John Vellone
T: 416-367-6730
jvellone@blg.com

Zoë Thoms
T: 416-367-6661
zthoms@blg.com

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto ON M5H 4E3
Canada
T 416-367-6000
F 416-367-6749
blg.com

Borden Ladner Gervais

File No. 024011.000005

12 May 2025

BY RESS
registrar@oeb.ca

Ms. Nancy Marconi, Registrar
Ontario Energy Board
PO Box 2319
26th Floor, 2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Marconi:

Re: ERTH Power Corporation - 2025 Incentive Rate-setting Mechanism (IRM) Application / Incremental Capital Module (ICM) Request
File Number: EB-2024-0021

In accordance with Procedural Order No. 6 issued on April 10, 2025, and the Ontario Energy Board's *Rules of Practice and Procedure*, please find enclosed the Reply argument of the ERTH Power Corporation in EB-2024-0021.

Please contact the undersigned with any questions.

Yours truly,

BORDEN LADNER GERVAIS LLP

Z. Thoms

Zoë Thoms

JV/ZT

EB-2024-0021

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

AND IN THE MATTER OF an Application by ERTH Power Corporation Inc. under Section 78 of the Act for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2025.

REPLY ARGUMENT OF
ERTH POWER CORPORATION INC.

May 12, 2025

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide St W.
Toronto ON M5H 4E3

John A.D. Vellone
Tel: (416) 367-6730
Facsimile: (416) 361-2758
Email: jvellone@blg.com

Zoë Thoms
Tel: (416) 367-6661
Facsimile: (416) 361-2758
Email: zthoms@blg.com

Counsel to the Applicant

TABLE OF CONTENTS

I. INTRODUCTION

1. Pursuant to Procedural Order No. 6, ERTH Power Corporation Inc. ("**ERTH Power**") submits this reply to the submissions of the Ontario Energy Board Staff ("**OEB Staff**"), the School Energy Coalition ("**SEC**"), and the Vulnerable Energy Consumers Coalition ("**VECC**") in respect of ERTH Power's 2025 Incremental Capital Module ("**ICM**") application, submitted as part of its 2025 Incentive Rate Mechanism ("**IRM**") pursuant to section 78 of the *Ontario Energy Board Act, 1998* ("**OEB Act**") on October 11, 2024 (the "**Application**"). ERTH Power repeats and adopts the submissions set out in its Argument-in-Chief filed on April 22, 2025, and relies on those submissions in response to the issues raised by OEB Staff and the intervenors.

2. ERTH Power requests that the OEB approve the full amount of its request for ICM funding of $33.2 million and the associated revenue requirement for the purchase of property, design, construction, and furnishing of a new administrative and operational facility (the "**New Facility**"). The New Facility will serve as ERTH Power's new headquarters, consolidating existing rental facilities which no longer meet ERTH Power's needs. ERTH Power further requests that the OEB approve three new variance and deferral accounts.[1]

3. OEB Staff, SEC and VECC support the request by ERTH Power for the New Facility, subject to adjustments to reduce the capital amount eligible for ICM recovery on the basis that ERTH Power has not established the prudence of the cost of the New Facility.[2]

4. ERTH Power submits that, contrary to the positions taken by OEB Staff, SEC and VECC, ERTH Power has provided extensive and detailed evidence to establish the prudence of its decision to incur the costs for the New Facility. The fact that market realities result in a cost higher than OEB Staff and intervenors would prefer is not, in and of itself, an indication of a lack of prudence on ERTH Power's part. The evidentiary

---

[1] ERTH Power Argument-in-Chief ("AiC"), para 2. SEC-2. SEC-6 and Attachments 4, 5, and 6.
[2] OEB Staff Submission, April 28, 2025 ("OEB Staff Submission"), p. 5-6. SEC Submission, April 28, 2025 ("SEC Submission") p. 2. VECC Submissions April 28, 2025 ("VECC Submission"), p. 4.

record illustrates ERTH Power's deep commitment to pursuing the most cost-effective option for customers at every stage in the process, from identifying the need, weighing available options, making design choices and tendering for construction.[3] Further, the benchmarking provided by ERTH Power comparing the New Facility against a comparator group of OEB-approved costs illustrates the reasonableness of the cost of the New Facility.[4]

5. For the reasons set out below and in the evidentiary record, ERTH Power respectfully submits that the proposed investment for the New Facility is both necessary and prudent. ERTH Power therefore requests that the OEB approve the full amount of the requested ICM funding and associated revenue requirement, along with the proposed variance and deferral accounts, as filed.

II. SUMMARY OF AREAS OF AGREEMENT

6. On April 28, 2025, the OEB received submissions from OEB Staff, SEC, and VECC regarding the ICM Application. These submissions included several areas of agreement between the parties and ERTH Power. The following section summarizes five (5) specific areas of agreement, including, need, materiality, prudence of the solar photovoltaic (PV) system and the geothermal system components, acceptance of the rate zone allocation methodology, and reporting on external funding secured during the ICM period.

a) ERTH Power has Satisfied ICM Eligibility Criteria for Materiality and Need

7. First, all three parties agree that ERTH Power has satisfied the OEB's ICM eligibility criteria for materiality and need.[5] There is unanimous recognition that the utility's current facilities are no longer adequate and that the challenges posed by the existing Bell Street and Aylmer properties must be addressed.

8. SEC clearly acknowledges this, stating:

---

[3] AiC, p. 17-23.
[4] AiC, para. 50-54.
[5] VECC Submission, p. 4; SEC Submission, p. 3. OEB Staff Submission, p. 5

> *ERTH Power has shown that the cost of the New Facility is outside of the current rate base and has adequately explained why the Bell Street and Elm Street facilities no longer meet the utility's needs.*[6]

9. VECC similarly endorses the need for the New Facility, stating:

> *ERTH Power has adequately described the operational, safety and workforce challenges with the existing Ingersoll and Aylmer properties and that they no longer meet ERTH Power's requirements.*[7]

10. Second, the parties agree that the New Facility is a discrete investment that is not funded through existing rates.[8] The project is clearly outside the base upon which current rates were derived. The facility passes the materiality threshold, and OEB Staff explicitly conclude that the project will have a "significant influence on the operation of the distributor."[9]

11. This unanimous endorsement of the project's materiality and necessity by all participating parties provides strong and credible support for the Board to conclude that the proposed New Facility meets these foundational eligibility criteria for ICM funding.

b) <u>Energy System Components are Reasonable and Supported by All Parties</u>

12. Third, all parties agree that the inclusion of energy-efficient technologies, specifically a solar PV system and a ground-source heat pump, as part of the New Facility is reasonable, prudent and aligned with customer and public policy interests.[10]

13. OEB Staff explicitly support the inclusion of these technologies even where there may be a potential for a longer payback period when accounting for financing costs:

> *Although there is a risk that the actual payback period for the solar panels may be longer than estimated, OEB staff submits that these energy system investments will benefit ERTH Power's customers in the long term. OEB staff does not object to the inclusion of these technologies as part of the*

---

[6] SEC Submissions, p. 3.
[7] VECC Submission, p. 4.
[8] OEB Staff Submission, p. 5. SEC Submission, p. 2. VECC Submission, p. 4.
[9] OEB Staff Submission, p. 3.
[10] OEB Staff Submission, p. 6. SEC Submission, p. 6; VECC Submission, p. 8.

new facility costs.[11]

14. SEC and VECC likewise support the inclusion of the solar panels and heat pump.[12]

15. This full alignment confirms that these technologies, while not the lowest initial cost, are a reasonable and prudent investment that will generate long-term customer value, operational savings, and environmental benefits consistent with provincial energy policy objectives.[13] No party has contested their inclusion in the ICM-eligible cost.

c) Proposed Rate Zone Allocation of Incremental Revenue Requirement Reasonable

16. ERTH Power proposed to allocate the costs of the New Facility between its two rate zones (Main Rate Zone and Goderich Rate Zone) based on the proportion of actual capital expenditures incurred in each zone over the 2018 to 2023 period.[14] This results in an allocation of 81% to the Main Rate Zone and 19% to the Goderich Rate Zone.[15]

17. Fourth, OEB Staff reviewed this approach and found it to be reasonable, stating that it is "straightforward to apply and results in similar allocation outcomes to the alternative approaches" considered in this proceeding.[16] Neither SEC nor VECC took a position on the rate zone allocation methodology.

d) ERTH Power to Report on Result of Efforts to Secure External Funding

18. ERTH Power retained Power Advisory LLP to review federal, provincial, and municipal funding opportunities, including tax credits and grants for the New Facility.[17] In the Application, ERTH Power committed to reflecting any funding received as part of the

---

[11] OEB Staff Submission, p. 6.
[12] SEC Submission, April 28, 2025, p. 6; VECC Submission, April 28, 2025, p. 8.
[13] AIC para 13-15. SEC-14(B). KT1.3 – Correction to Interrogatory Response SEC-13(C). JT1.8. JT1.1. Technical Conference Transcript, February 6, 2025 ("TC Transcript"), pg. 82, line 19-23. JT1.1. TC Transcript, pg. 9, lines 11-28. JT1.1. TC Transcript, pg. 10, lines 1-3.
[14] AiC para 30. Application, Appendix A – 2024 ICM Application, p. 38.
[15] Application, Appendix A – 2024 ICM Application, p. 38.
[16] OEB Staff Submission, p. 14.
[17] Staff-14B.

ICM true-up at its next cost of service application.[18]

19. SEC and VECC submit that, in addition to reflecting any funding received at the time of ERTH Power's next rebasing, the OEB should require that ERTH Power report on the steps taken to secure external funding and the results.[19] OEB Staff do not take a position on this issue.

20. Fifth, ERTH Power does not oppose this request. ERTH is committed to transparently accounting for any funding received through the ICM true-up mechanism. As noted, ERTH Power has already shared the results of its efforts to identify external funding opportunities through the production of the report prepared by Power Advisory LLP in this ICM application.[20] ERTH Power agrees to provide an update at the next rebasing on steps taken to secure external funding and the results of these efforts at the next cost of service application.

III. ISSUES IN DISPUTE

21. While the parties all acknowledge ERTH Power's need for the New Facility, they take issue with the prudence of its cost and propose substantial reductions to the ICM funding amount (OEB Staff 16% reduction and SEC and VECC 30% reduction).[21]

22. The parties point to ERTH Power's decision-making process and benchmarking to justify reductions that are, in substance, arbitrary.[22] In addition, the parties oppose ERTH Power's proposal to establish deferral and variance accounts that would return rent savings, operational, maintenance and administration ("OM&A") efficiencies and future affiliate rental income to customers.[23] The parties also reject ERTH Power's proposal to apply a reduced capital cost allowance on the mechanical and energy portion of its New

[18] Staff-14B.
[19] SEC Submission, April 28, 2025, page 9. VECC Submission, April 28, 2025, page 10.
[20] JT1.6 and Attachment 4: DER/CDM/NWA Review.
[21] OEB Staff Submission, p. 1. SEC Submission, p. 2. VECC Submission, p.3.
[22] OEB Staff Submission, p. 6-9. SEC Submission, p. 3-6. VECC Submission, p. 5-7.
[23] OEB Staff Submission, p. 9-14. SEC Submission, p. 6-10. VECC Submission, p. 7-9.

Facility.[24] Finally, SEC and VECC urge the OEB deviate from its standard ICM policy regarding in-service date treatment and the timing of the rate rider.[25] For the reasons outlined below, ERTH Power respectfully submits that these objections are without merit and should be dismissed by the OEB.

a) <u>Prudence of the Cost of the New Facility</u>

23. OEB Staff, SEC and VECC question the prudence of the New Facility's cost and propose substantial reductions to ERTH Power's ICM funding request. SEC and VECC criticize ERTH Power's decision-making process arguing that it lacked adequate analysis of alternatives, transparency and customer input.[26] All the parties take issue ERTH Power's benchmarking analysis arguing that ERTH Power's cost per square foot should be reduced to the median (SEC and VECC) or one standard deviation above the median (OEB Staff).[27] However, their proposed reductions rely on selective interpretations of the evidence and fail to reflect that the benchmarking is based on **amounts that were all previously approved by the OEB (i.e. they are all <u>OEB- approved and prudent amounts</u>)** and not actual project costs.

i) Decision Making

24. ERTH Power rejects, in the strongest possible terms, the suggestions by SEC and VECC that its decision-making process lacked rigor or was pre-determined. These claims are not only unfounded, they directly contradict the record in this proceeding. The OEB has made clear that it expects utilities to justify the prudence of their decisions based on what was known, or reasonably knowable, at the time the decision is being made.[28] ERTH Power has done exactly that. Over a multi-stage process, ERTH Power assessed multiple options, including status quo arrangements, leasing and new construction.[29] Site visits, internal

[24] OEB Staff Submission, p. 17-18. SEC Submission, p. 8-9. VECC Submission, p. 9.
[25] SEC Submission, p. 10. VECC Submission, p. 9.
[26] SEC Submission, p. 3-4. VECC Submission, p. 6-7.
[27] SEC Submission, p. 6. VECC Submission, p. 5. OEB Staff Submission, p. 15-16.
[28] EB-2020-0150, Decision and Order, Upper Canada Transmission, Inc., p. 28.
[29] AiC, para 46-49. Application, Appendix A – 2024 ICM Application p. 21-29.

planning sessions, engineering analysis, and third-party input shaped the outcome.[30] The sole leasing option available was determined to be financially and operationally impracticable, a conclusion supported by contemporaneous market research.[31]

25. SEC alleges that ERTH Power "failed to adequately assess alternatives before proceeding with its decision to acquire land and pursue construction of a single new facility."[32] VECC similarly alleges that "ERTH Power decided early on that purchasing land and constructing the New Facility was the preferred outcome without a similar in depth analysis of other alternatives."[33] In support of these allegations, the parties point to the fact that the conditional offer by ERTH Power for the 385 Thomas Street property in Ingersoll, was accepted early in 2023 on February 8th.[34] SEC also points to approval in October 2022, of a key performance indicator under ERTH Power's 2023 Corporate Action Plan to develop a business plan for a new LDC Hub facility and to explore property options.[35]

26. SEC and VECC have overlooked that even with the conditional offer on the 385 Thomas Street property in February 2023, ERTH Power was not locked into that one outcome and continued to explore all available options. The offer was conditional, a standard first step in considering the purchase of land which allows the purchaser to undertake due diligence with respect to the property. The conditional offer afforded offramps for ERTH Power while it considered whether 385 Thomas Street would be the best option.[36] The utility continued to explore all available options throughout 2023, including leasing.[37]

27. **ERTH Power did not proceed with closing the purchase of the land until almost a year later in January 2024.**[38]

28. ERTH Power had engaged a real estate firm to identify all available properties, whether

---

[30] AiC, para 45-46.
[31] AiC, para 46-49.
[32] SEC Submission, p. 3.
[33] VECC Submission, p. 6.
[34] SEC Submission, p. 3. VECC Submission, p. 6.
[35] SEC Submissions p. 6.
[36] SEC-7(a).
[37] Technical Conference Transcript, February 6, 2025 ("TC Transcript"), p. 93, line 16 to p. 97, line 28. VECC-8.
[38] SEC-1, Attachment 6, p. 1

leased or new build sites, and determined that there were very few options that met its needs.[39] Entering into a conditional offer for the 385 Thomas Street property while ERTH Power continued to explore alternatives, kept all options open. There was nothing preventing ERTH Power from selling the 385 Thomas Street property should it determine to pursue another option such as leasing or purchasing a different property. This timeline demonstrates ERTH Power's actions were not the result of a pre-determined outcome, but of a deliberate, phased approach that preserved optionality throughout 2023 while the utility carefully evaluated all reasonable alternatives.

29. SEC contends that there is no evidence that ERTH Power seriously explored the alternative of maintaining multiple sites to serve its service territory, or that it weighed ownership by ERTH Power versus its affiliate ERTH Corporation, and that this suggests a pre-emptive commitment to a particular outcome.[40] This is not accurate. First, ERTH Power is maintaining multiple sites to serve its service territory. ERTH Power will maintain its Goderich centre and use 50% of the Aylmer site for storage and staging.[41] Second, ERTH Power provided evidence that it specifically considered the option of multiple sites and determined that the consolidation of the two locations into the New Facility will provide needed management oversight and mentorship to reduce health and safety incidents and improve staff retention.[42] The decision to consolidate is not just about space, but about improving operational effectiveness and workforce management. Third, ERTH Power provided evidence that the ownership structure was specifically considered while creating the business plan.[43] These considerations reflect a reasoned and evidence-based approach, not a pre-emptive commitment to a predetermined outcome.

30. SEC and VECC allege that ERTH Power's procurement process for professional services by POW Engineering and Utilis Consulting raise concerns about transparency and value.[44]

---

[39] VECC-8.
[40] SEC Submission, p. 3.
[41] AiC, para 46. Application, Appendix A – 2024 ICM Application pg. 21-29.
[42] AiC, para 4. TC Transcript, p. 23, line 8-13.
[43] TC Transcript p. 31, line 20 to p. 32, line 8; p. 46, line 13 to 18; p. 55, line 12 to p. 56, line 3.
[44] SEC Submission, p. 3-4. VECC Submission, p. 6-7.

ERTH Power's engagement of both POW Engineering and Utilis Consulting were both reasonable and resulted in valuable contributions to assist ERTH Power to identify the most cost-effective solution to meet its needs. ERTH Power's decision to retain POW Engineering as a sole-source engagement was consistent with good utility practice. POW Engineering had prior experience working with utilities, provided an integrated engineering and architectural service which would create efficiencies and was locally based and highly regarded in the community.[45] Further, POW Engineering worked with ERTH Power to identify cost-saving adjustments throughout the design process.[46]

31. The business plan developed by Utilis Consulting was not an after-the-fact justification but a structured consolidation of findings and alternatives, including cost comparisons, made throughout the development of, and decision-making for, the New Facility.[47] Further, SEC suggests that the business plan prepared by Utilis Consulting was not sufficient because it did not include many multiple variables regarding possible building types, design options and material choices.[48] That level of options analysis is simply not practical or useful. The building type and design was largely dictated by factual circumstances such as, the size of the land, the number of employees to be accommodated, and the use of the space.[49] Options were continually evaluated through the design process with input from ERTH Power staff, management, elected municipal shareholders and consultants.[50] The result was a functional and cost-effective design tailored to ERTH Power's operational realities—not a theoretical exercise, but a practical solution grounded in real-world constraints and expert input.

32. Contrary to SEC and VECC's assertions, ERTH Power did not pursue a solution to the need for a new and upgraded administrative and operations space "with cost being no object."[51] ERTH Power scaled back the design, reduced the footprint, eliminated high-cost

[45] TC Transcript, p. 36, line 5 to p. 37, line 7.
[46] AiC, para. 45.
[47] AiC, p. 19. TC Transcript pg. 34, line 3 to pg. 35, line 17. TC Transcript pg. 46 line 20 to pg. 47 line 11.
[48] SEC Submission, p. 4.
[49] JT1.3 and Attachment 2: Requirements Document – 385 Thomas St New Build.
[50] AiC para 45.
[51] SEC Submission, p. 2.

features, and achieved over $2 million in savings.[52] To suggest that this reflects a flawed or inadequate decision-making process is not only inaccurate, it diminishes the careful work undertaken by ERTH Power's management, consultants and elected municipal shareholders.

33. Finally, the assertion that ERTH Power failed to consult customers is misplaced. ERTH Power is a municipally owned distributor. Its shareholders are elected officials who represent and are accountable to the very customers serviced by the utility.[53] These officials were consulted extensively, including on the range of potential rate impacts, supported the business plan, and endorsed the project.[54] The record shows not a pre-determined decision, but a prudent, transparent and well-evidenced response to long-standing needs.

34. SEC and VECC had ample opportunity in this Application to adduce real evidence of imprudent conduct by ERTH Power. Despite interrogatories, a technical conference (scheduled for two days but completed in one by the OEB Staff and intervenors), and undertakings, they were unable to do so. This is because ERTH Power acted reasonably and prudently, ensuring that the New Facility was the most cost-effective solution to the real and pressing need facing the utility.

ii) Benchmarking

35. SEC and VECC argue that ERTH Power's benchmarking shows its proposed facility is more expensive than comparable projects, with costs of the New Facility with a conventional energy system exceeding the "peer average" by approximately 29% and recommend substantial reductions to the ICM funding amount.[55] OEB Staff similarly raise concerns, noting ERTH Power's costs are above the comparator range and recommend a more moderate reduction based on one standard deviation above the median cost per

---

[52] AiC p. 18-19. Transcript TC p. 42 line 21 to p. 45 line 7, explanations of reductions provided by Mr. White.
[53] AiC p. 19.
[54] AiC p. 19. SEC-15(B). TC Transcript, pg. 26, line 20-24. SEC-15(B). SEC-1 – Attachments 1 -5 and 7. JT1.4.
[55] SEC Submission, pg. 4. VECC Submission, p. 5.

square foot.[56] OEB Staff also requested clarification of ERTH Power's most current benchmarking results based on the updated project costs included in ERTH Power's Argument-in-Chief.[57]

36. Prior to addressing the SEC and VECC arguments, ERTH Power will first address OEB Staff's request for clarification. Table 1 below, sets out the benchmarking data underlying the graph showing capital expenditures relative to total square footage, as presented in ERTH Power's Argument-in-Chief.[58] OEB Staff noted that the updated figures show a lower cost per square foot than the version included in the original ICM Application.[59] This observation is correct. As explained in footnote 92 of the Argument-in-Chief, this change reflects two key updates: (1) revised cost estimates for the New Facility,[60] and (2) updated assumptions for the conventional energy comparator.[61] It also reflects the use of the total square footage of the New Facility (57,170 ft^2) as provided in the revised response to interrogatory SEC-13.[62]

37. The use of the total square footage, including space allocated to affiliates, is appropriate because the capital cost reflects the construction of the entire building, not just the portion allocated to the regulated utility.[63]

38. In addition, while some of the building space is allocated to affiliates, the staff of those affiliates provide shared services back to ERTH Power. As a consequence, consistent with *Affiliate Relationships Code for Electricity Distributors and Transmitters* ("ARC"), the building overhead costs are ultimately allocated to ERTH Power as the recipient of those shared services. To ignore this reality would be to effectively penalize ERTH Power in this ICM benchmarking for the sin of efficiently structuring its affairs to utilize shared corporate services as contemplated under ARC. Moreover, without the proposed approach,

---

[56] OEB Staff Submission, p. 15-16.
[57] OEB Staff Submission, p. 7-8.
[58] AiC, para 54 and Figure 11.
[59] OEB Staff Submission, pg. 7-8.
[60] SEC-2. JT1.1 and Attachments.
[61] KT1.3 providing revised response to SEC-13C.
[62] AiC, para 54 and Figure 11.
[63] TC Transcript, p. 75, line 1 to line 18.

customers would face higher costs, as additional space in the New Facility would be required for utility staff to perform the services no longer being provided by the affiliate.

39. As a consequence, OEB Staff's recalculation of the benchmarking analysis of capital expenditures relative to total ft^2 overstates the per-square-foot costs by using a reduced area that excludes affiliate space and should therefore be given no weight in evaluating the reasonableness of ERTH Power's benchmarking.[64]

Table 1: Capital Expenditures Relative to Total ft^2

Utility	**Total ft2**	**OEB Approved CAPEX ($000)**	**OEB Approved $/ft^2**
Algoma Power	41,703	$15,361	$368
Milton Hydro	91,828	$24,594	$268
Waterloo North	104,000	$58,236	$560
InnPower	36,172	$19,129	$529
ERTH Power	**57,170**	**$33,182**	**$580**
ERTH Power - Conventional Energy	**57,170**	**$31,382**	**$549**

40. In raising the benchmarking concerns to challenge the prudence of ERTH Power's decision to incur the costs for the New Facility, the parties have failed to account for the fact that the entire benchmarking comparator group is considering **OEB-approved amounts**.[65] ERTH Power has benchmarked the New Facility costs against other new facility project costs that the OEB has previously determined to be just and reasonable recovery from ratepayers. The New Facility costs **are not** benchmarked against the actual costs of those comparator facilities. It is only being compared against the prudently incurred costs.

41. In this context, when Waterloo North has been approved with prudently incurred costs of $560/$ft^2$ and InnPower has been approved with prudently incurred costs of $529/$ft^2$– neither the VECC nor SEC proposal to reduce ERTH Power's costs to the median nor

[64] OEB Staff Submissions, p. 8 Figure 2.
[65] AiC para. 50-54. Application, Appendix A – 2024 ICM Application p. 29-35. SEC-1 Attachment 12 – DRAFT ERTH New Facility Business Plan. SEC-12. SEC-13.

OEB Staff's proposal to reduce ERTH Power's costs to one standard deviation above the median would result in just and reasonable rates.

42. The purpose of this benchmarking is not to demand conformity to an artificial average, but to assess whether proposed costs fall within or near to a range that the OEB has accepted as prudent. As set out in Table 1 above, ERTH Power's cost per ft^2 for the conventional energy system falls within the range that the OEB has accepted as prudent (the upper limit of that range is \$560/ft^2).

43. SEC and VECC both argue that the OEB should disallow ICM costs above the benchmarking average of \$428 or \$427 per ft^2 respectively.[66] This equates to a reduction of \$6.978 million or \$7.031 million. VECC does not cite any authority for reducing costs to a benchmark median. SEC cites three OEB decisions as authority for justifying a downward adjustment to a benchmark median. In EB-2018-0028, SEC notes that the OEB used benchmarking evidence to reduce approved costs to an average of comparator facilities on a per-square-foot basis.[67] That reduction, however, was made in the context of the OEB's concern about the quality of the utility's cost estimates, and not reflexively:[68]

> *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.*

44. In contrast, ERTH Power has submitted a detailed, transparent, and iterative cost estimate, supported by benchmarking, external validation, and project-level cost reductions.[69] Imposing a similar downward adjustment is neither necessary nor

[66] SEC Submission, p. 6. VECC Submission p. 6.
[67] SEC Submission, p. 6.
[68] EB-2018-0028, pg. 14.
[69] AiC paras 16-17, 45, 50-54. SEC-2(A). JT1.3. TC Transcript, p. 40 line 5 to p. 46 line 7.

appropriate.

45. SEC cites two other OEB decisions (EB-2017-0049 and EB-2019-0082), in which the Board reduced recoverable costs to a benchmark median in the context of compensation.[70] Both decisions concerned applications by Hydro One Networks Inc. ("**HONI**"), where the OEB made reductions due to a persistent and unresolved concern with HONI's elevated compensation costs. As the OEB noted:

> *The OEB continues to be concerned about Hydro One's total compensation costs being higher than comparable companies. As mentioned in the OEB's decision and order for Hydro One's distribution business, this concern has been expressed in almost every OEB decision involving both the distribution and transmission costs for the last ten years.*[71]

46. This context is materially different from facility benchmarking. Unlike compensation benchmarking, where the Board applies a consistent standard to address entrenched cost structures that impact rates, benchmarking new facility costs is less standardized and more context dependent. The objective for facility cost reviews is not to ensure uniformity, but to assess whether the capital investment is prudent and justified based on the project's unique circumstances. In this case, ERTH Power has demonstrated that the cost of the New Facility is reasonable, making a median-based adjustment inappropriate.

47. OEB Staff submit that the Board should disallow costs above one standard deviation from the median of the benchmarking comparators, setting a threshold of $586 per square foot.[72] However, OEB Staff do not provide any supporting authority for this proposal. OEB Staff's proposal was based on a benchmarking result that, as explained above in paragraphs 36-39, overstated ERTH Power's cost per square foot by excluding affiliate-occupied space from the total building. Using the correct inputs set out in Table 1 above, the costs of ERTH Power's conventional energy option is 6.78% less than the proposed OEB Staff benchmark. These calculations are set out in Table 2 below.

---

[70] SEC Submission, p. 6.
[71] EB-2019-0082, p. 140.
[72] OEB Staff Submission, p. 15.

Table 2: OEB Staff Proposed Benchmark of Median Value + Standard Deviation

Item	OEB Approved $/ft^2	
Algoma Power	$368	A
Milton Hydro	$268	B
Waterloo North	$560	C
InnPower	$529	D
Median of Value (A,B,C,D)	$449	E
Standard Deviation (A,B,C,D)	$138	F
Median Value + Standard Deviation (E + F)	$586	G
ERTH Power - Conventional Energy	$549	H
Difference (1-G/H)	-6.78%	I

48. The benchmarking provided by ERTH Power to support the New Facility is based on OEB-approved capital amounts, values the Board has found to be just and reasonable for recovery from ratepayers. This provides a meaningful and principled range against which to assess prudence. ERTH Power's proposed cost per square foot for the conventional energy option falls within the range previously accepted by the OEB, and the total New Facility cost is only slightly above this range, with clear justification for the solar and geothermal systems.

49. Under these circumstances, the Board should find that ERTH Power's ICM funding request is prudent, and that no adjustment is warranted based on benchmarking.

b) <u>Deferral and Variance Accounts</u>

50. OEB Staff, SEC and VECC oppose the creation of the three DVAs proposed by ERTH Power to account for avoided rent and OM&A costs and rental income for the benefit of ratepayers.[73]

i) Avoided Rent, OM&A Cost Savings and Rental Income from Affiliate

[73] OEB Staff Submission, p. 12. SEC Submission, p. 9-10. VECC Submissions, p. 8-9.

51. OEB Staff and SEC submit that the ICM policy is meant only for capital costs and not OM&A.[74] OEB Staff does not agree that any exception to this policy should be made, even if the OM&A variance benefits ratepayers.[75] VECC and SEC are concerned with a lag in the time from when customers receive the benefit of savings compared to when they begin to pay for the New Facility.[76] SEC and VECC submit that, while a DVA may not be appropriate, the avoided rent should be applied as an offset to the approved ICM revenue requirement while recognizing that the OEB has not previously made such an adjustment.[77]

52. OEB Staff, SEC and VECC also do not support the creation of the Rental Income Deferral Account to capture revenue from rental income for future credit to customers.[78] Instead, the parties submit that the costs of the portion of the New Facility rented to the affiliate should be removed from the revenue requirement. OEB Staff and VECC proposes that the disallowance should be for the ICM period only, and that the excluded costs would be considered in ERTH Power's next rebasing application.[79] SEC proposes that the portion of building used by an affiliate should be removed from ratebase and the approved ICM.[80]

53. ERTH Power maintains the position outlined in the Argument-in-Chief that the three proposed DVAs – ERTH Avoided Rent Deferral Account, Rental Income Deferral Account, and ERTH New Facility OM&A Costs Variance Account – are an appropriate mechanism to fairly return savings and credit rental income to customers.[81]

54. However, in light of the submissions of VECC, SEC and OEB Staff, ERTH Power proposes that it would be agreeable, in the alternative, to a temporary reduction to the approved ICM revenue requirement in the amount equivalent to the amounts that would have otherwise been recorded in the ERTH Avoided Rent Deferral Account (on account of

---

[74] OEB Staff Submission, p. 12. SEC Submission, p. 9-10.
[75] OEB Staff Submission, p. 10-12.
[76] VEC Submission, p. 9. SEC Submission, p. 10.
[77] VECC Submission, p. 8. SEC Submission, p. 9.
[78] OEB Staff Submissions, p. 10-12. SEC Submissions, p. 6-7. VECC Submissions, p. 7.
[79] OEB Staff Submissions, p. 16-17. VECC Submissions, p. 7-8.
[80] SEC Submission, p. 6.
[81] ERTH Power AIC, p. 27-30.

avoided rent) plus the amounts that would have otherwise been recorded in the Rental Income Deferral Account (on account of affiliate rental income). Under such an approach, ERTH Power would withdraw all three of its proposed DVAs. ERTH Power's acceptance of this proposal is on the basis that it is not a prudence disallowance, but rather an alternative approach to fairly return savings and credit rental income to customers until rebasing. ERTH Power submits that any such a reduction should only be for the ICM period until rebasing, because at that time the avoided rent would then work its way into base rates. Table 3 below provides a summary update in the proposed ICM revenue requirement as a result of these changes. Should the OEB accept this alternative proposal, ERTH Power expects that all parties would want to examine the ICM models as part of the draft rate order process.

Table 3: Alternative ICM Revenue Requirement – Rental Expense and Income Offsets

Item	$	
Proposed Revenue Requirement as of Undertakings	$2,739,056	A
Revenue Offset: Unused Rent Expense in Rates	$225,640	B
Revenue Offset: Forecast Rental Income	$46,950	C
Adjusted Revenue Requirement as of Reply Argument (A-B-C)	$2,466,466	D
Revenue Requirement Adjustment ((D-A)/A)	-10%	E

55. As set out in Table 4 below, this reduction results in a total capital amount of $29.9 million representing a 10% reduction from the ICM funding request of $33.2 million.

Table 4: Notional (temporary) Adjustment to CAPEX to achieve Adjusted Revenue Requirement inclusive of Rental Expense and Income Offsets

Item	$ (000's)
Proposed CAPEX	$33,182
Notional CAPEX Reduction to Achieve Revenue Offsets	$3,302
Notional CAPEX for Input to ICM Model	$29,880
Reduction: Proposed CAPEX to Notional CAPEX	-10%

56. Applying this adjusted total capital amount to the benchmarking analysis brings the total New Facility cost well within the range of OEB-approved costs at $523 per square foot as set out below in Table 5.

Table 5: Capital Expenditures Relative to Total ft^2 Adjusted for Rental Offsets

Utility	Total ft2	ICM Capital Request		Adjusted Capital - Rental Offsets	
		OEB Approved CAPEX ($000)	$/ft^2	CAPEX Equivalent Adjusted for Rental Offsets ($000)	$/ft^2 Adjusted for Rental Offsets
Algoma Power	41,703	$15,361	$368		
Milton Hydro	91,828	$24,594	$268		
Waterloo North	104,000	$58,236	$560		
InnPower	36,172	$19,129	$529		
ERTH Power	**57,170**	**$33,182**	**$580**	**$29,880**	**$523**
ERTH Power - Conventional Energy	**57,170**	**$31,382**	**$549**	**$28,080**	**$491**

ii) Space Allocated to Affiliate

57. OEB Staff, SEC and VECC submit that an affiliate allocation of 11% (OEB Staff) or 11.5% (SEC and VECC) of the New Facility should be removed from the revenue requirement to account for future rental income.[82] This is not the appropriate basis for establishing revenue offsets related to affiliate rental use in the New Facility. These figures are derived from the assumption that 6,546ft^2 of the total 57,170ft^2 of the building will be exclusively used by ERTH affiliates.[83] That figure, however, was included in the Business Plan solely for benchmarking purposes and was explicitly qualified as an estimate "prior to the finalization of any rental agreement between ERTH Power and it affiliate and, [does] not necessarily reflect the final square footage which will be rented at the facility."[84] The accurate and up-to-date evidence on this issue is that ERTH Power expects $46,950 in rental income from its affiliates.[85] As described in evidence, ERTH Power will rely upon a standard commercial lease agreement which applies a square-foot

[82] OEB Staff Submissions, p. 10-12. SEC Submissions, p. 6-8. VECC Submissions, p. 7-8.
[83] OEB Staff Submission, p. 16. SEC Submission, p. 7. VECC Submission, p. 7.
[84] JT1.9. TC Transcript, p. 79, line 10-20.
[85] TC Transcript, p. 81, line 7-20.

rate for exclusive space and a rate adder for use of common areas.[86]

58. SEC submits that the portion of the New Facility that will be used by affiliates should be removed from rate base entirely and relies on the OEB's decision in EB-2012-0033 as authority.[87] ERTH Power notes that the circumstances in that decision are materially different from the current situation. In EB-2012-0033, the OEB refused to impute rent for a portion of a new facility that exceeded the utility's needs and, instead, disallowed a portion of the total capital expenditures resulting in a reduction to rate base.[88] In that case, however, the utility had no plan to use the extra space, whether renting or otherwise. The OEB did not impute rent because it held that it would not be appropriate to imply that a utility should expand beyond the scope of distribution activities:

> *The Board regulates the distribution activities of Enersource and it would not be appropriate to render a decision that implies that the company should expand its scope to leasing facilities. This is not to say that the company could not have adopted the approach of renting out excess space until it is required for distribution activities. However, such an approach is potentially complex and in the absence of a proposal from the company to do so, the Board finds that it would be inappropriate to essentially mandate such an approach.*[89]

59. In contrast, ERTH Power has provided detailed evidence of its plans for the New Facility, including its plans to rent to the affiliate that provides corporate services to the utility.[90] Accordingly, ERTH Power submits that the circumstances in this case are clearly distinguishable from those in EB-2012-0033, and there are no grounds to remove the portion of the New Facility allocated to the affiliate from rate base or from the approved ICM.

60. SEC alleges that both the rate and the amount of space ERTH Power proposes to lease to

---

[86] TC Transcript, p. 81, line 7-28.
[87] SEC Submission, p. 6-7.
[88] EB-2012-0033, p. 18.
[89] EB-2012-0033, p. 18.
[90] AiC, para 12 and 60. TC Transcript pg. 81 line 4 to line 20. JT1.13. Application, Appendix A – 2024 ICM Application pg. 19.

its affiliates appear to contravene the ARC.[91] ERTH Power strongly rejects any suggestion of any contravention of its ARC obligations and has explicitly confirmed that the lease agreement with its affiliate will comply with ARC.[92] ERTH Power has always taken its ARC obligations seriously and is routinely subject to OEB compliance audits in the ordinary course of business. The OEB completed its most recent audit of ERTH Power and notified ERTH Power by letter dated February 18, 2025, that the utility was ARC compliant. See Appendix A for the OEB's letter dated February 18, 2025.

c) <u>Capital Cost Allowance Treatment</u>

61. ERTH Power maintains that its proposal to take a reduced capital cost allowance on the mechanical and energy portion of its New Facility is reasonable. Specifically, ERTH Power proposes to reduce its CCA claim on the ICM assets in order to yield a $0 impact on PILs, thereby preventing an overstated negative PILs adjustment.[93] OEB Staff, SEC and VEC oppose this approach, arguing that ERTH Power should claim the full available CCA, and that the precedent cited in EB-2023-0013 is not comparable.[94] ERTH Power respectfully disagrees.

62. In a cost of service proceeding, where a utility shows a tax loss the amount of PILs in rates is appropriately established as $0. This is inconsistent with ICM applications, in which PILs in the ICM revenue requirement can be established at a value of less than $0, reducing ICM funding. The fundamental challenge that must be addressed is the circumstance in which a negative PILs value is derived via the OEB's ICM model which is larger than the actual PILs expected to be paid by the utility. During the 2025 to 2027 period, the negative PILs adjustment in the ICM model may at times exceed ERTH Power's actual PILs incurred absent the ICM project. In this circumstance, ICM funding would be reduced for PILs savings in an amount that is greater than actual PILs saved; effectively underfunding the ICM project. ERTH Power's proposal neutralizes this risk

---

[91] SEC Submission, p. 7.
[92] AiC, para 60. SEC-6 pg. 2 and Attachment 5.
[93] AiC, para 20.
[94] OEB Staff Submission, p. 17-19. SEC Submission, p. 8-9. VECC Submission, p. 9.

by ensuring there is no PILs impact to ICM rate riders (be it positive or negative), in a manner that preserves Undepreciated Capital Cost ("**UCC**") as a future benefit for ratepayers.[95]

63. While the OEB has initiated a policy consultation to review ICM mechanics more broadly, that process will not conclude in time to address the risk identified above for ERTH Power.[96] Approving the proposed reduced CCA treatment in this case offers a fair and practical solution. It ensures the utility is not underfunded on an actual basis, while preserving UCC balances that will benefit ratepayers in ERTH Power's next rebasing application, currently scheduled for 2028.[97]

d) <u>In-Service Date</u>

64. ERTH Power has followed the OEB's standard ICM policy by requesting that rate riders take effect on May 1, 2025.[98] Both SEC and VECC argue that the OEB should deviate from its standard ICM policy due to the late timing of the New Facility's in-service date of November 24, 2025.[99]

65. ERTH Power submits that there is no basis to depart from OEB's established approach where ICM recovery is aligned with the IRM test year, and rate riders are implemented as part of the utility's May 1 rate adjustment. Any variance between ICM revenue collected versus the ICM revenue requirement will be addressed at the time of rebasing.[100] This approach ensures consistency across distributors and protects customers through the true-up mechanism.

IV. <u>CONCLUSION</u>

---

[95] AiC, para 21.Staff-16(C). EB-2023-0013, E.L.K. Energy Inc., Decision and Rate Order, dated March 21, 2024, pg. 22-25.
[96] Evaluation of Incremental Capital Module (ICM) Policy | Engage with Us
[97] Application, Appendix A – 2024 ICM Application
[98] OEB, Filing Requirements for Electricity Distribution Rate Applications Filed in 2024 for Rates Taking Effect in 2025, Chapter 3 – Incentive Rate-Setting Applications, p. 2.
[99] SEC Submission, p. 10. VECC Submission, p. 9.
[100] OEB, Filing Requirements for Electricity Distribution Rate Applications – 2023 Edition for 2024 Rate Applications, Chapter 3 – Cost of Service, p. 22-23

66. ERTH Power submits that it has established the prudence of its decision to incur costs in the amount of $33.2 million for the New Facility and that an ICM incremental revenue requirement of $2.74 million is appropriate. ERTH Power further submits that approval of the three requested deferral and variance accounts is appropriate given that this ICM Application is brought within the context of an IRM Application. However, as outlined above in paragraphs 54-56, ERTH Power is agreeable, in the alternative to the approval of the deferral and variance accounts, to a temporary reduction to the approved ICM revenue requirement. This reduction would be equal to the amount that would otherwise have been recorded in the ERTH Avoided Rent Deferral Account (on account of avoided rent), plus the amounts that would have been recorded in the Rental Income Deferral Account (on account of affiliate rental income) for the ICM period until rebasing. This reduction, however, would not be characterized as a prudence disallowance, but rather an alternative approach to fairly return savings and credit rental income to customers until rebasing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF MAY 2025.

BORDEN LADNER GERVAIS LLP

Per:

Z. Thoms

Zoë Thoms

V. APPENDIX A – LETTER FROM OEB REGARDING ARC COMPLIANCE INSPECTION

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

Ontario

BY EMAIL: graig.pettit@erthpower.com

February 18, 2025

Graig Pettit
Vice President & General Manager
ERTH Power Corporation
143 Bell Street
Ingersoll, ON. N5C 3K5

Dear Mr. Pettit:

Re: Compliance Inspection – Affiliate Relationships

By way of letter dated August 21, 2024, you were advised that Ontario Energy Board (OEB) staff would be conducting an inspection under the *Ontario Energy Board Act, 1998* to assess ERTH Power Corporation's (ERTH Power) compliance with Section 2 of the Affiliate Relationships Code for Electricity Distributors and Transmitters (ARC), regarding its relationship with ERTH Business Technologies Inc. (ERTH Technologies).

Please be advised that OEB staff has now completed its assessment, and that no further action will be taken, with regard to the above-referenced compliance inspection.

Yours truly,

Maggie Zhu
Manager, Inspection & Enforcement
Phone: (416) 544-5163
Email address: **Maggie.Zhu@oeb.ca**