 - (c) If the Board panel had used an appropriate construction sector inflationary index, 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 a cost of \$7,585,578. This is more than \$1 million higher than the amount approved as prudent in the Decision. This difference alone is material to the Energy+ management team, which is struggling to execute on the Southworks facility within the context of the Board's original non-fact-based prudence Decision.

- (d) If the Board panel had the benefit of actual 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. In particular, Mr. Kelsey's expert opinion that the costs of the Enersource project were extremely low – and that there was not sufficient evidence available to explain why this is the case – would limit the use of the 2012 Enersource data as a relevant comparator. Had the Board panel used the properly inflated cost of \$409 per square foot for the PowerStream facility, it would result in a total cost benchmark that is \$800,000 more than the forecasted renovation costs for the Southworks facility. This is clear evidence that the entire forecasted costs of the Southworks facility of \$8.1 million is both reasonable and prudent.
- (e) Finally, if the Board panel had the benefit of an actual line-by-line independent Class C Estimate of costs for the Southworks facility, such as that included at Appendix "B" of Mr. Kelsey's expert evidence, the Board would have recognized that the Energy+ cost estimates for Southworks are for the most part entirely consistent with those of a reputable independent cost consultancy firm CBRE (the main difference being \$259,000 in assumed construction management fees).
- (f) For each of the foregoing reasons, Energy+ submits that the Board panel erred in its decision when it determined that the forecasted Southworks facility costs of \$8.1 million were imprudent. 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.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Original signed by John A. D .Vellone

John A. D Vellone
Counsel for Energy+ Inc.