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File 17834

February 10, 2010

**VIA COURIER and *RESS FILING***

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Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street  
27<sup>th</sup> Floor  
Toronto ON M4P 1E4

Dear Ms. Walli

**Re: Hydro One Networks Inc. Board File EB-2010-0003  
Motion for Review and Variance of Board's Decision dated December  
16, 2009 in EB-2008-0272  
Submissions of Power Workers' Union**

Attached please find the Power Workers' Union's submissions in the above-referenced proceeding.

Yours very truly,

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Richard P. Stephenson

RPS:jr

encl.

cc John Sprackett, PWU  
Judy Kwik, ERA  
Hydro One and Intervenors

Doc 748089v1

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(1934 - 2006)

**IN THE MATTER OF Section 78 of the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Schedule B;**

**AND IN THE MATTER OF a review of an application filed by Hydro One Networks Inc. under section 78 of the Ontario Energy Board Act, 1998 seeking changes to the uniform provincial transmission rates;**

**AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's Rules of Practice and Procedure.**

**SUBMISSIONS OF THE POWER WORKERS' UNION ON HYDRO ONE NETWORKS INC.'S MOTION TO REVIEW AND VARY**

**OVERVIEW**

1. These are the submissions of the Power Workers' Union ("PWU") in respect of Hydro One's motion for review and variance of the Board's decision dated December 16, 2009 in EB-2008-0272. These submissions are filed pursuant to Procedural Order No. 1 dated January 15, 2010.
2. The PWU supports Hydro One's motion and submits that the Board should grant the relief sought therein.
3. This motion illustrates precisely why the Board has the power, pursuant to s. 21.2(1) of the *Statutory Powers Procedure Act* and s. 42 of the Board's *Rules of Procedure* to review and vary a prior decision of the Board. The Board has the obligation to determine just and reasonable rates for the transmission of electricity, and to do so in the public interest. Occasionally, for any number of reasons, including the discovery of information not available at the time of original decision, the Board will make a decision which is not correct, or which

ceases to be correct. In such cases, the public interest is served when the Board exercises its authority to ensure the correctness of its decisions. This is one such case.

4. The PWU submits that the motion should be granted because it:
  - a. will ensure conformity with the Board's newly issued policy as set out in its Cost of Capital Report;
  - b. will ensure that Hydro One's transmission rates are just and reasonable;
  - c. will ensure that Hydro One is permitted the opportunity to earn a return in accordance with the "fair return standard".

## **THE FACTS**

5. The PWU accepts the chronology of facts as set out in the factum submitted by Board Staff on the motion as being substantially accurate.

## **ISSUES AND ARGUMENT**

- a. **The First Issue: Has the Threshold to have the Board Review its Decision Been Met?**
6. Rule 44.01 of the Board's Rules of Procedure set out the grounds for a motion to vary a prior order of the Board.

**Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:**

- (a) **set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:**
  - (i) **error in fact;**
  - (ii) **change in circumstances;**
  - (iii) **new facts that have arisen;**
  - (iv) **facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;**

7. In considering the threshold question the Board must determine:
  - a. Whether the grounds asserted raise a question as to the correctness of the order or decision;
  - b. Whether there is enough substance in the issues raised, such that a review could result in a variance;
  - c. The alleged error must be an identifiable one, such that the review is not simply an opportunity for the unsuccessful party to reargue its position;
  - d. The applicant must be able to show that:
    - i. The findings were contrary to the evidence before the panel;
    - ii. The panel failed to address a material issue;
    - iii. The panel made inconsistent findings; or
    - iv. Similar error; and
  - e. The error was a material one, such that it would affect the outcome of the decision.<sup>1</sup>
8. The determination of whether the threshold has been met is not an entirely distinct process from a consideration of the merits of the proposed motion for review. It may be the case that a demonstration of the merits of the proposed motion will be co-extensive of the demonstration that the threshold has been met.<sup>2</sup>
9. In this case, it is submitted that it can be easily demonstrated that the threshold has been met, regardless of whether the merits of the motion should ultimately be granted. In that regard, the following factors are relevant:

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<sup>1</sup> NGEIR Review Decision, May 22, 2007, EB-2006-0322/0338/0340; p. 17-18

<sup>2</sup> OPG Payment Amounts Review Decision, May 11, 2009, EB-2009-0038; p. 10

- a. Throughout the EB-2008-0272 proceeding, it was apparent that the Board intended to adjust 2010 rates in accordance with updated cost of capital parameters then in effect;
- b. On June 18, 2009 the Board delivered a letter to stakeholders initiating the Cost of Capital review process. In that correspondence, the Board indicated that, "It is anticipated that any changes to the policy made as a result of this review will apply to the setting of rates for the 2010 rate year."<sup>3</sup>
- c. Although final written submissions with respect to the Board's Cost of Capital proceeding were filed with the Board on October 26, 2009, the Board gave no indication of when its Report arising from the proceeding would be forthcoming;
- d. When the Board's Report on Cost of Capital was released on December 11, 2009, it indicated that the policy contained in the report, "will come into effect for the setting of rates beginning in 2010, by way of a cost of service application".<sup>4</sup> On December 11, 2009, the Board had not yet rendered its decision in EB-2008-0272;
- e. On December 16, 2009 the Board issued its decision in this matter, EB-2008-0272. In that decision, it determined the cost of capital parameters to be used by Hydro One in the setting of its transmission rates for 2010. Those parameters were not based on the new policy contained in the December 11, 2009 Cost of Capital Report. No reference was made to the existence of the December 11, 2009 Cost of Capital Report, or why the new policy was not to be applied in setting Hydro One's 2010 transmission rates;
- f. Prior to the Board finalizing Hydro One's 2010 transmission rates by approving Hydro One's revenue requirement and approving a

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<sup>3</sup> Board letter dated June 18, 2009 re: Cost of Capital Review

<sup>4</sup> OEB Cost of Capital Report, December 11, 2009, p. 61

rate order with respect to the 2010 uniform transmission rates the Board was made aware of Hydro One's position that the policy set out in the December 11, 2009 Cost of Capital Report should be applied to the setting of its 2010 transmission rates. Notwithstanding this information, on December 22, 2009 the Board reaffirmed that Hydro One's cost of capital was to be determined in accordance with the parameters established under the prior Board policy. No explanation as to why the policy contained in the December 11, 2009 Cost of Capital Report was not applicable was provided;

- g. The difference between the revenue requirement generated pursuant to the policy set out in the December 11, 2009 Cost of Capital Report and the revenue requirement approved by the Board on December 22, 2009 is material. In particular, the revenue requirement would increase by \$64.5M from \$1,217.7M to \$1,282.2M.
10. It is submitted that the Board failed to apply its new Cost of Capital policy in circumstances where, on its face, the policy would be applicable. The Board failed to provide any indication as to whether it considered the question of whether or not the new policy should be applied. It certainly provided no explanation which would justify the non-application of the new policy. The effect of the non-application of the new policy is a material decrease in Hydro one's allowed revenue requirement.
11. In summary, it is submitted that the Board's new Cost of Capital Report was a new circumstance, the existence of which Hydro One could not have foreseen prior to December 11, 2009. The Board was obviously aware of the existence of the new policy prior to its impugned decision in the matter on December 16, 2009. Nevertheless, the Board failed or refused to consider the applicability of the new policy, depriving Hydro One of its ability to earn a fair

return, to a material extent. Therefore, the threshold for review by this Board has been met.

**b. The Second Issue: Should the Board's Decision be Varied?**

12. The facts establishing that the threshold for review has been met also demonstrate the basis upon which the decision of the Board should be reviewed.

13. On its face, the Cost of Capital Report establishes a policy which is applicable to the rate setting exercise that the Board was undertaking in EB-2008-0272. It is true that the Board would not have had the new Cost of Capital policy in its mind at the commencement of the process of setting the 2010 rates in May 2009. Nevertheless, it clearly became applicable prior to that proceeding concluding. The question is whether there was a valid basis for the Board's failure or refusal to apply it in rendering its final decision. The PWU submits there was not.

14. The Cost of Capital Report discusses its relationship to the rate setting process in the following terms:

**The final "product" of this process, of course is a Board policy. This was not a hearing process, and it does not – indeed cannot – set rates. The Board's refreshed cost of capital policies will be considered through rate hearings for the individual utilities, at which it is possible that specific evidence may be proffered and tested before the Board. Board panels assigned to these cases will look to the report for guidance in how the cost of capital should be determined. Board panels considering individual rate applications, however, are not bound by the Board's policy, and where justified by specific circumstances, may choose not to apply the policy (or a part of the policy).<sup>5</sup>**

15. The mere fact that a proceeding to establish 2010 rates was already underway at the time of the announcement of the new Cost of Capital policy is not a basis to summarily dismiss the application of the new policy to the case at hand. In EB-2009-0096, Hydro One's 2010-11 distribution rates case, the proceeding was also well advanced prior to the release of the new Cost of

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<sup>5</sup> OEB Cost of Capital Report, December 11, 2009, p.13

Capital policy. The case had commenced many months previously, and oral hearing was more than one-half completed. The Board specifically considered whether it should consider and apply the new policy, given the stage of the proceeding. The Board ruled as follows:

**The Board does not intend to reopen the cost of capital policy, which was only recently determined after a lengthy and thorough review by the Board.**

**The Board was assisted in this review by a wide variety of interested parties and experts, many of whom are intervenors in this proceeding.**

**The Board considers the cost of capital policy to be sufficiently robust to apply across the Board to all electricity LDCs. The prior policy also applied to all LDCs.**

**The Board does, however, recognize that it is open to parties to argue that there may be certain circumstances where the policy should not be applied.**

**The Board will, therefore, allow the filing of evidence that establishes the specific circumstances, which exist in this case and with this applicant, which would make the application of the policy inappropriate.**

**The Board sees no need to require the applicant to file further evidence justifying the application of the Board's policy at this time.<sup>6</sup>**

16. There is no reason why a similar approach was not available to the Board in the current proceeding. In particular, it is submitted that there was and is no reason for Hydro One to file any additional evidence in the current proceeding in order to justify the application of the Board's current Cost of Capital policy to the current case.

17. Because the Board failed to provide any reasons whatsoever for failing or refusing to apply its own new policy to determine Hydro One's cost of capital determination, the rationality of that decision cannot be assessed. In the absence of such reasons, the Board exposes itself to the risk that its decision will be considered not only incorrect, but also unreasonable.

18. There is no doubt that the new policy was released very late in the EB-2008-0272 proceeding. In accordance with the comments contained in the Cost of Capital Report itself, it likely would have been appropriate to seek the input of

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<sup>6</sup> EB-2009-0096 Transcript, December 15, 2009, p. 147-8

the parties to the proceeding as to whether, and to what extent there was any basis why the parameters dictated by the new policy might *not* be appropriately applied. It is possible that such a process may have delayed the finalization of the EB-2008-0272 proceeding. However, that is not a reason which justifies the Board's failure or refusal to *consider* applying the new Board policy in the proceeding.

19. In fact, at the outset of the Board's undertaking the process of setting Hydro One's 2010 transmission rates it adverted to the possibility that the process might not be concluded early enough to have the new rates in effect in a timely way. As a result, the Board indicated that,

**If necessary, the Board will declare the 2010 rates to be interim at the appropriate time in order that the rate impacts of these projects can be included in the event the Board approves the projects.<sup>7</sup>**

In view of the Board's willingness to declare the current transmission rates interim, there can be no justification in refusing to consider the application of the Board's new Cost of Capital policy on the basis of the shortness of time.

20. It is submitted that the effect of the new Board Cost of Capital policy is (as a practical matter, if not a legal one) to create a presumption that a utility is entitled to earn a fair return in accordance with the parameters established by the new policy, in respect of 2010 rates as established in cost of service proceedings. That said, the Board is required to give parties the opportunity to adduce evidence and make submissions as to why the presumption should not apply in any particular case.

21. The effect of the Board's decision in this case is to deny Hydro One the benefit of the presumption, and if required, the opportunity to make submissions in favour of the new Cost of Capital policy.

22. Even more significantly, the ultimate effect of the Board's decision in this case is to deny Hydro One the opportunity to earn a fair return in accordance with the Board's own assessment of how a fair return should be determined.

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<sup>7</sup> EB-2008-0272 Board Decision May 28, 2009

This error is a serious one. In the Cost of Capital report, the Board described its obligation to permit a utility the opportunity to earn a fair return as an “absolute obligation”:

**The Board is of the view that the FRS frames the discretion of a regulator, by setting out three requirements that must be satisfied by the cost of capital determinations of the tribunal. Meeting the standard is not optional; it is a legal requirement. As set out by Enbridge in their final comments, the Supreme Court of Canada has “described the requirement that the approved rates must produce a fair return as an ‘absolute obligation’.”<sup>8</sup>**

23. In the event the Board determines that it will not vary the decision of December 16, 2009 it will have failed to discharge this “absolute obligation”.

### **Conclusion**

24. In conclusion, it is submitted that Hydro One’s motion should be allowed, on the terms requested.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Doc. No. 748057v1

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<sup>8</sup> OEB Cost of Capital Report, December 11, 2009, p.17