

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

**AND IN THE MATTER OF** an Application by Energy+ Inc.  
to the Ontario Energy Board for an Order or Orders approving  
or fixing just and reasonable distribution rates and other service  
charges to be effective January 1, 2022.

**REPLY SUBMISSION**

**ENERGY+ INC.**

**EB-2021-0018**

**NOVEMBER 25, 2021**

## A. INTRODUCTION

1. Energy+ Inc. (“**Energy+**”) filed an Incentive Rate-setting Mechanism (“**IRM**”) application with the Ontario Energy Board (“**OEB**”) on August 16, 2021 under section 78 of the *Ontario Energy Board Act, 1998*, seeking approval for changes to its electricity distribution rates, to be effective January 1, 2022 (the “**Application**”). The OEB approved School Energy Coalition (“**SEC**”), Toyota Motor Manufacturing Canada Inc. (“**TMMC**”) and Vulnerable Energy Consumers Coalition (“**VECC**”) as Intervenors.
2. In accordance with the OEB’s Procedural Order No.1 dated October 4, 2021, parties were required to submit written submissions by November 11, 2021 with the Energy+’s reply submission due November 25, 2021. Energy+ received written submissions from OEB Staff and SEC on November 11, 2021. Submissions from VECC were received on November 12, 2021. Energy+ did not receive submissions from TMMC.
3. Energy+ makes reply submissions on the following:
  - (a) Group 1 Deferral and Variance Accounts (DVAs)
  - (b) Advanced Capital Module (ACM)

## B. Group 1 Deferral and Variance Accounts (DVAs)

4. Energy+ requested disposition of its December 31, 2020 Group 1 DVA balances in the amount of \$3,286,290 on a final basis and is requesting disposition over a 12-month period.<sup>1</sup>
5. OEB Staff is supportive of Energy+’s request to dispose of its December 31, 2020 Group 1 DVA balances on a final basis on the condition that Energy+ calculates the impact and updates its evidence to include the principal adjustments for the variance in Account 1588, which is attributable to differences between year-end estimated and actual revenues recorded in 2020. In the alternative, Energy+ is to explain why it is not appropriate for Energy+ to do this.<sup>2</sup>

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<sup>1</sup> Energy+ Inc. 2022 IRM Application, August 16, 2021, Section 4.3.6.1, page 14.

<sup>2</sup> EB-2021-0018, OEB Staff Submissions, November 11, 2021 (“OEB Staff Submissions”), page 3.

6. OEB Staff's view is that the amounts should be recorded as a 2020 principal adjustment in Tab 3 of the IRM Rate Generator model and reflected in the Global Adjustment Analysis Workform.<sup>3</sup> OEB Staff goes on to state that there would presumably be similar unbilled to actual revenue variances in Account 1589 for the 2020 year-end, pertaining to Global Adjustment revenue and any similar impacts should be recorded as well.<sup>4</sup>
7. OEB Staff further submits that in advance of Energy+'s next rates proceeding, it would be helpful to the OEB if Energy+ investigates why its approved loss factors differ materially from its actual system losses and disclose the insights from this review in Energy+'s next rate application.<sup>5</sup>
8. Energy+ has calculated the impact attributable to the differences between year-end estimated and actual revenues recorded in 2020 on Accounts 1588 and 1589 and has updated Tab 3 of the IRM Rate Generator model and the Global Adjustment Analysis Workform. The following table summarizes the impact:

<b>Unbilled vs Actual Difference</b>	
Not posted to Dec 31, 2020 G/L, DVA Continuity	
<u>Account 1588 - RSVA Power</u>	
Estimated RPP & Non-RPP Revenue	\$ 8,046,893
Actual RPP & Non-RPP Revenue	\$ (8,208,265)
Adjustment	\$ (161,372)
<u>Account 1589 - RSVA Global Adjustment</u>	
Estimated Non-RPP GA Revenue	\$ 4,891,069
Actual Non-RPP GA Revenue	\$ (4,783,772)
Adjustment	\$ 107,297

9. The adjustments result in revised December 31, 2020 Group 1 DVA balances for disposition of \$3,231,907. Energy+ submits that these balances should be approved for final disposition over a twelve-month period.

<sup>3</sup> OEB Staff Submissions, page 3.

<sup>4</sup> OEB Staff Submissions, page 3.

<sup>5</sup> OEB Staff Submissions, page 4.

10. Energy+ also submits that it will investigate the differences between the approved loss factors and actual system losses and document the findings in its next rate application.

**C. Advanced Capital Module (ACM)**

**(a) The Policy Intent of the ACM**

11. This case draws into direct focus a key limitation of the Ontario Energy Board's Advanced Capital Module ("ACM") policy as is outlined in the *Report of the Board on Policy Options for Funding Capital Investments* (EB-2014-0219) issued September 18, 2014<sup>6</sup> and the *Report of the Board on Policy Options for Funding Capital Investments: Supplemental Report* (EB-2014-0219) issued January 22, 2016<sup>7</sup> (the "**ACM Reports**").
12. The ACM was intended to adapt and add to the existing ICM mechanism. According to the ACM Reports, the ACM was intended to facilitate regulatory efficiency by placing the requirement to establish the need and prudence for any additional incremental capital spending within a cost of service proceeding, at the same time a five-year DSP is also being tested.
13. To achieve the policy intention of facilitating regulatory efficiency, a distributor should not be prejudiced simply because they chose to file for an ACM approval rather than waiting for a subsequent ICM approval. Yet that is exactly what is proposed to happen in this case.

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<sup>6</sup> Ontario Energy Board, *Report of the Board on Policy Options for Funding Capital Investments* (EB-2014-0219) issued September 18, 2014, Available Online: [https://www.oeb.ca/sites/default/files/uploads/Board\\_ACM\\_ICM\\_Report\\_20140918.pdf](https://www.oeb.ca/sites/default/files/uploads/Board_ACM_ICM_Report_20140918.pdf) (Last Accessed: November 18, 2021) ("**2014 Policy Options Report**").

<sup>7</sup> Ontario Energy Board, *Report of the Board on Policy Options for Funding Capital Investments: Supplemental Report* (EB-2014-0219) issued January 22, 2016, Available Online: [https://www.oeb.ca/sites/default/files/uploads/Report\\_of\\_the\\_OEB\\_Capital\\_Funding\\_Suppl\\_20160122.pdf](https://www.oeb.ca/sites/default/files/uploads/Report_of_the_OEB_Capital_Funding_Suppl_20160122.pdf) (Last Accessed: November 18, 2021) ("**Policy Options Supplemental Report**").

(i) The ACM Decision

14. In Energy+'s 2019 Rate Application Decision and Order (EB-2018-0028)<sup>8</sup> ("ACM Decision"), the OEB found that there was **insufficient evidence** to approve a capital budget of \$8.1 million for the Southworks facility as prudent.<sup>9</sup>

15. The OEB expressed concerns over the Energy+ estimate, including that only a small portion of the Southworks construction agreements had been awarded based on a competitive tender process, which in the OEB's view presented significant uncertainty regarding the reliability of the estimated cost of the facility and raised questions as to whether the forecast of a \$400,000 project contingency was adequate.<sup>10</sup>

16. The OEB further expressed concerns over the accuracy of Energy+'s cost estimates at that time, noting that the original Class D estimate of \$5.0 million had an accuracy of +/- 30%, and the updated Class C estimate of \$8.1 million still only an accuracy of +/- 20% - in spite of the 62% increase in the costs from Class D to Class C.<sup>11</sup>

17. In this context, the OEB found that:

*"The OEB finds that Energy+ has not provided sufficient evidence in support of the reasonableness of its current cost estimate for the Southworks facility. While acknowledging the need for the facility, the OEB will only approve \$6.5 million for the ACM. This funding envelope is based on reasonable comparisons and the history of the development of the Energy+ estimates. **Energy+ will have 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.**"<sup>12</sup>*

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<sup>8</sup> EB-2018-0028, Decision and Order dated June 13, 2019, corrected June 18, 2019.

<sup>9</sup> ACM Decision at page 13.

<sup>10</sup> ACM Decision at page 13-14.

<sup>11</sup> Ibid at page 14.

<sup>12</sup> Ibid.

18. The ACM Decision expressly identifies the \$6.5 million as a “funding envelope” and contemplates that Energy+ will be afforded an opportunity to address any deviations from the \$6.5 million approval as part of this Application.<sup>13</sup>

19. In this context the questions of whether or not:

- a. inflationary cost drivers that are particular to the construction industry constitutes a justifiable cost increase above this funding envelope;
- b. COVID related cost drivers constitutes a justifiable cost increase above this funding envelope; or
- c. The documented other unexpected costs constitute a justifiable cost increase above this funding envelope;

simply did not arise in the ACM Decision and was not considered by the OEB panel in that Decision.

20. The approach set out in the ACM Decision makes sense. The OEB did not rule in that decision that the proposed Southworks facility was imprudent. Rather, the OEB established a very tight “funding envelope” because there was insufficient evidence available at the time of the ACM Decision to approve the Southworks facility as prudent.

21. This is to be expected. Forecasts that are available at the time of an ACM application will not be as well refined or accurate as the forecasts that would be available as part of an ICM application. Indeed, the change in cost estimates from the Class D estimate to the Class C estimate was cited by the OEB as a key factor in their decision to impose a tight “funding envelope” on Energy+.

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<sup>13</sup> Ibid.

22. In this context, had Energy+ filed instead for ICM approval for the Southworks facility – it would have been in this application. The evidence that this OEB panel has available before it now would have been the evidence the OEB was considering for the ICM approval.
23. In fact, had Energy+ spent more than 30% more than the funding envelope approved in the ACM Decision – this is exactly what would have happened. Energy+ would have been required to file an entirely new ICM Application and obtain a de novo approval for the Southworks project.
24. In this context, it appears that the parties wish to punish Energy+ for taking active steps to reduce project costs in response to the ACM Decision, and in so doing remain within 30% of the approved “funding envelope” by arguing that the OEB should now deny numerous prudently incurred cost increases.

(ii) The Implications of the ACM Decision and the Motion to Review

25. As is outlined in the ACM Reports, if the costs of the Southworks project were 30% or more above the amounts approved – Energy+ would need to treat the project as a new Incremental Capital Module and re-file the business case in the applicable IR year.<sup>14</sup>
26. With an approval of \$6.5 million, this meant that the ACM Decision was valid for costs of up to \$8.45 million, failing which Energy+ would need to treat the project as a net new Incremental Capital Module request and re-litigate the entire business case in the applicable IR year.
27. The OEB had in effect placed significant restrictions on Energy+ with regards to the Southworks project. At that time, Energy+ was quite concerned based on the Class C estimate of \$8.1 million +/- 20% (which was the best available information at that time) that it would not be able to complete the project within the approved funding envelope set out in the ACM Decision.

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<sup>14</sup>2014 Policy Options Report at page 12 and Policy Options Supplemental Report, Appendix A at page 22

28. In this context, Energy+ filed a motion to review and vary the ACM Decision on various procedural grounds. The OEB assigned file number EB-2019-0180 to the Energy+ motion to review, and on December 5, 2019 the OEB dismissed the motion at the threshold stage. Specifically, in the Decision to Energy+'s Motion to Review (EB-2019-0180)<sup>15</sup> (“**Motion to Review Decision**”):

*“The OEB finds that the Motion does not pass the threshold test. Energy+ has not identified grounds that raise a question as to the correctness of the Decision such that a review based on those grounds could result in the OEB varying, cancelling or suspending the Decision. The Motion is therefore dismissed at the threshold stage.”<sup>16</sup>*

29. Since the motion was dismissed at the threshold stage, and the OEB did not consider the motion on the merits, it did not consider the evidence filed by Energy+, except as it related to the threshold test. With regards to the relationship of the evidence filed to the threshold test, the OEB ruled that:

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

*As noted by Energy+ in its AIC, a motion to review is not an opportunity for the party to reargue its case. In its reply argument in the Rate Application, Energy+ clearly indicated that inflation should be included in the benchmark used. To argue now that the OEB IRM inflation factors were the wrong measure is an attempt to re-argue the Rate Application.”<sup>17</sup>*

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<sup>15</sup> EB-2019-0180

<sup>16</sup> Motion to Review Decision at page 11.

<sup>17</sup> Ibid at page 9.



30. As a result, the OEB's funding envelope set out in the ACM Decision stood and Energy+ was required to proceed with the Southworks project on this basis.

31. However, at no time in either the ACM Decision nor in the motion to review did the OEB consider whether or not inflation within the construction industry or COVID related costs were justifiable cost increases over and above the funding envelope approved in the ACM Decision.

**(b) Inflationary Factor**

32. Each of OEB Staff, VECC and SEC do not agree with Energy+'s proposal to include the proposed inflationary impacts in its claim for increased ACM funding on the basis that it has already been decided in the ACM Decision and the Motion to Review Decision.<sup>18</sup>

33. This argument must fail for three key reasons: 1) The ACM Decision provides Energy+ an opportunity to address any deviation from the approved funding envelope and deviations due to inflationary cost drivers particular to the construction industry are a prudently incurred and justifiable cost increase; 2) The inflationary impacts are supported by expert evidence, and demonstrate the difference between the actual costs and the assumptions used to arrive at the approved funding envelope; and 3) A failure to approve inflationary cost drivers would have the effect of prejudicing Energy+ for bringing an ACM application rather than waiting to file for ICM in this application, which is clearly contrary to the stated policy intention of the ACM as set out in the ACM Reports.

**(i) What happened after the ACM Decision**

34. Following the ACM Decision, and the OEB's denial of the motion to review, Energy+ hired Colliers Project Leaders Inc. ("**Colliers**") to implement a process of value engineering to identify possible cost reductions through changes to the design and specifications in addition to alternate tendering strategies.<sup>19</sup> As a result of this process, Energy+ realized cost reductions

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<sup>18</sup> OEB Staff Submissions, page 7; SEC Submissions page 3; VECC Submissions at page.

<sup>19</sup> Application at Section 4.4.1.3.2.

of \$570,000 from the Class C estimate as further outlined in Table 13 of the Application<sup>20</sup> and as further explained in response to SEC-3.<sup>21</sup>

35. Energy+ also conducted competitive tendering processes with the support of Colliers.<sup>22</sup> The detailed results of these competitive tendering processes were filed in confidence in response to SEC-7,<sup>23</sup> and a comparison of these tendered costs to the ACM Decision is provided in a table filed in response to 1-Staff-6.<sup>24</sup> As shown in 1-Staff-6, competitively tendered costs were higher than approved costs in the ACM Decision for most of the construction elements.

36. In this context, Energy+ documented all of the project cost increases as against the ACM approval in Table 16 of the Application.<sup>25</sup>

37. The Southworks facility is now near completion and Energy+ does not expect material changes from the cost forecast. The construction costs have been incurred at market rates through the competitive tender process and Energy+ has mitigated the risks highlighted by the OEB in the ACM Decision regarding the estimate accuracy, project contingency, and amount of costs remaining to be awarded through tender.

(ii) Inflation in the Construction Industry

38. The top cost driver in Table 16 in the Application is identified as “Higher costs due to pricing and demand in the local construction industry”. This cost driver is quantified at \$1,118,000 above the OEB approved amount of \$6.5 million.

39. This is further explained in Appendix G of the Application, which is expert evidence that was prepared by Mr. Neil Kelsey, Director of Cost Consultancy for the Central and Eastern Region of CBRE Limited (“**CBRE Report**”).<sup>26</sup> The evidence was originally prepared in support of

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<sup>20</sup> Application at Section 4.4.1.3.2, Table 13.

<sup>21</sup> EB-2021-0018, Response to Interrogatories dated November 10, 2021 (“**IRR**”), SEC-3 at pages 22 to 23.

<sup>22</sup> Application at Section 4.4.1.3.3.

<sup>23</sup> IRR, SEC-7 at page 26.

<sup>24</sup> IRR, 1-Staff-6 at page 8.

<sup>25</sup> Application at Section 4.4.1.3.1, Table 16.

<sup>26</sup> Application, Appendix G, Written Evidence of Mr. Neil Kelsey dated September 13, 2019.

the Energy+ motion to review, however Part D of this evidence is useful in the context of this Application.

40. Part D of the CBRE Report explains that the construction industry is susceptible to micro and macro-economic inflation, along with local market forces that can influence pricing by both general contractors and sub-trades.<sup>27</sup> As of 2019, CBRE noted that concrete, formwork and roofing sub-trades have been in higher than usual demand and can have the effect of driving up costs above forecasted inflation.<sup>28</sup>
41. Based on their subject matter expertise, and as further documented in Part D of the CBRE Report, CBRE recommended using Statistics Canada's Building Construction Price Index – Office Buildings – Toronto as the most appropriate index for inflation in the construction industry for the Energy+ Southworks facility.<sup>29</sup>
42. CBRE explains how this inflationary index differs from GDP-IPI noting that:

*"In Canada, the GDP-IPI is the federal government's featured index of inflation in the domestic economy's final goods and services. It differs from the Construction Price Index mainly in covering inflation in the prices of capital equipment used by industry as well as inflation in consumer product prices. This is very different to construction. As stated previously under D.1, the construction industry is susceptible to different micro and macro-economic influences than those inflation indexes used for typical household goods or those that are not related to construction."*<sup>30</sup>

43. However, understanding that inflation in the construction industry is different than GDP-IPI is not enough. The burden of proof that Energy+ must meet is to demonstrate, quantitatively, that increases above the \$6.5 million approved in the ACM Decision were both reasonable and prudent.

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<sup>27</sup> CBRE Report, Appendix B, Section 5.0.

<sup>28</sup> CBRE Report at page 13.

<sup>29</sup> CBRE Report at page 15.

<sup>30</sup> Ibid.

44. To do that, Energy+ had to look into the details of how the OEB calculated the \$6.5 million in the ACM Decision. Energy+ does this in Table F2 of Appendix F of the Application<sup>31</sup> to arrive at a quantitative impact of \$1,118,392. This calculation uses the exact same two benchmark costs the OEB used to arrive at its \$6.5 million, and isolates and quantifies the impacts that are solely due to inflation in the construction industry increasing at a pace that was faster than GDP-IPI.
45. In this way, the Energy+ methodology accepts implicitly the findings in the ACM Decision, and simply attempts to quantify the component of incremental costs incurred that were directly related to incremental inflation in the construction industry.
46. Incremental inflationary costs in the construction industry are entirely outside of Energy+ management's control. They are, by definition, industry wide cost drivers that impact every single non-residential construction project in the geographic region.
47. To suggest that these incremental costs were somehow imprudently incurred is inappropriate.
48. As a consequence, each of OEB Staff, SEC and VECC take a different approach to arrive at the same result – denial of recovery of these incremental costs.
49. OEB Staff articulates the issue best – arguing that Energy+ filed the same evidence in support of its proposed inflationary increase as had been filed on the Motion to Review Decision<sup>32</sup> and does not agree that there is “new evidence” that was not available in the 2019 Rate Application. OEB Staff submits that if the evidence was not before the panel in the 2019 Rate Application, it is because Energy+ chose not to file such evidence and not because it was not available. Only the OEB inflationary factors were referenced and no evidence or submissions were provided in support of a different inflationary factor.<sup>33</sup>

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<sup>31</sup> Application, Appendix F, Table F2, page 120.

<sup>32</sup> OEB Staff Submissions, page 7.

<sup>33</sup> OEB Staff Submissions, page 8.

50. In effect – these arguments amount to a suggestion that Energy+ should be “punished” for bringing a motion to review the ACM Decision by alleging that its legal and procedural rights were not met. Specifically, they argue that because the OEB denied the Energy+ motion to review and vary the ACM Decision – Energy+ has no right to rely on evidence of inflation in the construction industry in this subsequent Price Cap IR application.
51. This is simply not correct.
52. Section 78 of the *Ontario Energy Board Act, 1998* (the “Act”) entitles an applicant, including Energy+, to file and have heard an application where the evidence filed would assist the OEB in fulfilling its objectives under Section 1(1) of the Act.
53. Pursuant to the ACM Decision, the OEB determined that with regards to the \$6.5 million “funding envelope” that “*Energy+ will have 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.*”<sup>34</sup>
54. This determination is consistent with the ACM Reports, which provides that if the forecasted costs (or timing) are significantly different than what was approved, the onus is on the distributor to support the changes.<sup>35</sup> If Energy+ is to be charged with a burden of proof in this case, it must also be afforded an opportunity to produce evidence that can discharge this burden of proof. The fact that Energy+ brought a motion to review the ACM Decision on the basis of concerns that its legal and procedural rights were not met should in no way derogate from Energy+’s right, in this new application, to adduce relevant evidence regarding incremental cost drivers including the impacts of inflation in the construction industry on the actual costs of the Southworks project.

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<sup>34</sup> Ibid.

<sup>35</sup> ACM Report at Page 12.

55. If the OEB accepts OEB Staff, VECC and SEC's arguments, it would in fact constitute an impermissible fettering of the Board's discretion, for irrelevant reasons, to consider evidence that is directly relevant to the matters at issue in this application.
56. In addition, Energy+ would be given no opportunity to discharge its burden of proof to clearly evidence incremental costs and demonstrate how those incremental costs were prudently incurred if the OEB disregards the evidence filed by Energy+ for irrelevant reasons.
57. To deny recovery of these costs would be akin to a ruling that these incremental inflationary costs were somehow imprudent. This is not the case. Management of Energy+ cannot control general inflation in the construction industry, and must operate within the confines of industry pricing that is arrived at through their competitive tendering process.
58. An ACM has inherent cost risks associated with inflation due to the advanced nature of the funding envelope approval, compared to an ICM which is approved with more cost certainty. The funding envelope approach is applied to address the uncertainty in the estimates and not accounting for incremental inflationary impacts in an ACM would undermine the funding mechanism and result in a prejudiced outcome. If Energy+ had foregone an ACM, and applied for the funding through an ICM, the impact of inflation would be embedded in the funding request and be a non-factor in the case.

(iii) Are any adjustments required to the inflationary factor?

59. OEB Staff submits that the \$1.1M increase for the inflationary factor would be more accurately presented when reduced by the achieved savings of \$570,000, such that the net increase is \$530,000.<sup>36</sup>
60. OEB Staff provides no rationale for this arbitrary reduction.
61. To subtract \$570,000 off of any of the incremental costs listed in Table 16 would result in a double accounting of these savings: once because Energy+ already accounted for the reduction

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<sup>36</sup> OEB Staff Submissions, page 7.

in the total project cost and then again, as a reduction to the incremental costs over the \$6.5 million approval set out in Table 16.

62. In effect, it would punish Energy+ management by arbitrarily denying recovery of \$570,000 – despite Energy+ management doing exactly what the OEB wanted it to do after approving a lower \$6.5 million funding envelope in the ACM Decision.
63. As described above, consistent with the funding envelope approved in the ACM Decision, Energy+ hired Colliers to implement a process of value engineering to identify possible cost reductions through changes to the design and specifications in addition to alternate tendering strategies.<sup>37</sup> As a result of this process, Energy+ realized cost reductions of \$570,000 from the Class C estimate as further outlined in Table 13 of the Application and as further explained in response to SEC-3.
64. Energy+ is not seeking recovery in rates for any of these savings. The amount of \$8,152,916 Energy+ is seeking recovery for already accounts for these savings.
65. In this context, Energy+ has identified in Table 16 incremental cost drivers above the OEB's approved funding envelope of \$6.5 million in Table 16 of the Application. These incremental cost drivers are intended to help explain why Energy+ costs totalled \$8,152,916 rather than the OEB's approved funding envelope of \$6.5 million. Since the \$8,152,916 already accounts for the \$570,000 savings, it would be double counting to also include those savings again to arbitrarily reduce any one of the Table 16 incremental cost drivers.

**(c) COVID-19 Costs**

66. As explained in the Application, the second largest contributor to the cost increases were the unforeseen impacts of the COVID-19 pandemic, which resulted from increase in material costs due to lumber and structural steel shortages, and additional costs for health and safety measures at the job site. This resulted in a cost increase of \$413,000.

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<sup>37</sup> Application at Section 4.4.1.3.2.

67. VECC, SEC, and OEB Staff do not agree with Energy+'s proposal to recover the incremental costs associated with the COVID-19 pandemic through the ACM mechanism.
68. Each of these parties instead rely on the *Report of the OEB: Regulatory Treatment of Impacts Arising from the COVID-19 Emergency* issued June 17, 2021 (EB-2020-0133) (the "**COVID Report**") to argue that Energy+ must be forced to instead record incremental costs associated with the COVID-19 pandemic in the Account created through the COVID Report.
69. In making this argument, each of the parties are ignoring the clear and unambiguous wording in the COVID Report that states that the use of the account is voluntary. It was not established to capture industry-wide variances for all pandemic-related impacts. Utilities are not required to record amounts in the Account. Specifically:
- "The OEB agrees with OEB staff, as well as certain stakeholders, that this Account was not established with the intent to capture industry-wide variances for all pandemic-related impacts. Accordingly, utilities that do not intend to submit claims are not required to record amounts in the Account."*<sup>38</sup>
70. OEB Staff argues that in this paragraph, the OEB simply affirmed that utilities are not required to return net gains to customers and does not indicate that utilities are invited to submit requests via alternate mechanisms for recovery of COVID-related impacts.<sup>39</sup>
71. However, this interpretation is inconsistent with the clear and unambiguous wording of the COVID Report. If the OEB had intended to say that utilities are not required to return net gains to customers, then it should have clearly stated exactly that. This is not what the COVID Report says. The OEB's choice of words in the COVID Report was deliberate. It was intended to provide flexibility to utilities to decide whether or not they wish to use the Account.
72. It is also inconsistent with OEB Staff's own recommendations as set out in the *OEB Staff Proposal: Consultation on the Deferral Account – Impacts Arising from the COVID-19*

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<sup>38</sup> COVID Report, page 27

<sup>39</sup> OEB Staff Submission at page 9.



*Emergency* issued December 16, 2020 (EB-2020-0133) (the “**Staff Proposal**”). While OEB Staff considered the ICM/ACM mechanism in the Staff Proposal<sup>40</sup> – at no time did OEB Staff propose that the Account should be used to limit recovery of amounts that were otherwise eligible for ICM/ACM recovery. Rather, both the Staff Proposal and the subsequent presentation made by OEB Staff on January 14, 2021 emphasised the importance of the OEB allowing for flexibility: “*providing utilities the latitude to record what they assess as incremental and attributable to the pandemic, given their own circumstances.*”<sup>41</sup>

73. The circumstances in this case matter. Prior to the pandemic, Energy+ had applied for and received OEB approval in the ACM Decision to proceed with the construction of the Southworks facility with the renovations happening in 2021 and occupancy to occur in 2022.
74. As part of this process, Energy+ had produced evidence that it had conducted a multi-year assessment of alternative options, which were ultimately either not feasible or uneconomic. As noted in the ACM Decision “*OEB staff noted that Energy+ reviewed various options with a cost range of \$28 million to \$32 million and determined that the Southworks option is the most cost-effective one.*”<sup>42</sup>
75. While the OEB ultimately found that there was not sufficient evidence to support the Class C cost estimate for the Southworks facility at that time, the OEB approved a “funding envelope” of \$6.5 million with the express understanding that: “*Energy+ will have 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.*”<sup>43</sup>
76. The OEB’s decision to approve a funding envelope of \$6.5 million was on the understanding that Energy+ would have an opportunity to address any deviation from that amount as part of

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<sup>40</sup> Staff Proposal at pages 12-13.

<sup>41</sup> Staff Proposal at page 14.

<sup>42</sup> ACM Decision at page 9.

<sup>43</sup> ACM Decision at page 14.

this Application. It does not include any qualification or suggestion that certain deviations would later be excluded or ignored entirely.

(i) What are the implications of applying the COVID Report?

77. By suggesting the OEB use the COVID Report, the parties are seeking to fundamentally change the means test set out by the OEB in the ACM Reports.
78. Typically, to access ACM and ICM funding, a utility's regulated return must not exceed 300 bps above the approved ROE embedded in the utility's rates.<sup>44</sup> Exceeding the 300 bps dead band is an indication that funding in advance of the next rebasing is likely not required from a cash flow perspective.
79. The evidence is clear that Energy+ passes the means test as set out in the ACM Reports. In 2020, Energy+ achieved a regulated rate of return of 7.89%, which does not exceed 300 basis points of its deemed return of 8.98% embedded in rates.<sup>45</sup>
80. By contrast, in the COVID Report the OEB adopted a means test to recoveries in the Account based on achieved ROE compared to a utility's OEB-approved ROE less 300 bps.<sup>46</sup>
81. Energy+ would not qualify for recovery due to the means test used in the COVID Report. OEB Staff acknowledges in their submissions that if Energy+ seeks to recover the incremental costs associated with the COVID-19 pandemic in accordance with the rules set out in the COVID Report, Energy+ would not appear to qualify for recovery due to the means test whereby a utility must earn less than 300 basis points below its OEB-approved return on equity in order to recover COVID-related costs.<sup>47</sup>

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<sup>44</sup> 2014 Policy Options Report, page 15.

<sup>45</sup> Application at Section 4.4.1.2.

<sup>46</sup> COVID Report at page 2.

<sup>47</sup> OEB Staff Submission, page 9.

82. Energy+ submits that by attempting to substitute the means test set out in the ACM Report for the means test established in the COVID Report, the parties' submissions have the effect of undermining the policy objectives that the ACM Report was established to achieve.
83. The purpose articulated in the ACM Report is to provide incremental funding for discrete, material and needed capital projects if the means test set out in the ACM Report is met. The ACM Decision confirmed that the Southworks project was just such, a discrete and material capital project that was needed. The effect of the parties' submissions would be to deny recovery of prudently incurred incremental capital costs, even though those costs met all the criteria to qualify for ACM / ICM funding.
84. In this context, Energy+ does not agree with OEB Staff's suggestion that if the ACM/ICM module is an available option to utilities to claim incremental capital costs associated with the COVID-19 pandemic, then the sub-account established in Account 1509 would effectively be redundant.<sup>48</sup> This is not the case. There are quite a few tests that must be met to qualify for ACM/ICM funding beyond a means test. Because of this, very few capital projects in-fact qualify for ACM/ICM funding each year.
85. As noted in the ACM Report, the principal purpose of allowing for an ACM funding option in addition to an ICM funding option is to facilitate regulatory efficiency by hearing the bulk of the ACM evidence at the same time as a cost of service application rather than addressing all of materiality, need and prudence during a subsequent Price Cap IR proceeding. In all other respects, an ACM funding request should be treated and viewed similarly to an equivalent ICM funding request in the applicable year.
86. If applicants like Energy+ find that they are prejudiced simply because they used the ACM rather than the ICM funding mechanism, it is a near certainty that the ACM mechanism will not be used by applicants in the future.

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<sup>48</sup> OEB Staff Submission, page 9.

87. In addition, Energy+ has a legitimate expectation that the OEB would treat its ACM funding request in a similar manner to how it has treated other utilities in its prior decisions. The OEB has approved various ICM funding requests where the capital costs were adjusted to incorporate known impacts of COVID-19 pandemic.
88. In its May 6, 2021 Decision and Order in EB-2020-0181, the OEB approved Enbridge Gas Inc.'s request for ICM funding of \$124.0 million for the London Line Replacement Project effective January 1, 2021. This request for ICM funding was supported by a five year Asset Management Plan which states clearly that the cost and timing estimates for ICM-eligible projects were already adjusted for COVID-related impacts (emphasis added):

“The optimized result and ICM-eligible projects were reviewed with all asset managers and business stakeholders. Proposed adjustments were driven by resource capacity, re-alignment with life cycle management strategies and where possible, maintaining a total spend within the capital constraint. Resource implications were also considered for routine maintenance activities to ensure that project pace and timing met life cycle strategies, adequately reduced risk and identified as feasible. **Given the challenges faced in 2020, once COVID-related impacts to 2020 were starting to be identified, adjustments were made to reflect the impact on timing and cost of specific investments. Updates for any ICM-eligible projects were also reviewed and adjusted.** Adjustments were incorporated as necessary through consultation with asset managers and using the value framework for project comparison.”<sup>49</sup>

89. Enbridge provided further clarity on the impacts of COVID-19 in Exhibit I.SEC.17, noting:

“In 2020, **there were some delays in receipt of permits and materials that could have been related to the pandemic.** However, this is not unusual and the degree to which this was caused by COVID-19 is difficult to determine.

Some work at Keil Drive and VPC was delayed as Enbridge Gas made changes to working practices to ensure worker safety. Additionally, **there were increased costs as changes were made to critical facilities such as dispatch centres and control rooms to meet physical distancing requirements.**

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<sup>49</sup> Enbridge Gas Inc. – 2021 Rates – Application and Evidence (Incremental Capital Module) OEB File No. EB-2020-0181 at pdf page 421 of 652.

Construction procedures, particularly those that required workers to enter customers' homes (for example to inspect and light appliances) **were adjusted to protect workers and members of the public, resulting in increases to cost and reduced productivity.**"<sup>50</sup>

90. In addition, on March 25, 2021, the OEB approved Greater Sudbury Hydro Inc.'s request for a cost increase of 4.35% over the approved ACM funding amount, with the difference representing actual costs incurred in 2020 as well as remaining budget costs that will be incurred in 2021.<sup>51</sup>
91. Similarly, in its December 17, 2020 Decision and Order in EB-2020-0002, the OEB approved Alectra Utilities Corporation's request for ICM funding of \$2,090,197 for the Goreway Road Widening Project and \$2,885,574 for the Rutherford Road Widening Project.
92. Given the timing over which the construction of Greater Sudbury Hydro Inc.'s and Alectra Utilities Corporation's projects occurred, it is impossible to believe that these cost increases were not at least partly driven by the impacts of the COVID-19 pandemic.

**(d) Unforeseen Costs**

93. Other unforeseen costs that contributed to the project cost increase include firewall construction costs, legal and real estate fees, conduit replacement, waterproofing, design consistency and various other costs, totalling to \$692K ("**Unforeseen Costs**").<sup>52</sup>
94. OEB staff submits that the \$692,000 in the Unforeseen Costs is reasonable to include in the updated ACM total claim. The firewall was required and the costs were reasonably incurred. The other unforeseen costs were reasonably expected to be unforeseen, incremental to the \$6.5M funding envelope previously approved, and prudently incurred.<sup>53</sup>

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<sup>50</sup> Exhibit I.SEC.17 in EB-2020-0181.

<sup>51</sup> Decision and Rate Order in EB-2020-0024 issued March 25, 2021 at page 14.

<sup>52</sup> Application, page 26.

<sup>53</sup> OEB Staff Submission, page 10.

95. SEC submits that the Unforeseen Costs should not be recoverable as the benchmark costs were determined by inflating final actual costs of two comparator facilities to 2021 dollars and therefore it does not make sense to then permit recovery of additional costs after the Southworks Project is near completion.<sup>54</sup> SEC further submits that if the revised cost estimates were included in the forecast budgets in the 2019 Rate Application, the OEB decision would not have been different as the \$6.5M was based on the benchmark costs and not Energy+'s forecast costs and if anything, the OEB may have been less likely to grant any approvals as it may have had greater doubts on the prudence of the Southworks Project.<sup>55</sup>
96. SEC submits that Energy+ did not provide evidence that the type of costs that it did not include in the 2019 Rate Application 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. Therefore, it should not be eligible for additional recovery for any of the Unforeseen Costs.<sup>56</sup>
97. VECC did not make submissions on the Unforeseen Costs.
98. Energy+ does not agree with SEC's interpretation of the ACM Decision. The approved funding envelope of \$6.5 million was established using benchmark comparisons, and Energy+ is permitted to address any deviation from this amount within this application. The ACM Decision did not approve the \$6.5 million as the final capital amount. Within this application, Energy+ provided a detailed breakdown of its cost forecast which is within the +/-30% threshold, documented the differences between the funding envelope and the cost forecast, and demonstrated that costs were prudently incurred, including the Unforeseen Costs.
99. Energy+ agrees with OEB staff and submits that the Unforeseen Costs were reasonably expected to be unforeseen, incremental to the \$6.5 million funding envelope previously approved, and prudently incurred.

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<sup>54</sup> SEC Submission, pages 4 to 5.

<sup>55</sup> SEC Submission, pages 5.

<sup>56</sup> SEC Submission, pages 5.

**(d) ACM Parameters**

100. OEB Staff submits that the updated 2022 capital budget in the ACM model of \$23.50 million, which is a \$1.43 million increase from \$22.07 million is reasonable as the cost estimate for the Southworks facility has also increased by \$1.65 million. OEB Staff notes that any amount approved by the OEB between \$6.5 and \$8.1 million for this ACM would be fully eligible for recovery.<sup>57</sup>
101. Energy+ agrees with OEB staff that any amount approved by the OEB up to the requested amount of \$8,152,916 for this ACM would be fully eligible for recovery.

**(e) Conclusion**

102. As the OEB considers the prudence of the incremental costs documented by Energy+ in this Application, it may be helpful to revisit the Facilities Business Plan that was filed by Energy+ as part of the EB-2018-0028 ACM Application at Exhibit 2, Appendix 2-1 – Distribution System Plan, Appendix N: Facilities Business Plan.<sup>58</sup>
103. The Facilities Business Plan documents a comprehensive multi-year review beginning in 2018 of alternatives ranging from renovating/rebuilding currently owned buildings, purchasing/renovating alternative facilities, leasing alternative facilities and construction of new facilities. This options analysis is summarized again in Table 1 below (with costs updated to reflect this Application).

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<sup>57</sup> OEB Staff Submission The purpose articulated in the ACM Report is to provide incremental funding for discrete, material and needed capital projects. The ACM Decision confirmed that the Southworks project was just such a discrete and material capital project that was needed. ion, page 10.

<sup>58</sup> In SEC-1, the intervenors asked and Energy+ agreed that evidence filed in EB-2018-0028 could be deemed to be included in the evidentiary record in this proceeding.

**Table 1: Facilities Plan Options Summary**

Option	Description	Building Costs	Notes
1, 2	(1) Build a third floor on the Bishop Street Building. (2) Expand the Bishop Street Building.	\$28,638,555 or \$33,078,530 for LEED building.	Considerable site approval challenges due to proximity to wetlands. Cannot easily build on older (1989) portion of the building.
3, 4	(3) Retain the Bishop Street Building for an administrative office and build a new operations centre. (4) Build a combined operations centre and administrative office at a new location.	\$31,534,277 or \$32,980,677 for LEED building.	Land not included at \$300,000 to \$400,000 per acre.
5	Renovate an existing building in Cambridge for both administration and operations.	Not applicable.	Lack of suitable sites due to need for outside storage, garage and proximity to major roads.
6	Renovate an existing building in Cambridge for administrative space and retain the Bishop Street Building for operations.	Southworks (administrative): \$8,100,000 <b>(updated estimate based on this Application)</b> Bishop Street (operations): \$2,000,000	<b>Preferred option.</b>

104. After including all incremental costs documented in this Application, the Southworks facility remains by far the most cost effective and prudent option available to Energy+ to meet its facility needs.

- All of which is respectfully submitted -