



BY EMAIL and RESS

Mark Rubenstein
mark@shepherdrubenstein.com
Dir. 647-483-0113

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

October 17, 2019
Our File: EB20190180

Attn: Christine Long, Registrar & Board Secretary

Dear Ms. Long:

Re: EB-2019-0180 – Energy+ Motion to Review – SEC Submissions

We are counsel to the School Energy Coalition (“SEC”). Attached, please find SEC’s submissions.

Yours very truly,
Shepherd Rubenstein P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicant and intervenors (by email)

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF a Motion to Review and Vary the Board’s Decision and Order dated June 13, 2019 in respect of an Application by Energy+ Inc. under Section 78 of the Act for an order approving just and reasonable rates and other charges for electricity distribution to be effective January 1, 2019 (Board File No. EB-2018-0028).

**SUBMISSIONS OF THE
SCHOOL ENERGY COALITION**

Overview

1. Energy+ Inc. (“Energy+”) has brought a motion to review the Decision and Order dated June 13 2019 (the “Decision”), in which the Ontario Energy Board (the “Board” or “OEB”) approved \$6.5M of the requested \$8.1M for an Advanced Capital Module (“ACM”) for its proposed Southworks facility.
2. Pursuant to Procedural Order No. 2, these are School Energy Coalition’s (“SEC”) submissions on the threshold question and merits of the motion.
3. Energy+ claims the Board breached its procedural fairness by relying on the benchmarking of costs of two comparators that were not provided in the evidence, but only through OEB Staff’s argument. In addition, the Board used the wrong inflation index to adjust the comparator costs so that they can be fairly compared against the costs of the proposed Southworks facility.
4. SEC submits that the Board should reject this motion at the threshold stage, and if not, on the merits. Energy+ cannot as part of its Reply Argument “thank OEB Staff” for bringing the comparator information to the Board’s attention so that it is “available for the Board panel’s consideration”, and then claim the Board erred by doing exactly what it asked, albeit reaching a different conclusion on how to interpret the results than it had wanted.¹ Similarly, it was entirely appropriate for the Board to accept OEB Staff’s proposed use of the IRM inflation index as part of the benchmarking analysis contained in its submissions, when Energy+ had neither proposed, nor used, any inflation adjustment in its own benchmarking evidence.

¹ EB-2018-0028, Reply Submission of Energy+ Inc., dated August 23 2019 [“Energy +Reply Submission”]p.8-9

5. Even if the Board does agree that the threshold test has been met, the outcome of the decision would not change. The inclusion of the comparators in OEB Staff's submission *helped* Energy+. If only the comparator facilities that were included in Energy+'s own benchmarking evidence were considered, the average cost per square foot, both with and without the Energy+ recommended inflation index, would be *higher* than what was in OEB Staff's submissions, and adopted by the Board in the Decision.

The Board Decision

6. As part of its 2019 cost of service application, Energy+ sought approval for an \$8.1M ACM for its Southworks facility. The project was to construct a new administration only facility for the utility.

7. In its Decision, the Board agreed that Energy+ met the materiality and need requirements for ACM, but it found there was "insufficient evidence to approve a capital budget of \$8.1 million for the Southworks facility as prudent."²

8. For the Board, its findings on prudence were "reinforced" by the comparisons provided of the estimated costs of the proposed Southworks facility relative to other buildings constructed by other distributors.³ The Board noted that comparisons provided by Energy+ showed that the estimated cost per square foot was significantly higher than the comparators.⁴

9. The Board though found that the comparative analysis provided by OEB Staff was more relevant than the one provided by Energy+, as it used administration only facilities, like Southworks, as comparators as opposed to joint administration and operations (which tend to have lower per square foot costs). OEB Staff's analysis showed that the Southworks costs still remained higher, albeit by a narrow margin, when compared against two administration only comparators (one constructed in 2012 by Enersource and the other in 2012 by Powerstream).⁵

10. The Decision noted that the OEB Staff analysis addressed concerns raised by Energy+ regarding the comparison, as it included inflationary adjustments to reflect the passing of time since the construction of the Enersource and PowerStream facilities.⁶ A simple average of the per square foot cost analysis of

² Decision, p.13

³ *Ibid*

⁴ *Ibid*

⁵ *Ibid*, p.9-10, 13

⁶ *Decision*, p.13

the comparators applied to the square footage of the Southworks facilities, results in a cost estimate of \$6.5M compared to the Energy+ estimate of \$8.1M.⁷

11. In the Decision, the Board also commented that there remained significant uncertainty with respect to the cost estimate. At the time of the application, 87% of the total construction costs were yet to be awarded through planned competitive tender.

12. Finally, the Board was “concerned about the quality of Energy+’s cost estimates.”⁸ At the time of the filing of the application, the cost estimate was \$5M based on a Class D estimate.⁹ Energy+ filed updated evidence during the proceeding increasing the estimated cost to \$8.1M, reflecting a more accurate Class C estimate. The Board found that “there does not appear to be a corresponding improvement in the accuracy of the cost estimate in spite of the 62% increase in the actual estimate”.¹⁰ The Board found the change in contingency line-item from moving from a Class D to Class C estimate was counter-intuitive. Instead of decreasing, Energy+ significantly increased the contingency amount, as the accuracy increased.¹¹

13. The Board ultimately determined that while Energy+ had not provided sufficient evidence to support the reasonableness of its cost estimates, it would still approve a significant portion of the proposed ACM funding upfront. It granted Energy+ a \$6.5M funding envelope “based on reasonable comparisons and the history of the development of the Energy+ estimates”.¹² It also provided Energy+ with the “opportunity to address any deviation from this amount in its subsequent Price Cap IR application for the year in which the project comes into service.” This would allow Energy+ to seek a subsequent approval for additional amounts and, if approved, have those incorporated into the ACM rate rider calculation when it is applied.

Threshold Test

14. SEC submits that Energy+ has not met the threshold test.

⁷ *Decision*, p.9, 13

⁸ *Decision*, p.14

⁹ In fact, at the time of the filing of the application, the Energy+ evidence was this it was a Class C estimate. After filing updated evidence on it determined that this was an error, and it was only a Class D estimate. (See EB-2018-0028 Transcript, Vol.1, p. 73)

¹⁰ *Decision*, p.14

¹¹ *Ibid*

¹² *Ibid*

15. Pursuant to *Rule 43.01* of the Board’s Rules of Practice and Procedure, the Board conducts a threshold inquiry to determine whether the matter should be reviewed on the merits. The threshold test was articulated by the Board in the Motion to Review Natural Gas Electricity Interface Review (“NGEIR”) Decision.¹³ The Board stated that the purpose of the threshold test is to determine whether the grounds relied upon by the moving party raise a question as to the correctness of the decision, and whether there is enough substance to the issues raised that a review based on those issues could result in the Board varying, cancelling or suspending that decision.¹⁴ While the grounds listed in Rule 42.01(a) are not exhaustive, in order for the threshold test to be met, there must be an “identifiable error”¹⁵ and the “review is not an opportunity for a party to re-argue the case”.¹⁶ The Divisional Court has confirmed the Board’s principle that re-argument of issues is not an appropriate ground for review.¹⁷

16. As discussed throughout these submissions Energy+ has not met the threshold test. Energy+ has not raised a question as to the correctness of the decision, or one that on a review could result in the Board changing the outcome of its decision. In fact, the evidence demonstrates that, if not for the proposed error, the Board likely would have approved a smaller amount for the Southworks facility.

17. At its core, Energy+ is just not happy with the Board’s decision. That is not an appropriate basis for another panel of the Board to review the matter on the merits.

Standard of Review

18. A Motion to Review is not a hearing de novo.¹⁸ The original hearing panel, which had the benefit of considering the evidence first hand, is entitled to deference by a reviewing panel. The Board has previously said that “[a] reviewing panel should not set aside a finding of fact by the original panel unless there is no evidence to support the decision and [it] is clearly wrong.”¹⁹

¹³ *Decision with Reasons* (EB-2006-0322/338/340 - NGEIR Motion to Review), May 22 2007 [“NGEIR”]; Also see *Decision and Order on Motion to Review* (EB-2013-0193 - Milton Hydro Motion to Review), July 4 2013, p.4; *Decision on Motion to Review Decision and Order* (EB-2013-0331 - NAN), January 16 2014), p.6

¹⁴ *NGEIR*, p.18

¹⁵ *NGEIR*, p.14

¹⁶ *NGEIR*, p.18

¹⁷ *Grey Highlands (Municipality) v. Plateau Wind Inc.*, 2012 ONSC 1001, para. 7

¹⁸ *Decision with Reasons* (RP-2004-0167/EB-2005-0188 - Natural Resource Gas Ltd. Motion to Review), October 6 2005, p.7

¹⁹ *Decision and Order* (EB-2009-0063 - Brant County Power Inc. Motion to Review), August 10 2010, para. 38

19. A reviewing panel is not tasked with re-considering afresh the evidence and arguments to determine what decision they would have reached. Rather, it is tasked with reviewing the decision to determine if it was unreasonable or there was a clear error.

20. The Board has consistently found that the standard of review of a reviewing panel is that of reasonableness, which requires “deference to the original hearing panel.”²⁰ Giving deference to the findings and conclusions of the original hearing panel is especially important in the rate-setting context, where there is almost never a clear ‘right’ or ‘wrong’ answer. Most decisions the Board makes when determining forecast budgets are ones that require judgment and balancing of various considerations.

21. The Decision at issue is a good example of this. The Board was faced with a number of different competing arguments and approaches regarding how to assess the Energy+ ACM proposal. It made a number of findings regarding its view of the insufficiency of the evidence. Deference should be given to its factual findings as they were reasonable.

Admissibility of the Expert Evidence on the Motion

22. Energy+ filed expert evidence of Mr. Kelsey in support of this motion. Mr. Kelsey’s evidence contains his opinion broadly on three matters: a) the appropriateness of the Powerstream and Enersource comparators, b) what appropriate inflation adjustment should be used in any comparison between other facilities and Southworks, and c) an independent Class C estimate based on the information provided by the Southworks facility architect.²¹

23. SEC submits that the evidence should not be considered in a motion to review, as they do not present new facts that have arisen or facts that could not have been discovered by reasonable diligence pursuant to the Rule 42.01(a)(i), (iii) or (iv).²² Motions to review are not meant to be hearings de novo, or an opportunity for an applicant to re-argue its case by providing evidence that it could or should have filed during its original proceeding.

²⁰ *Decision and Order* (EB-2018-0085 - OPG Motion to Review), August 30 2018, p.5; Also see: *Decision and Order* (Hydro One Networks Inc), March 7 2019, p.5; *Decision and Order* (EB-2016-0225 - Milton Hydro Motion to Review), February 22 2018, p.10

²¹ Written Evidence of Mr. Neil Kelsey [“Kelsey Evidence”], para 8

²² Ontario Energy Board, *Rules of Practice and Procedure*, Rule 42.01(a)(i),(iii),(iv)

24. Mr. Kelsey does not provide much new evidence related to the Enersource and Powerstream comparators. His opinions are of a similar type to the reservations OEB Staff expressed in its submissions, and that Energy+ referred to in its Reply Argument, which the Board did not accept.²³

25. With respect to the other evidence he provides, it is all evidence and analysis that could have been filed during the original proceeding. Energy+ should not now on a motion to Review be allowed to introduce new evidence related to the most appropriate inflation adjustment for building construction when its own evidence during the hearing included no inflation adjustment.

26. Energy+ was also in a position to file a third-party independent Class C estimate during the hearing as part of either its original evidence, or its updated evidence. If it had done so, that evidence would have thoroughly been tested, not just through interrogatories, but also by way of cross-examination at the oral hearing that was held. None of this evidence is new ‘facts’ that were discovered, nor facts that could have been provided with reasonable diligence.

27. While it is correct that Mr. Kelsey’s *analysis* of the facts was not available at the time of the original proceeding, it is the underlying facts, not the analysis of them that must be new or could not be discovered by reasonable diligence.²⁴

No Breach of Procedural Fairness

28. Energy+ argues that it was a breach of procedural fairness for the Board to rely on the Enersource and Powerstream comparators, as they were not filed as evidence by the parties, but appeared for the first time in OEB Staff’s submissions.

29. SEC notes that there has been no breach of procedural fairness. It is regular practice for parties during submissions to refer to publicly available information during argument. The Enersource and Powerstream comparators were included as part of OEB Staff’s submission and Energy+ was given an opportunity to comment on them during its Reply Argument.

²³ Kelsey Evidence, para 18-27; EB-2018-0028, OEB Staff Submissions, dated March 29 2019, p.7-10, EB-2018-0028 Energy +Reply Submission, paras 27-77

²⁴ The Board has previously rejected evidence filed on a motion to review that included various scenarios as they were based on information contained in audited financial statements available at the time. The Board noted that this “does not present new facts that have arisen or facts that could not have been discovered by reasonable diligence”. See *Decision and Order* (EB-2017-0171 - Hydro One/Orillia Power motion to review and vary decision in EB-2016-0276), dated August 23 2018, p.12

30. In fact, not only did Energy+ have an opportunity reply to OEB Staff's submission, it expressly thanked them for including the now disputed comparators: Energy+ wrote in its Reply Argument:

To support its conclusion that the costs to complete Southworks are comparable to other similar investments that have been approved by the OEB, OEB Staff cite publicly available information from the OEB's prior approval of a 2008 Powerstream administrative building and a 2012 Enersource administrative building. Energy+ would like to thank OEB Staff for ensuring that this additional benchmarking evidence is available for the Board panel's consideration. [emphasis added]²⁵

31. After thanking OEB Staff for bringing this information to the Board's attention so that it is "available for the Board panel's consideration", it now argues that the Board erred by considering it. What Energy+ is really upset about is that the Board simply did not agree with either it or OEB Staff's conclusions regarding that information. This is not a basis for a motion to review. It is simply a re-argument, which the Board has consistently said is not the purpose of a motion to review.

32. The information itself is also uncontroversial. Enersource and Powerstream information that OEB Staff used is the exact same type of information that Energy+ included in its own application with respect to four other comparators that it used.²⁶ The numbers were drawn from publicly available information.²⁷ While the inferences that the Board should draw from the information may differ among parties, Energy+ was given the opportunity to address it in its Reply Argument. It is telling that Energy+ did not cite a single legal authority or Board precedent to support its proposition that there was a breach in procedural fairness.

Enersource and Powerstream Comparators Benefited Energy+

33. Regardless of the appropriateness of using the Enersource and Powerstream comparators, their inclusion was to the benefit of Energy+.

34. The Board has consistently commented that benchmarking evidence is useful and an important part of its decision-making process.²⁸ Presumably in light of its importance, Energy+ filed as part of its Facilities Business Plan, a benchmark comparison of the three facilities it proposed to refurbish and construct against four comparator facilities constructed by other Ontario distributors.²⁹ Energy+'s view is

²⁵ EB-2018-0028 Energy +Reply Submission, p.9-10

²⁶ EB-2018-0028, Exhibit 2, p.1024; EB-2018-0028, Updated Evidence, p.11-13

²⁷ OEB Staff Submissions, dated March 29 2019, see ft note 21-22

²⁸ See for example, *Decision and Order* (EB-2012-0033 - Enersource), dated December 13 20102, p.37

²⁹ EB-2018-0028, Exhibit 2, p.1024; EB-2018-0028, Updated Evidence, p.11-13

that the comparison was favorable to it. It even relied on that analysis in its Argument-in-Chief in the original proceeding.³⁰

35. As SEC noted in its Final Argument, the problem with Energy+'s analysis is that it includes within its costs, all three facilities included in its plan, not just the Southworks facilities. This included the renovation of its existing Bishop Street facility.³¹ Renovation of one of its existing facilities is entirely dissimilar to both the Southworks facility, and those of the comparator distributor projects that Energy+ selected, which were all custom builds or purchase/refurbishing of a non-utility building.³²

36. The evidence showed that once Bishop Street facility was removed, and only the Southworks and Garden Street facility are included (which would include both operations and administration), Energy+'s forecast costs per square foot is significantly *higher* than the comparators.³³ Since the Garden St. facility was not before the Board at the time, it is not clear why the total cost per square foot was so much higher, but it is a concern that warrants requiring further information from Energy+, before approving the cost consequences of the project.³⁴

Benchmarking Table (SEC EB-2018-0028 Submissions)							
	Energy + (Entire Facilities Plan)	Energy+ (Southworks & Garden St.)	Energy + (Southworks)	Waterloo North Hydro	InnPower	Milton Hydro	PUC Distribution Inc.
Year of Occupancy	2022/22/24	2020/22	2022	2011	2015	2015	2012
Function	Admin & Ops	Admin & Ops	Admin	Admin & Ops	Admin & Ops	Admin & Ops	Admin & Ops
Type	Purchase/ Refubish	Purchase/ Refubish	Purchase/ Refurbish	Custom Build	Custom Build	Purchase/ Refubish	New Build
Capital Cost	\$14,500,000	\$12,500,000	\$8,100,000	\$26,682,000	\$10,896,704	\$12,524,798	\$23,000,000
Square Footage	88,243	35,143	21,892	105,000	36,172	91,872	110,382
Capital Cost/Square Footage	\$164.32	\$355.69	\$370.00	\$254.11	\$301.25	\$136.33	\$208.37

37. The average of the four comparators that Energy+ selected and provided in its evidence (Waterloo North, InnPower, Milton Hydro, PUC Distribution) was \$225 per square foot.³⁵ Energy+ did not include or even mention the need for an inflation adjustment so as to increase those costs to 2022 dollars so as to be comparable with the proposed Southworks facility.

³⁰ EB-2018-0028, Argument-in-Chief, dated March 15 2019, p.14-15

³¹ EB-2018-0028, SEC Final Argument, March 29 2019, para. 13-14

³² *Ibid*

³³ EB-2018-0028, SEC-TCQ-5

³⁴ *Ibid*

³⁵ Simple average of the comparators in SEC-TCQ-5

38. The Enersource and Powerstream comparators that OEB Staff used in its submissions resulted in an average cost per square foot of \$300. If the Board had only used the benchmarking evidence provided by Energy+, it would have resulted *in a greater reduction* to the proposed ACM amount. Based on the same methodology, comparing Southworks to the benchmark average, Energy+ would have faced a reduction of \$3.2M instead of \$1.6M.

39. It is also entirely unfair for Energy+ to criticize the Board’s use of the IRM inflation index and not a construction industry specific index, when Energy+ not only did not propose such an approach during the original proceeding, but did not include any inflationary adjustment to the comparators as part of its own benchmarking analysis. It should also not come as a surprise to Energy+ that parties were interested in the benchmarking analysis. There were numerous interrogatories and technical conference questions related to the issue.

40. Even though Energy+ did not include any inflationary amount in its own benchmarking comparison, SEC asked Mr. Kelsey to re-run the comparators included in the evidence, using his preferred industry specific construction index.³⁶ When the comparators cost per square foot are re-run to include the Building Construction Price Index, the average increased from \$225 to \$278 per square foot.³⁷ This benchmark is still below the Enersource/Powerstream average used in the Decision. SEC submits that on that basis Energy+ has not met the threshold test. Correction of the claimed error would not lead to a change in the outcome. In fact, it would likely lead to an even *greater* reduction in the approved amount.

Benchmarking Table (with BCPI Adjustment)							
	Energy + (Entire Facilities Plan)	Energy+ (Southworks & Garden St.)	Energy + (Southworks)	Waterloo North Hydro	InnPower	Milton Hydro	PUC Distribution Inc.
Year of Occupancy	2022/22/24	2020/22	2022		2011	2015	2012
Function	Admin & Ops	Admin & Ops	Admin	Admin & Ops	Admin & Ops	Admin & Ops	Admin & Ops
Type	Purchase/ Refubish	Purchase/ Refubish	Purchase/ Refurbish	Custom Build	Custom Build	Purchase/ Refubish	New Build
Capital Cost (w BCPI)	\$14,500,000	\$12,500,000	\$8,100,000	\$34,335,151	\$13,094,357	\$15,050,806	\$28,647,586
Square Footage	88,243	35,143	21,892	105,000	36,172	91,872	110,382
Capital Cost (w BCPI)/Square Footage	\$164.32	\$355.69	\$370.00	\$327.00	\$362.00	\$163.82	\$259.53
<small>Source: SEC-2(b)</small>							

³⁶ SEC-2(b)

³⁷ SEC-2(b)

Cost Per Square foot

41. Energy+ also claims that the Board's reliance on cost per square foot of the Southworks facility without regard to other aspects of the evidence was in error.³⁸ SEC submits that Energy+ has overstated the reliance on cost per square foot in its decision. The Board's decision was based on a number of factors which led it to find that Energy+ has provided insufficient evidence to approve the proposed \$8.1M capital budget. This included not just the benchmarking evidence filed by Energy+, and that included in OEB Staff's submissions, but also the uncertainty related to the cost estimate with more than 87% of the project to be tendered, nature of the proposed contingency amount, and the 62% increase in costs as the project moved from a Class D to Class C estimate.³⁹

42. Regardless, it was open to the Board to use cost per square foot as the sole measure of reasonableness if it so determined. Similar to the Board's envelope approach or use of benchmarking results, it is entirely consistent with past practice and appropriate for the Board to use an outcome based approach to determining the reasonableness of costs.

Accurate Cost Estimate Does Not Mean Reasonable Costs

43. While Energy+ recounts much of the evidence it filed in the original proceeding, it ignores evidence that demonstrates that it conducted no analysis to demonstrate Southworks was the best option for an administration only building. Much of the cited evidence was in support of the chosen solution to build a dedicated administration only facility, and refurbish the Bishop Street facility, as opposed to constructing a single administration and operations facility.

44. The evidence before the Board in the original proceeding was that Energy+ did not retain the help of a real estate professional to look at other options for a purely administrative building, either to purchase or lease.⁴⁰ Mr. Miles, the CEO of Energy+, testified that they did not do this because a) there is not a lot of real estate in Cambridge, and b) they were going to tender out the material and construction costs to ensure the costs are prudent.⁴¹ But as SEC argued neither rationale was sufficient. Energy+ is not a real estate company, and in preparing to spend millions of dollars to purchase and construct a new building, it was incumbent upon them to do the necessary due diligence to determine that the specific site it purchased was the most cost effective solution.⁴² Having a purely administrative building may be prudent

³⁸ Argument-in-Chief, para 12

³⁹ Decision, p.14

⁴⁰ EB-2018-0028, Transcripts, Vol., p.49-50

⁴¹ EB-2018-0028, Transcripts, Vol., p.49-50

⁴² EB-2018-0028, SEC Final Argument, March 29 2019, para. 11-12

in the context of the overall Facility Plan, there is no evidence on the record to justify that the Southworks facility itself is the prudent option.

45. Mr. Kelsey's Class C estimate is also of limited use to the Board in determining the reasonableness of the proposed forecast costs. The estimate was based on the Design Brief provided by the Energy+ architect. While the estimate of overall costs is not too different from that provided by Energy+ in its evidence, at best this demonstrates that the forecast costs for the Southworks facility are relatively accurate. But that is different from saying that the Southworks facility and its cost consequences area reasonable. Mr. Kelsey was not asked to review the Energy+ decision to select the Southworks facility.⁴³

46. Moreover, none of this addresses the specific concerns that the Board had with the quality of the cost estimates provided by Energy+. Mr. Kelsey's evidence does not address the comments from the Board regarding the improvement in accuracy from when it went from a class D to Class C estimate, nor the issue regarding the level of contingency built into the budget. If anything he raised additional concerns regarding the level of contingency. Whereas Energy+ had built in a \$400,000 contingency⁴⁴, Mr. Kelsey's estimate includes an amount that is more than double (\$889,000).⁴⁵

47. The Board's decision provides Energy+ with approval of a sufficient amount of funding for an administration only building. It may be, that based on the current design, the allotted funding may not sufficiently cover the costs. But the Board's Decision provides for two options. First, Energy+ can construct an administration only facility, including at Southworks, that is more cost effective or has the design scaled down. Second, the Board expressly allows Energy+ to come back to the Board before the rate rider is applied to request further funding if it can justify it.

Relief

48. SEC submits the Board should deny Energy+'s motion to review and vary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

⁴³ SEC-3

⁴⁴ Decision, p.14

⁴⁵ Kelsey Evidence, Appendix B, p.10. This is the contingency amount of \$829,000 and an additional contingency for work to existing shell (5%).

Original signed by

Mark Rubenstein
Counsel to the School Energy
Coalition