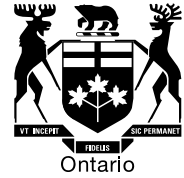


**Ontario Energy
Board**
P.O. Box 2319
27th. Floor
2300 Yonge Street
Toronto ON M4P 1E4
Telephone: 416- 481-1967
Facsimile: 416- 440-7656
Toll free: 1-888-632-6273

**Commission de l'énergie
de l'Ontario**
C.P. 2319
27e étage
2300, rue Yonge
Toronto ON M4P 1E4
Téléphone: 416- 481-1967
Télécopieur: 416- 440-7656
Numéro sans frais: 1-888-632-6273



BY E-MAIL

October 17, 2019

Christine E. Long
Registrar and Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Long:

Re: Energy+ Inc. (Energy+)
Motion to Review and Vary the Decision and Order EB-2018-0028
OEB File Number EB-2019-0180
OEB Staff Submission

In accordance with Procedural Order No. 2, please find attached OEB staff's submission for the above-noted proceeding.

Energy+ and all intervenors have been copied on this filing.

Yours truly,

Original Signed By

Shuo Zhang

Project Advisor, Electricity Distribution - Major Rate Applications & Consolidations

Encl.

**Motion to Review and Vary the Decision and
Order EB-2018-0028**

ENERGY+ INC.

EB-2019-0180

OEB STAFF SUBMISSION

OCTOBER 17, 2019

I. INTRODUCTION

Energy+ Inc. (Energy+) filed a motion to review and vary (Motion)¹ the Decision and Order issued on June 13, 2019 in respect of Energy+'s application for electricity rates effective January 1, 2019 (Decision).²

The Motion requested that the Ontario Energy Board (OEB) review and vary the Decision with respect to its conclusions regarding the Advanced Capital Module (ACM) and the impact of Bill C-97. The Motion also requested an Order that Energy+ satisfies the "threshold test" in Rule 43.01 of the OEB's *Rules of Practice and Procedure* (Rules).³

In Procedural Order No. 1, the OEB dismissed the Bill C-97 portion of the Motion at the threshold stage without a hearing pursuant to Rule 43 given the OEB's accounting direction to all electricity distributors.⁴ The OEB also determined that it would hear 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. Energy+ stated that it has retained an expert, CBRE Limited (CBRE), to provide an opinion relevant to the ACM issue.

In Procedural Order No. 2, issued on August 22, 2019, the OEB approved Energy+'s request to file further evidence in support of the Motion and provided additional steps for a discovery process of the additional evidence.

On September 13, 2019, Energy+ filed the written evidence that was prepared by Mr. Neil Kelsey, Director Cost Consultancy for the Central and Eastern Region of CBRE Limited, a firm that offers cost consultancy services for real estate and other services related to property sales and leasing (CBRE Evidence).⁵

¹ EB-2019-0180, Notice of Motion, filed July 2, 2019.

² EB-2018-0028, Decision and Order, issued June 13, 2019 and corrected June 18, 2019.

³ https://www.oeb.ca/oeb/Documents/Regulatory/OEB_Rules_of_Practice_and_Procedure.pdf

⁴ Letter from OEB to all rate-regulated electricity and natural gas utilities, Re: Accounting Direction Regarding Bill C-97 and Other Charges in Regulatory or Legislated Tax Rules for Capital Cost Allowance, July 25, 2019.

⁵ EB-2019-0180, Written Evidence of Mr. Neil Kelsey, filed September 13, 2019 (CBRE Evidence), page 4.

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

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

OEB Decision in EB-2018-0028

In its cost of service application for rates effective January 1, 2019, Energy+ applied for an ACM in the amount of \$8.1 million to renovate and convert an existing heritage building in downtown Cambridge into an administrative office building (Southworks facility).⁶ The OEB found that the materiality and need criteria for the ACM request were met but that there was insufficient evidence that the \$8.1 million budget for the Southworks facility was prudent. The Decision approved \$6.5 million for the ACM instead of the \$8.1 million requested by Energy+.

In evaluating the prudence of the ACM, the OEB questioned the reliability and quality of Energy+'s cost estimate. Regarding reliability, the OEB noted that 87% of the budget will be awarded based on a competitive tender process, which presents a significant uncertainty. With respect to quality, Energy+ pointed to its effort to improve its cost estimate from Class D ($\pm 30\%$ uncertainty) to Class C ($\pm 20\%$ uncertainty) by completing 30% of the design, building and site due diligence, environmental approval, etc. However, the OEB found that there did not appear to be a corresponding improvement in the accuracy of the cost estimate in spite of the 62% increase in the actual estimate (from initial estimate of \$5 million to the updated estimate of \$8.1 million).⁷

⁶ In its original pre-filed evidence, Energy+ stated that it had obtained an estimate of \$5.0 million from Melloul Blamey to renovate the Southworks for administrative offices. EB-2018-0028, Exhibit 2, Appendix 2-1, page 1040. After the settlement conference in November 2018, Energy+ revised the estimate to \$8.1 million. EB-2018-0028, Energy+ Update to Evidence, December 13, 2018, page 6.

⁷ Decision, pp. 13-14.

The Decision noted that the Southworks facility is only intended to accommodate administrative staff while the comparisons provided by Energy+ were for facilities developed by other distributors which were designed to accommodate a combination of administrative and operations staff.⁸

In its submission OEB staff prepared a comparison of the estimated cost of the Southworks facility with two other, administrative-only facilities, PowerStream and Enersource, which showed that the Southworks facility cost was still higher but by a narrower margin. The Decision used the comparators submitted by OEB staff and determined that, when adjusted for the OEB's approved inflation factors, the cost range of those facilities (PowerStream and Enersource) would be approximately between \$250 and \$350 per square foot with an average of \$300 per square foot. If that average cost was applied to the Southworks facility the estimated total cost would be \$6.5 million.

The OEB concluded that Energy+ had not provided sufficient evidence in support of its \$8.1 million cost estimate and, based on reasonable comparisons and the history of the development of the Energy+ estimates, that a funding envelope of \$6.5 million was reasonable.⁹

Motion to Review

The Motion asserts that the Decision contains three errors with respect to the ACM which are grounds for a motion to review under the Rules:

- i. Relying upon benchmarking comparisons that were not filed in evidence by the parties
- ii. 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. Applying an inflation index to the comparisons that was not grounded in evidence.¹⁰

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ EB-2019-0180, Energy+ AIC, page 3.

OEB staff's submission will address each of the alleged errors set out in the Motion, with respect to both the Threshold Test (Part 1) and the Merits (Part 2) of the Motion.

II. STAFF SUBMISSION

1) Threshold Test

Under Rule 43.01 of the OEB's Rules, the OEB may determine, with or without a hearing, a threshold question of whether a matter should be reviewed before conducting any review on the merits.

The factors considered under Rule 43.01 are similar to the grounds for a motion to review under Rule 42.01 which require that a motion for review set out grounds that raise a question as to the correctness of the order or decision in question, and may include the following: (i) error in fact; (ii) change in circumstances; (iii) new facts have arisen; and (iv) facts that were not placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time. However, as the OEB has stated in other cases, this list is not exhaustive but illustrative.¹¹

The purpose of the threshold test was articulated by the OEB in its decision on a Motion to Review the Natural Gas Electricity Interface Review Decision (NGEIR Review Decision).¹² In the NGEIR Review Decision, the OEB stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision. In order to proceed with a review on the merits of a motion to review, the OEB had to determine that there was 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.

In the NGEIR Review Decision the OEB stated:

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel.

¹¹ Natural Gas Electricity Interface Review Decision with Reasons, EB-2006-0322/0338/0340 (May 22, 2007) (NGEIR Review Decision)

¹² NGEIR Review Decision, page 18

that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.¹³ (emphasis added)

In *Grey Highlands v. Plateau*¹⁴ the Divisional Court dismissed an appeal of an OEB decision where the OEB had determined that the motion to review did not meet the threshold test and the OEB did not proceed to review the earlier decision. In upholding the OEB's decision, the Divisional Court stated:

The OEB's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing.¹⁵ (emphasis added)

Having set out the principles of the threshold test articulated in the OEB's *Rules of Practice and Procedure* and case law, OEB staff's submission will now address the alleged grounds for review raised in the Motion and AIC in the Motion, in the context of the Threshold Test.

i. Comparisons to PowerStream and Enersource Costs

In its Motion and AIC, Energy+ alleges that the Decision is erroneous because the OEB relied upon comparisons and benchmarks that were "never submitted into evidence".¹⁶

OEB staff notes that Energy+'s pre-filed evidence first introduced comparisons to "data taken from rate applications for a number of other distributors" and submitted that "Energy+ plan compares very favorably to other new facilities".¹⁷

¹³ *Ibid*

¹⁴ *Grey Highlands (Municipality) v. Plateau Winds Inc.* [2012] O.J. No. 847 (*Grey Highlands v. Plateau*) at para 7

¹⁵ *Grey Highlands v. Plateau* at para 7

¹⁶ Energy+ AIC, page 1, para 1

¹⁷ EB-2018-0028, Energy+ Pre-filed Evidence, filed April 30, 2018, Exhibit 2, page 1053 – 1055, Table 6 sets out the costs of Administration & Operations facilities of Waterloo North Hydro (EB-2015-0108), InnPower (EB-2014-0086), Milton Hydro (EB-2015-0089) and PUC Distribution (EB-

Energy+ stated that, although it apparently considered the PowerStream facility costs (along with the Hydro Ottawa facility), it deliberately excluded them from the comparison on the basis that “these distributors are significantly larger than Energy+”.¹⁸

OEB staff notes that, firstly, even in its own pre-filed evidence, Energy+ considered it appropriate to benchmark the Southworks cost estimate against costs of other local distribution companies (LDCs). It was not unreasonable for the OEB to expect Energy+ to be aware, at the outset of the proceeding, that comparison to other LDCs’ publicly available project costs could be examined in order to assess the reasonableness and prudence of the cost estimate for the Southworks facility. In fact, benchmarking generally is an expectation in cost based or rate cases involving a prudence review.

Secondly, Energy+ did not object to the use of different comparators, i.e. PowerStream and Enersource, when they were presented in OEB staff’s submission. As the Decision noted, the comparators presented by Energy+ were for combined administrative and operations facilities but the panel found that it was “more relevant” to consider administrative-only facilities as put forth in OEB staff’s submission.¹⁹

In response to OEB staff’s submission, which provided the data regarding cost per square foot for PowerStream and Enersource, Energy+’s Reply Submission stated:

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.

2012-0162). This cost comparison was updated in Exhibit K-1.1, Responses to Technical Conference Questions, Part 1 (Updated Evidence), pages 114-117

¹⁸ *Ibid*, at page 1055

¹⁹ Decision at page 13 and OEB Staff Submission in EB-2018-0028, page 9.

Energy+ agrees with OEB Staff's reservation on the use of these comparators, in particular the fact that they do not account for the presence of inflation in the construction sector since 2008 or 2012. Energy+ expressed a similar reservation about its own comparators in its AIC.²⁰

If Energy+ had an objection to the use of "publicly available information" from the PowerStream and Enersource applications, it should have objected to it in its Reply Submission, but instead Energy+ welcomed the "additional benchmarking evidence" for the panel's consideration.

In its Reply Submission, SEC also comments on OEB staff's submission on the PowerStream and Enersource comparators:

Board Staff's submissions compare the Southworks forecasted costs with projects for administrative offices for both the former PowerStream and Enersource distributors (now part of Alectra). On a cost per square foot, they are both substantially lower costs than the forecast Southworks project. While Board Staff is correct to note the various limitations of the comparison, SEC does not understand how a difference in cost of 23% and 62% leads to the conclusion that the "proposed capital cost per square foot for the Southworks facility is comparable to similar investments that have been approved by the OEB".²¹ (emphasis added)

In response to SEC's criticism that the comparators cited in the OEB staff submission are "substantially lower costs than the forecast Southworks project", Energy+ again does not reject the use of those comparators but points out that the comparative costs do not account for inflation. Energy+'s Reply Submission states:

In reply submissions, SEC comments on the OEB staff's new administrative building comparators but fails to account for known inflationary cost increases when comparing the Southworks cost per sq. ft. directly with PowerStream and Enersource projects.²²

²⁰ EB-2018-0028, Energy+ Reply Submission, pages 9-10, para 28-29

²¹ EB-2018-0028, SEC Reply Submission, filed April 5, 2018, page 1, para 2

²² EB-2018-0028, Energy+ Reply Submission, page 10, para 32

Conclusion

OEB staff submits that the argument put forward by Energy+ 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.

OEB staff submits that the Decision correctly found that the comparators provided in OEB staff's submission were relevant and using those comparators, instead of Energy+'s proposed comparators, does not give rise to an "identifiable error" that raises questions as to the correctness of the Decision.

As stated in the NGEIR Review Decision, in order to demonstrate an error the applicant must be able to show that, "the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature."²³ OEB staff submits that the arguments put forward in the Motion and AIC fail to demonstrate that the use of the PowerStream and Energy+ comparators in the Decision amounts to an identifiable error and the Motion therefore does not meet the threshold test for review on this ground.

ii) Average cost per square foot for an administration only facility

In its Motion and AIC, Energy+ argues that the Decision contains an error of fact and 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.²⁴

OEB staff submits that there was sufficient evidence on the record, in publicly available information and in submissions by all parties, including Energy+, to arrive at the figure of \$300 per square foot as a reasonable average cost for comparator projects against which to compare the reasonableness of the cost estimate for the Southworks project.

Firstly, as discussed above, Energy+ was aware of publicly available information, including the costs per square foot for the administrative portions of the

²³ NGEIR Review Decision, page 18

²⁴ AIC, page 10 para 37

PowerStream (\$301) and Enersource (\$228) projects. While this information was provided in OEB staff's submission, it is also readily found on the public records of those proceedings, which were referenced in the OEB staff submission.²⁵

In any event, Energy+ in its Reply Submission did not take issue with the information provided in OEB staff's submission regarding the PowerStream and Enersource costs per square foot or challenge the appropriateness of using them as comparators, except to agree with OEB staff's reservation since they did not account for the presence of inflation.²⁶

Secondly, using the approved annual incentive rate-setting mechanism (IRM) inflation factors applied to the PowerStream and Enersource costs to arrive at a range of \$250-\$350 per square foot, the Decision arrived at an average cost of \$300 and applied that to the Southworks project. The Decision applied that average (\$300) to the area to be developed at Southworks, and found that the cost for the Southworks facility would be \$6.5 million and not the \$8.1 million in Energy+'s updated estimate.²⁷

OEB staff submits 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 LDC facilities.

iii) Applicable inflation index

In its Motion and AIC, Energy+ argues that the Decision contains a material error in applying the wrong inflation index to the benchmarking comparators, namely the OEB IRM inflationary factors, instead of a construction specific index.

²⁵ EB-2018-0028, OEB Staff Submission, filed March 29, 2019, page 9 and footnotes 21 – 22. Comparison of the specific costs of PowerStream and Enersource costs per square foot were filed in EB-2012-0033, Exhibit K4.6 and Transcript Volume 4, pages 11-14.

²⁶ Energy+ Reply Submission, page 10, para 29

²⁷ When it first filed the cost of service application, Energy+ provided an estimate of \$5.0 million to renovate the Southworks facility for administrative offices (EB-2018-0028, Exhibit 2, Appendix 2-1, page 1040). After the settlement conference in November 2018, Energy+ revised the estimate to \$8.1 million.

Firstly, OEB staff notes that, in its original application, Energy+ did not file any evidence or make submissions regarding an appropriate inflationary factor that should be applied to any benchmarking comparators.²⁸

In its AIC in the original rate application, Energy+ stated:

Any such benchmarking comparisons are not a perfect exercise. Costs for the comparators are from 2011, 2012 and 2015, which have not been adjusted for known inflationary increases in materials or construction costs. Consequently the costs of the comparators are understated when comparing to a Facilities Plan for the period 2020-2024.²⁹

Hence, while recognizing that the comparators in its own submission did not include an inflationary adjustment, Energy+ did not propose an appropriate factor that should be applied for inflationary increases.

In its Reply Submission in the rate case, Energy+ stated:

Energy+ agrees with OEB Staff's reservation on the use of these (PowerStream and Enersource) comparators, in particular the fact that they do not account for the presence of inflation in the construction sector since 2008 or 2012. Energy+ expressed a similar reservation about its own comparators in its AIC.³⁰

Again, instead of proposing a different inflationary factor that should be applied to the cost per square foot comparison to the PowerStream and Enersource projects, the Reply Submission refers to the OEB's IRM inflationary measures for the previous 10 year period. The Reply Submission states:

In reply submissions, SEC comments on the OEB staff's new administrative building comparators but fails to account for known inflationary cost increases when comparing the Southworks cost per sq. ft. directly with PowerStream and Enersource projects...

²⁸ EB-2019-0180, Response to Interrogatory SEC-2 on CBRE Evidence.

²⁹ EB-2018-0028, AIC, page 16, para 43

³⁰ EB-2018-0028, Reply Argument, pages 9-10, para 28-29

By contrast, the OEB's IRM inflationary measures over this same period of time is shown below... ³¹ (emphasis added)

While Energy+ does not submit that the the IRM inflationary measures should be applied to the PowerStream and Enersource project costs per square foot, neither does it suggest that the IRM inflationary factors are not appropriate or that applying those factors to the PowerStream and Enersource comparators per square foot is not appropriate.

Given the apparent acceptance of the PowerStream and Enersource comparators and the reference to the IRM inflation factors in Energy+'s 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. The Decision stated:

To address the concern that the \$370 per square foot cost estimate is significantly higher than other comparators, Energy+ stated that inflationary cost increases and utilization (square foot per FTE) should also be factored in when using the cost per square foot benchmark. Energy+ reviewed the OEB published inflation factors for the period of 2008 to 2017 and supported OEB staff's administrative building comparison of Southworks with the PowerStream and Enersource projects.³²

As indicated above, the panel considered, among other things, the resulting cost per square foot when the IRM inflation factors are applied to the Enersource and PowerStream comparators, and found that the average of the comparators, adjusted for inflation, was \$300 per square foot. Energy+'s estimated cost of \$370 per square foot for the Southworks facility exceeded the average of those comparators.

Even though the Decision panel had considered evidence and submissions that Energy+ did not find objectionable at the time that arguments were made, Energy+ was dissatisfied with the outcome of the Decision. It was only in the

³¹ EB-2018-0028, Reply Argument, pages 10-11, para 32-33

³² Decision and Order, page 12

material filed in support of the Motion³³ that Energy+, for the first time, proposed a “more appropriate inflation index specific to the construction industry”, namely the Non-Residential Building Construction Price Index (BCPI). In response to interrogatories on the CBRE Evidence, Energy+ stated that it is “not an expert in benchmarking and did not have readily available the applicable inflationary adjustments that are relevant to the construction industry.”³⁴

OEB staff submits that Energy+ had the opportunity in the original rate application to file evidence and make submissions that the BCPI, and especially a BCPI applicable to metropolitan areas and the Toronto and GTA region in particular,³⁵ was the appropriate inflation factor that should be applied.

OEB staff submits that the onus is on the applicant utility to supply the proper evidence on which the OEB can consider a rate application.³⁶ Energy+ failed to provide sufficient evidence in support of the requested cost approval for the Southworks facility in the original rate application. OEB staff referred to previous cases that were in the public domain and known to Energy+, in an effort to address gaps in the evidence, and Energy+ did not object to their use, in their Reply Submission. Energy+ has introduced new information in this Motion which is equivalent in OEB staff’s view to an attempt to reargue the rate case and does not constitute grounds for a motion to review the Decision.

Furthermore, had Energy+ filed evidence and arguments supporting the BCPI, OEB staff and intervenors would have had an opportunity to properly test the evidence through cross-examination and / or independent expert evidence. While staff and intervenors filed IRs in the review motion inquiring into, among other

³³ CBRE Evidence, page 15, para 32.

³⁴ EB-2019-0180, Response to Interrogatory SEC-2 on CBRE Evidence

³⁵ CBRE Evidence, page 13 at para 25 states: “The construction cost steady increase referred to above ...illustrate the escalation over the period of 2008-2021 in the Toronto region, based on the Building Construction Price Index...Given that Toronto is the closest region to Cambridge, it makes sense to use this data for adjustment of costs from the appropriate year.” (emphasis added) See also, paras 25, 29, 30.

³⁶ Ontario Energy Board Act, s.78 (8) provides that the burden of proof in an application under section 78 is on the applicant.

matters, the appropriateness of using a BCPI for Toronto, the responses were not useful.³⁷

The IRM inflationary factor for 3rd Generation IR (2007 – 2013) used the GDP-IPI (FDD), a macroeconomic index that 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 (IPI).³⁸ For the 4th Generation IR period (2014 and onwards) the OEB adopted a 2-factor methodology as a more industry specific inflation measure.³⁹

OEB staff submits 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.

Applying an accepted inflationary escalator, in the absence of any alternative proffered by Energy+ in the original proceeding, does not raise a question as to the correctness of the Decision on this point, and the Motion therefore does not meet the threshold test for review.

The information regarding BCPI inflation factors was not placed in evidence by Energy+ in the original proceeding, but it is not “new facts” or facts that “could not have been discovered by reasonable diligence” in the original proceeding. The introduction of this information at the Motion to review stage is not sufficient to establish grounds for review under Rule 43.01. It is re-litigating the issues in the

³⁷ Staff-CBRE-3(a) asked whether the BCPI is the only guide used by professional quantity surveyors. In response to Staff-CBRE-3(b) whether any other indices, standards, etc were used to assess cost escalations for this type of development in a given geographic area, the response was that CBRE is not aware of and did not consider any other indices or sources of information. In response VECC-2 and VECC-3, whether any comparable properties were considered more specific to the Cambridge-Preston area, Energy+ declined to provide information that was not specifically within the instructions given to Mr. Kelsey by Energy+ counsel.

³⁸ Gross Domestic Product Implicit Price Index for final domestic demand (GDP IPI FDD) Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors, July 14, 2008, pages 8-11

³⁹ EB-2019-0379 Report of the Board – Rate Setting Parameters and Benchmarking under the Renewed Regulatory Framework for Ontario's Electricity Distributors, November 21, 2013, pages 5-8

original proceeding and the motion therefore does not meet the threshold test to proceed to a review on the merits.

iv) Other Considerations in the Decision re Southworks Estimate

The Motion and AIC allege that the Decision contains three identifiable errors on which the Decision was based. As discussed above, OEB staff does not agree that the Decision is erroneous on those three points, but also notes that those were not the only factors that the panel considered in arriving at its decision.

The Decision, in both the Background and Findings sections, referred to the evidence and submissions of Energy+, OEB staff and intervenors that were relevant to the panel's decision-making.⁴⁰

The Decision findings section starts with the conclusion that there is 'insufficient evidence' to approve a capital budget of \$8.1 million as prudent and then states that the "finding is reinforced by the comparison to similar facilities developed by other distributors" (emphasis added).⁴¹

Hence, in OEB staff's view, the starting point in finding that the \$8.1 million budget was not prudent is that there was insufficient evidence to support that it was and that finding was reinforced by considering comparators.

The Decision findings first considered the comparisons that Energy+ provided, which were for both operations and administrative functions, and found that, compared to those, the Southworks facility estimate was 'significantly higher', i.e. 29% - 171%.⁴² In other words, the Decision indicates that the Southworks estimate was too high, on the basis of the comparators Energy+ had put forth, before even considering the Enersource and PowerStream comparators that OEB staff presented.

After comparing the Southworks costs per square foot with the comparators put forth by OEB staff, and applying the IRM inflation factor to arrive at \$300 per square foot, the Decision uses the average of \$300 per square foot to conclude that the cost would be \$6.5 million. In the absence of better evidence from

⁴⁰ Decision, pages 7-11

⁴¹ Decision page 13

⁴² Decision page 13 and EB-2018-0028, Energy+ responses to SEC-TCQ-5, January 22, 2019.

Energy+, that is the funding envelope the OEB approved. The Decision states that this funding envelope was approved “given reasonable comparisons and the history of the development of the Energy+ estimates” (emphasis added.)⁴³

It is also important to note that the findings reference other concerns that the Decision panel had regarding the Energy+ estimate, including:

- 87% of the construction contract had yet to be awarded and this presents significant uncertainty regarding the reliability of the estimate
- The quality and accuracy of the estimate (Class C), with 62% increase in cost over its previous Class D estimate of \$5 million
- The increase in contingency from \$125,000 to \$400,000 even as the accuracy of the estimate was presumably improved from a Class D estimate to a Class C estimate

The above-noted and other concerns were also canvassed in the Background section of the Decision, including the absence of alternative analysis of other options for a dedicated administrative facility. This was one of the arguments made by intervenors (Consumers Council of Canada (CCC), SEC and VECC) who submitted that the OEB should reject the ACM proposal for the Southworks facility and Energy+ should file a subsequent Incremental Capital Module application with additional evidence.⁴⁴

Conclusion re Threshold Test

OEB staff submits that Energy+ fails to establish sufficient grounds in its Motion to raise a question as to the correctness of the Decision such that a review of the issues could result in the OEB varying, cancelling or suspending the Decision. The Motion therefore does not meet the threshold test and should be dismissed without proceeding with a review on the merits.

⁴³ Decision page 14

⁴⁴ Decision page 10

2) Merits of the Motion

If the OEB determines that the Motion does meet the threshold test to proceed with a review, OEB staff submits that the Motion failed to demonstrate, on the merits, that the Decision should be reviewed and varied for any of the items discussed in this submission. OEB staff repeats and relies on the submissions set out in the preceding section on the Threshold Issue in support of its view that the Motion should also be dismissed on its merits.

In addition, OEB staff provides the following additional submissions on the merits of the Motion.

a) CBRE Evidence

As discussed above, Energy+ filed new evidence in support of its cost estimate for the Southworks facility prepared by CBRE Limited, a firm that offers cost consultancy services for real estate and other services. CBRE was engaged to provide evidence relating to prudence assessment in the Decision regarding the Southworks facility and was instructed to review and provide opinions on:

- i. The PowerStream and Enersource comparators referenced in the Decision
- ii. Average cost per square foot of those comparators
- iii. Appropriate rate of inflation to apply to their average cost per square foot to provide a current average cost

In addition, CBRE also prepared an independent Class C Estimate based on the Design Brief prepared by the Architect, Martin Simmons.⁴⁵

OEB staff will address each of these aspects of the CBRE Evidence below:

- i) PowerStream and Enersource Comparators

The CBRE Evidence indicates that there are limitations, risks and challenges in using comparisons of costs per square foot derived from prior approvals of other

⁴⁵ CBRE Evidence, pages 5-6, paras 7-9

LDCs' facilities.⁴⁶ The CBRE Evidence also indicates that, in order to perform more reliable benchmarking comparison of the PowerStream, Enersource and Southworks facilities, further information would be needed such as, for example, detailed breakdowns of construction costs, drawing plans, etc., but CBRE was unable to find sufficient information on the PowerStream and Enersource comparators.⁴⁷ However, in the absence of detailed information, in order to attempt comparison on an equal basis, appropriate escalation should be applied to the comparators.⁴⁸

The CBRE Evidence then considers construction industry escalation / inflation, namely the Building Construction Price Index (BCPI)⁴⁹ and applies the BCPI to the PowerStream and Enersource comparators, and arrives at a cost per square foot for 2021 of \$409 (PowerStream) and \$284 (Enersource).⁵⁰

OEB staff notes that the CBRE Evidence appears to accept that the PowerStream and Enersource costs could be used for comparison with the cost estimate for the Southworks facility, provided that an appropriate inflation factor is applied. OEB staff therefore submits that the Decision was not incorrect in considering these comparators as part of its findings on the prudence of the Southworks cost estimate.

ii) Average cost per square foot

The CBRE Evidence indicates that, other than cost per square foot, other metrics could be used in determining prudence, although they tend to be more relative to a particular market or sector.⁵¹

In OEB staff's view, the CBRE Evidence does not indicate that a metric using cost per square foot is inappropriate, or that there are better metrics or benchmarks of performance. Accordingly, there is no merit in the argument that

⁴⁶ CBRE Evidence, page 9, para 13

⁴⁷ CBRE Evidence, pages 10-11, paras 14-16

⁴⁸ CBRE Evidence, page 12, para 19

⁴⁹ CBRE Evidence, page 13, para 26. The Statistics Canada BCPI collects residential and non-residential price movements and market information across 11 census metropolitan areas in Canada. The Ontario geographic areas covered by the BCPI are Toronto and Ottawa.

⁵⁰ CBRE Evidence, page 16,

⁵¹ CBRE Evidence, page 12, para 21

cost per square foot is not an appropriate metric and the Motion fails to demonstrate the Decision was incorrect in considering this metric.

iii) Appropriate inflation rate

As discussed above, the CBRE Evidence advocates using an inflation rate specific to the construction industry, i.e. the non-residential BCPI for the purpose of escalating construction costs. CBRE chose the BCPI for Toronto because it is the closest location to Cambridge, Ontario.⁵²

As discussed in the threshold section, OEB staff submits that the IRM inflation factor is a more appropriate index than an industry specific price index. However, if the OEB agrees with CBRE that a construction specific inflation index should be applied for the purpose of escalating the Southworks construction costs, OEB staff submits that it is not clear that the BCPI is the appropriate escalation factor to apply for Southworks. Although Melloul Blamey, when preparing the original \$8.1 million estimate, did not specify the inflation factors used in its cost estimate, it appears that CBRE uses a higher estimate of escalation than the assumption used by Melloul Blamey. OEB staff notes that when Melloul Blamey's cost estimate changed from Class D (2017) to Class C (2018), an amount of \$124,000 was identified as inflation related,⁵³ which represents approximately 2.9% of the original Class D estimate. This calculated escalator is lower than the BCPI of 3.2% from 2017 to 2018.⁵⁴ Based on the discussion above, OEB staff submits that the construction inflation factor used by Melloul Blamey might have been a more appropriate index to use, however it was not presented by Energy+ in the original rate case and, as such, it was not tested in that proceeding.

If the OEB accepts BCPI as an appropriate inflation factor, OEB staff submits that BCPI should be applied only until 2019 not 2021, in order to be consistent with the basis of the requested \$8.1 million in Melloul Blamey's cost estimate.⁵⁵ Applying BCPI to PowerStream and Enersource comparators to 2019, rather

⁵² CBRE Evidence, pages 14-15. The only other Ontario region covered by the BCPI is Ottawa.

⁵³ EB-2018-0028, TCQ-SEC-1.

⁵⁴ CBRE Evidence, page 16.

⁵⁵ Melloul Blamey's cost estimate was prepared in December 2018 (EB-2018-0028, TCQ-SEC-2, Design Brief, and Appendix H) and it does not include cost escalation for work and materials for a future construction start date (EB-2018-0028, TCQ-SEC-2, Design Brief, page 13 of 14).

than to 2021, the 2008 PowerStream cost would be at \$390 per square foot and the 2012 Enersource cost would be \$271 per square foot. The average of these comparators is \$330.50 per square foot and multiplying this average amount by the total square footage of the Southworks facility would result in an estimate of \$7,104,428.⁵⁶ This cost is \$1 million lower than the requested \$8.1 million for the Southworks facility and \$0.6 million higher than the OEB approved amount. It is OEB staff's view that the cost comparison of \$7.1 million demonstrates that the Decision was within a range of reasonableness and therefore the Decision should not be varied.

b) CBRE Class C Cost Estimate

OEB staff submits that although CBRE performed an independent Class C cost estimate, it did not address all of the issues identified by intervenors and the OEB with respect to the prudence of the cost estimate for the Southworks facility. For example, the CBRE Evidence did not address the appropriateness of Energy+ selecting Southworks as its dedicated administration office,⁵⁷ and therefore does not support the prudence of the Southworks facility.

However, if the OEB accepts the CBRE Evidence in support of the prudence of the cost estimate for the Southworks facility, OEB staff provides a brief summary of key deficiencies of the CBRE evidence in the following discussion.

CBRE performed an independent Class C cost estimate and arrived at a total project cost of \$7.8 million for the Southworks project.⁵⁸ OEB staff compared the original / initial cost estimates prepared by Melloul Blamey⁵⁹ and the CBRE Estimate in Table 1 below.

⁵⁶ $330.5 \times 21,496 = 7,104,428$. Per Staff-CBRE-1 part e), Energy+ clarified that 21,496 is the updated square footage of the property.

⁵⁷ EB-2019-0180, SEC-3 and VECC-1.

⁵⁸ CBRE Evidence, section 6.0 Financial Summary.

⁵⁹ EB-2018-0028, TCQ-SEC-1 and TCQ-SEC-2, Design Brief, Appendix H.

Table 1. Melloul Blamey and CBRE Class C Cost Estimates Comparison

Cost Component	Melloul Blamey Cost Estimate ¹ (\$)	CBRE Cost Estimate ² (\$)	Difference
	A	B	A-B
Area (sf)		21,496	
Building	4,580,203	4,160,685	419,518
Sitework	305,525	417,000	(111,475)
Net Construction Cost	4,885,728	4,577,685	308,043
\$/sf	227	213	
General Conditions	681,447	517,000	164,447
Allowances	435,815	145,815	290,000
Construction Management Fee	420,000	161,000	259,000
Pre-Construction Service Fee	30,000	N/A	
Total Project Developmemt Cost	6,452,990	5,401,500	1,051,490
\$/sf	300	251	
Professional Fees: Architectural, structural, mechanical, electrical, civil	607,772	617,772	(10,000)
Firewall ³	254,000	269,315	(15,315)
Furniture/stations	400,000	400,000	-
Building Permit Fees	10,000	10,000	-
Contingency	375,000	889,000	(514,000)
CBRE Cost Estimate Escalation to 2020	N/A	222,000	
Total Project Costs	8,099,762	7,809,587	290,175
\$/sf	377	363	
Notes:			
1. EB-2018-0028, TCQ-SEC 1 and TCQ-SEC-2, Design Brief, Appendix H.			
2. EB-2019-0180, CBRE Evidence, section 6.0 Financial Summary.			
3. CBRE Cost Estimate for the firewall per Staff-CBRE-1 part c). CBRE confirmed that cost for the firewall was included in the construction cost estimate.			

The comparison shows that Melloul Blamey's cost estimate is \$290,175 higher than CBRE's estimate. CBRE noted that the main cost difference resides in the estimate of the construction management fee.⁶⁰

⁶⁰ Evidence of Neil Kelsey, page 17.

OEB staff notes that CBRE's construction cost estimate includes an escalation amount of \$222,000 from 2019 to 2020, which is approximately 3.3% of the total construction cost estimated by CBRE (\$6,636,000).⁶¹

OEB staff notes that Melloul Blamey's cost estimate was prepared in December 2018⁶² and it does not include cost escalation for work and materials for a future construction start date.⁶³ As shown in the design brief, Melloul Blamey's cost estimate was based on a schedule starting construction in 2019.⁶⁴ To compare the CBRE Estimate with Melloul Blamey's cost estimate on the same basis, OEB staff submits that the \$222,000 escalation amount from 2019 to 2020 should be excluded. The resulting revised CBRE Estimate would be \$7,587,587.

In the Decision, the OEB found it counter-intuitive that the project contingency significantly increased from \$125,000 to \$400,000⁶⁵ as the accuracy of the cost estimate presumably improved from a Class D to Class C estimate.⁶⁶ In the CBRE Estimate, an even higher amount of contingency was built into the estimate. OEB staff also had concerns with the contingency of \$889,000 included in the CBRE Estimate and questioned it in the interrogatories on the CBRE Evidence.⁶⁷ Neither CBRE nor Energy+ addressed the OEB's concern with the accuracy of contingency assumption used in the cost estimates. The Decision also noted that given the amount of work that Energy+ did to improve the accuracy of the cost estimate (from a Class D estimate with defined accuracy of +/- 30% to a Class C estimate with defined accuracy of +/- 20%), 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.⁶⁸ OEB staff submits that the same concern exists with the CBRE Estimate.

Given that the concerns regarding the accuracy of the estimates and contingencies had not been addressed in either the original rate application nor the Motion , OEB staff submits that the CBRE Estimate should not be relied on in

⁶¹ CBRE Evidence, Financial Summary, total construction costs (3Q 2019).

⁶² EB-2018-0028, TCQ-SEC-2, Design Brief, Appendix H.

⁶³ EB-2018-0028, TCQ-SEC-2, Design Brief, page 13 of 14.

⁶⁴ EB-2018-0028, TCQ-SEC-2, Design Brief, Appendix G.

⁶⁵ EB-2018-0028, Hearing Transcript, March 7, 2019, page 65, lines 18-19.

⁶⁶ Decision and Order, page 14.

⁶⁷ EB-2019-0180, Staff-CBRE-1, part b.

⁶⁸ *Ibid.*

evaluating the prudence of the proposed \$8.1 million should the OEB decide to review this Motion on its merits.

In conclusion, OEB staff submits that if the Motion passes the threshold test and is reviewed on its merits, it should be dismissed given that the Motion and supporting material do not establish an error that requires the Decision to be varied in any way. The CBRE Evidence does not provide sufficiently robust support for the cost estimate for the Southworks facility and therefore does not justify varying the Decision on that point.

All of which is respectfully submitted