



**BY EMAIL and RESS**

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November 11, 2021  
Our File: EB20210018

**Attn: Christine Long, Registrar**

Dear Ms. Long:

**Re: EB-2021-0018 – Energy+ 2022 – SEC Submissions**

We are counsel to the School Energy Coalition (“SEC”). These are SEC’s submissions on the ICM request by Energy+ Inc. (“Energy+”) related to its new administrative office building (the “Southworks Project”). The Applicant has asked for incremental funding of approximately \$1.65M above what was previously approved as part of the approval of an Advanced Capital Module (“ACM”) in EB-2018-0028.

SEC submits that the Board should deny the incremental funding.

**Background**

**ACM Decision.** In Energy+’s last rebasing application (EB-2018-0028) it applied for an ACM for the Southworks Project, based on forecast costs of approximately \$8,1M.<sup>1</sup> In the *Decision and Order* (“ACM Decision”), the OEB agreed that Energy+ met the need and materiality criteria but, with respect to the prudence, it found that the company had not provided sufficient evidence regarding the reasonableness of the cost estimate.<sup>2</sup> It determined that it would only approve \$6.5M “based on reasonable comparisons and the history of the development of the Energy+ estimates”.<sup>3</sup>

The approved amount was based on benchmarking evidence that demonstrated that the Applicant’s cost estimate was significantly higher on a cost per square foot basis than other similar facilities that had been constructed in Ontario.<sup>4</sup> The \$6.5M approval was based on a \$300/sq. ft. benchmark provided by OEB Staff, multiplied by the proposed square footage of the Southworks Project.<sup>5</sup> The

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<sup>1</sup> Application, p.19-20

<sup>2</sup> [Decision and Order, \(EB-2018-0028\), June 13, 2019](#) (Corrected June 18, 2019) [[“ACM Decision”](#)], p.13

<sup>3</sup> [ACM Decision](#), p.14

<sup>4</sup> [ACM Decision](#), p.13

<sup>5</sup> [ACM Decision](#), p.14

OEB also had concerns with the quality of the Energy+ cost estimate, which seemed simply to increase as time went on.<sup>6</sup> The level of contingency also increased.<sup>7</sup>

In the ACM Decision, the OEB noted that Energy+ would have an opportunity to address any deviations from that amount in the Price Cap IR application for the year in which the project came into service. This was nothing unique, but just a restatement of existing ACM Policy.<sup>8</sup>

**Motion To Review.** Energy+ brought a motion to review of the ACM Decision. In its motion, it argued, among other grounds, that the OEB erred in fact by using the OEB's Inflationary Factor as the annual inflationary adjustment to account for the differences in cost over time between the forecast completion of the Southworks Facility, and the comparator facilities (Enersource and PowerStream).<sup>9</sup> Energy+'s position, supported by expert evidence that it has re-filed in this proceeding, was that the OEB should have used a non-residential Building Construction Price Index ("BCPI") as the appropriator escalator. If it had done so, the benchmark would be much higher than the \$300/sq. ft. that was the basis for the OEB's ACM Decision.<sup>10</sup>

The OEB dismissed the motion to review at the threshold stage on the basis that Energy+ had not identified an error in fact, and was simply attempting to re-argue the case.<sup>11</sup> It found that Energy+ itself recognized that the benchmark would need to be adjusted for inflation. Energy+ was the one who mentioned the IRM factors in its reply submissions and, while "referring to inflation in the construction sector, it did not suggest that the IRM inflationary factors are inappropriate, nor did it propose a different inflationary measure."<sup>12</sup> It also found that the expert evidence was nothing that could not have been filed as part of its evidence in the original proceeding.<sup>13</sup>

**Current Application.** The Southworks Project is expected to be in-service in January 2022, at a final cost of \$8,152,916, which is not only \$1.65M (25.4%) higher than the amount approved in the ACM Decision, but also higher than what was included in the Energy+ updated forecast back in EB-2018-0028.<sup>14</sup>

Energy+ evidence is that, after the ACM Decision, it undertook a number of changes to its design to lower costs valued at \$0.57M, but ultimately due to a number of factors the costs ended up being higher than originally approved.<sup>15</sup> This includes, before offset by the design changes (-\$0.57M)<sup>16</sup>, among others, approximately \$1.2M due to inflationary increases, \$0.41M related to the impact of

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<sup>6</sup> [ACM Decision](#), p.14

<sup>7</sup> [ACM Decision](#), p.14

<sup>8</sup> [Report of the Board New Policy Options for the Funding of Capital Investments: The Advanced Capital Module](#) (EB-2014-0219), September 18, 2014, p.12

<sup>9</sup> [Decision and Order \(EB-2019-0180\), December 5, 2019](#), p.7 [["Motion to Review Decision"](#)]

<sup>10</sup> [Motion to Review Decision](#), p.8

<sup>11</sup> [Motion to Review Decision](#), p.10

<sup>12</sup> [Motion to Review Decision](#), p.9

<sup>13</sup> [Motion to Review Decision](#), p.10

<sup>14</sup> Interrogatory Response, SEC-2

<sup>15</sup> Application, p.24; Interrogatory Response, SEC-3

<sup>16</sup> Application, p.24; Interrogatory Response, SEC-3

COVID-19, and \$0.69M related to other cost increases including costs that were not included in the EB-2018-0028 forecast budget.<sup>17</sup>

1 **Table 16 – Project Cost Increases**

Item	Description	Increase
Inflationary Impacts	Higher costs due to pricing and demand in the local construction industry. See Appendix F.	\$1,118,000
COVID-19 Impacts	Increase in material costs due to lumber and structural steel shortages. Additional costs for sanitary measures on site and increased personnel on site for COVID-19 screening.	\$413,000
Firewall Construction	Costs to complete the firewall construction were not included in the 2019 Cost of Service estimate.	\$269,000
Legal and Real Estate Fees	Legal and real estate fees related to closing the transaction of acquiring the Southworks facility were not included in the 2019 Cost of Service estimate.	\$123,000
Conduit replacement	Existing conduits required replacement for the roof, clearstory wood siding, masonry repair and windowsills.	\$85,000
Waterproofing	West wall required waterproofing due to high water table impacting ground water conditions at the site	\$40,000
Design Consistency	Developer related design requiring a consistent look and feel to the adjacent buildings impacted roof, window and exterior landscaping costs.	\$34,000
Various Other		\$141,000
<b>Total</b>		<b>\$2,223,000</b>

### **OEB Should Deny Recovery of the Cost Increases Compared to the ACM**

***Inflationary Impacts.*** The largest driver in the cost increase from the approved amount is what Energy+ has called an inflationary impact, which it describes as “[h]igher costs due to pricing and demand in the local construction industry.”<sup>18</sup>

SEC submits this is somewhat a misleading description. It does not represent changes in the cost assumptions (as presented in the 2019 application) to account for inflation. What Energy+ has done is revise the basis of the \$300/sq. ft. benchmark that was included in the ACM Decision to \$351/sq. ft., by adjusting the two comparator facilities over time, not by the OEB’s annual Inflation Factor, but by the Toronto specific BCPI.<sup>19</sup> The difference, when applied over the total square footage, is the approximately \$1.2M inflationary impact. Just like the motion to review, Energy+ is once again simply impermissibly re-arguing the ACM Decision. The Motion to Review Decision was very clear that the OEB’s approach was not in error, and it is not open now for Energy+ to revisit it yet one more time.

The inflationary impact is not actually a cost increase, just a challenge to the OEB’s approach to benchmarking, i.e. its assessment of what ratepayers should reasonably expect to pay for a new administrative facility. The OEB was, and continues to be, entirely within its right to determine the reasonable cost for construction of the Southworks Project with reference to the benchmarking exercise. While Energy+ may not agree with each of the inputs and the OEB’s approach to determining a reasonable cost envelope, that is not an error, and the OEB should not allow the company to simply re-argue, for a second time, this aspect of the ACM Decision.

This distinction is very important. The OEB did not, and is not, required to approve recovery of costs on the basis of what is a reasonable cost to build the specific Southworks facility. It is entirely

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<sup>17</sup> Application, p.2

<sup>18</sup> Application, p.26

<sup>19</sup> Application, p. Appendix F

reasonable and appropriate to determine the recoverable costs based on what is a reasonable amount to include in rates for an administration building. In fact, in the EB-2018-0028 proceeding there was no issue about the need for a new administration facility, but parties, including SEC, argued that there was little to no evidence that the Southworks Project specifically, was the most appropriate solution. The OEB's use of external benchmarking to set the recoverable amount was intended to focus, not on the Southworks cost, but on the reasonable cost of an administration building.

**COVID-19 Impacts.** Energy+ evidence is that the company has and is expected to incur \$0.41M costs related to COVID-19. These are costs related to the increase in costs due to lumber and structural steel shortages, and costs related to on-site sanitary measures and additional personnel for screening.

SEC submits that COVID-19 related costs are required to be included in Account 1509, consistent with the *Report of the OEB: Regulatory Treatment of Impacts Arising from the COVID-19 Emergency* ("COVID-19 Policy"), and not passed-through to customers through the ACM mechanism. OEB's COVID-19 Policy provided the creation of a new Capital-related Revenue Requirement sub-account to "record the capital-related revenue requirement impacts (costs and savings) associated with the pandemic."<sup>20</sup>

The reason why this is important is that the OEB's COVID-19 Policy recognizes the extraordinary nature of the pandemic and its impact on customers. There is to be sharing of any increased net cost between customers and the utility, even if the threshold means test is passed.<sup>21</sup> As the OEB stated, "the 50% recovery rate to be appropriate and reflective of its role to serve as a proxy for competition" and that "[i]t is unreasonable to suggest that even those who pass the OEB's means test would have been protected from bearing some portion of these impacts in the competitive landscape."<sup>22</sup>

Inclusion of these costs in the ACM rider would result in customers paying 100% of the costs, and no application of a means test. This is directly contrary to OEB policy on this issue, as it treats COVID-19 related costs for this project, different from similar costs for any other capital project across the province.

**Other Cost Increases.** Another category of cost increases is that of approximately \$0.69M that are not related to either the inflationary impact or COVID-19, that Energy+ seeks to recover.<sup>23</sup> These include costs for construction of a firewall, legal and real estate costs, and other incremental costs that were either higher than originally forecast, or not even included in the forecast provided in the forecast in EB-2019-0028. SEC submits that these costs should not be recoverable.

Both the OEB's ACM Decision, and even Energy+'s attempt to attribute additional costs through its inflationary impacts, reflect the setting of a reasonable envelope for construction of a new administrative building by reference to benchmark costs. While they may take different approaches,

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<sup>20</sup> [Report of the OEB: Regulatory Treatment of Impacts Arising from the COVID-19 Emergency](#), p.42

<sup>21</sup> [Report of the OEB: Regulatory Treatment of Impacts Arising from the COVID-19 Emergency](#), p.18

<sup>22</sup> [Report of the OEB: Regulatory Treatment of Impacts Arising from the COVID-19 Emergency](#), p.18

<sup>23</sup> Application, p.26



the benchmark costs were determined by inflating final actual costs of two comparator facilities to 2021 dollars. It does not make much sense to then, after the Southworks Project is near completion, to permit recovery of additional costs like these. The comparator projects that were used to determine the per square foot cost by the OEB in the ACM Decision, or the revised amounts proposed by Energy+ through the inflationary impact, are based on actuals that incorporate all aspects of costs of those projects.

To put it another way, if the revised cost estimates had been included in the forecast budgets back in EB-2018-0028, nothing in the OEB decision would have been any different, since \$6.5M was based on the benchmark costs, not Energy+ forecast costs. If anything, if they had been included, the OEB may have been less likely to grant any approvals, considering the cost estimate would have been much higher, and it may have had greater doubts on the prudence of the Southworks Project.

SEC submits it would have been one thing if Energy+ had provided evidence that the types of costs that it did not include in its EB-2019-0028 forecast, or specific increases in costs it did include, are of an entirely different type from those included in the actual costs of the comparator projects. Energy+ has tendered no such evidence, and so should not be eligible for additional recovery for any of these cost items.

### **Summary**

SEC submits that the OEB should deny the request for Energy+ to include the revenue requirement impact of the incremental \$1.65M capital cost for the Southworks Project in the ACM rate rider beginning in 2022. At this time, the OEB should allow Energy+ to include \$0.41M of additional costs caused by COVID-19 in Account 1509, with possible recovery of some, or all, of that amount if it meets the requirements for disposition in accordance with the OEB's COVID-19 Policy.

Yours very truly,  
**Shepherd Rubenstein P.C.**

Mark Rubenstein

cc: Ted Doherty, SEC (by email)  
Applicant and intervenors (by email)