

ONTARIO ENERGY BOARD

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*.

**FACTUM OF THE RESPONDING PARTY,
THE CONSUMERS COUNCIL OF CANADA**

I OVERVIEW AND BACKGROUND

1. Hydro One Networks Inc. ("**HON**") has applied for certain relief, including the following:

1. A review and variance of the Ontario Energy Board's ("**Board**") decision of December 16, 2009 in EB-2008-0272 which ordered, in part, that HON calculate its 2010 transmission revenue requirement using a return on equity of 8.39%;
2. An order varying the return on equity to be used by HON to calculate its 2010 transmission revenue requirement from 8.39% to 9.75% in accordance with *Report of the Board on the Cost of Capital for Ontario's Regulated Utilities, EB-2009-0084 ("Cost of Capital Report")*;
3. An order varying the short term debt rate to be used by HON to calculate 2010 transmission revenue requirement from .55% to 1.93% in accordance with the *Cost of Capital Report*;

2. There are two principal issues, as follows:
 1. Whether HON has met the threshold test, as set out in Rule 44.01 of the Board's *Rules of Practice and Procedure*;
 2. Whether, if HON has met the threshold test, the relief it seeks should be granted.
3. This is the Factum of the Responding Party, the Consumers Council of Canada ("CCC").
4. It is the position of the CCC that:
 1. HON has not met the threshold test, and that the Board should not consider the Motion on its merits;
 2. Even if HON has met the threshold test, the Motion should be dismissed on its merits;
 3. In the alternative, if HON has met the threshold test, the Board should not grant the Motion on its merits but should require an oral hearing on the question of what the ROE should be for HON's transmission revenue requirement for 2010.

II Facts

5. On September 30, 2008, HON filed an application for an order setting rates for electricity transmission for 2009 and 2010. The rates were to be effective and implemented on July 1, 2009.
6. Included in the relief sought in that application was an order setting the return on equity and HON's debt rate, according to the then-existing Board formula, which had been set in 2006. Employing that formula, HON's ROE, for 2010, would be 8.39%.

7. Included in its application was a request for approval of certain capital projects.
8. In its Decision with Reasons, dated May 28, 2009, (the "**May 28th Decision**"), the Board disposed of all of the application, with the exception of four capital projects. With respect to those projects, the Board ruled as follows:

The Board will not approve these four projects at this time because of the evidence has not been sufficient. The only evidence provided was a letter of recommendation from the OPA which the Board has already explained is not sufficient. No supporting evidence or analysis was provided. (**May 28th Decision, p. 48**)

However, the Board went on to make the following decision, with respect to those four projects:

The Board will keep this part of the proceeding open and will provide Hydro One with the opportunity to provide additional evidence on these projects for purposes of setting 2010 rates. (**May 28th Decision, p. 48**)

9. With respect to the Cost of Capital, the Board made the following finding:

For 2010, the Board agrees with Hydro One that September 2009 data should be used to update the cost of capital parameters ... The Board will issue a letter to Hydro One setting out Hydro One's 2010 cost of capital parameters in due course. The Board expects that this will be treated as a mechanistic update. (**May 28th Decision, p. 52**)

10. By letter dated November 5, 2009, from the Board to HON, the Board set out values for the return on equity and the deemed short-term debt rate for use in HON's 2010 transmission revenue requirement application. In so doing, the Board explicitly relied on the mechanism established in 2006 for the determination of the cost of capital of electricity LDCs.

11. HON did not challenge the values prescribed by the Board in the November 5, 2009 letter, and did not challenge the Board's reliance on the 2006 mechanism.

12. Pursuant to the allowance given to it in the May 28th Decision, HON filed, on September 30, 2009, evidence with respect to the two of the four capital projects left open in that May 28th Decision.

13. In the *Decision with Reasons* dated December 16, 2009 (the "**December 16th Decision**"), the Board approved the two projects for which HON sought approval. In doing so, the Board made the following finding:

The compiling of supporting information that was originally filed as either pre-filed evidence, responses to interrogatories or in undertakings filed by Hydro One in the main hearing, has resulted in a more cogent rationale for the projects.
(**December 16th Decision, p. 9**)

14. On page 12 of the December 16th Decision, the Board made the following statement with respect to the return on equity and cost of short-term debt for 2010:

In accordance with its May 28, 2009 Decision, the Board issued a letter to Hydro One on November 5, 2009 setting out the Board's determination of Hydro One's return on equity and cost of short-term debt for 2010. The return on equity was set at 8.39% and the short-term debt rate was set at 0.55%. These values shall be used in the derivation of Hydro One's revenue requirement.
(**December 16th Decision, p. 12**)

15. Finally, the December 16th Decision directed Hydro One to file certain exhibits showing the final calculation of the revenue requirement, among other things.

16. HON responded to the Board's direction that it file information showing its final revenue requirement, in a letter dated December 21, 2009. In that letter, HON mentioned, for the first time, that it was calculating its final revenue requirement using, among other things, the formulae set out in the *Cost of Capital Report*.

17. The Board immediately responded to that suggestion, in a letter the following day, in which the Board reminded HON that the May 28th Decision had set out the way the cost of capital was to be determined and that the Board had reinforced that first in its letter of November 5, 2009, and then in its December 16th Decision.

18. Being unhappy with that result, HON has filed this Motion.

III ISSUES RAISED BY THE APPLICANT

(a) The Motion Meets the Threshold Test

19. HON argues that it meets the threshold test, as set out in section 44.01 of the Board's *Rules of Practice and Procedure*, because there has been a change in circumstance. That change in circumstance, HON argues, is the issuance, on December 11, 2009, of the *Cost of Capital Report*.

20. The Council submits that the change in circumstance would only apply if the *Cost of Capital Report* applied to circumstances like those of HON in this case. It is clear, however, that the Report does not.

21. In the *Cost of Capital Report*, the Board makes the following statements:

1. "The actual effect, if any, on specific utilities' revenue requirements as a result of any updated policies arising from this consultation and the determination of just and reasonable rates would not be addressed in this process, but in future rate proceedings." (*Cost of Capital Report*, p. 8);
2. "The onus is on an applicant to adequately support its proposed cost of capital, including the treatment of and appropriate rates for debt instruments. The Board notes that this is being done in cost of service applications. However, the Board wishes to point out the increased emphasis that it is placing on applicants to support their existing and forecasted debt, and the treatment of these in accordance with the guidelines, or to support any proposed different treatment." (*Cost of Capital Report*, p. 61);
3. "The Policy set out in Chapter 4 of this report will come into effect for the setting of rates, beginning in 2010, by way of a cost of service application." (*Cost of Capital Report*, p. 61).

22. The CCC submits that it is clear that the *Cost of Capital Report* does not contemplate revising decisions already made, in order to reflect the adjusted cost of capital

formula. Accordingly, the CCC submits that there is no change in circumstance. Given that, the CCC submits that HON has not met the threshold requirement for the hearing of its Motion.

(b) The Motion Should be Granted on its Merits

23. HON's arguments on the merits are indistinguishable from its arguments on the threshold issue.

24. In essence, HON's argument is that it is entitled to the benefits of the revised cost of capital formula. The CCC submits that it is clear, from the *Cost of Capital Report*, that it does not apply to LDCs in HON's position.

IV ISSUES RAISED BY THE RESPONDENT

25. The Board is exercising a discretion to determine whether to reconsider its decision. The CCC submits that that discretion should be exercised narrowly, and only in the clearest circumstance, lest the Board invite frequent challenges to its decisions.

26. As set out above, the CCC submits that HON's real challenge is to the May 28th Decision, and not to the December 16th Decision. That earlier Decision, on the cost of capital issue, reflected HON's own position on what the cost of capital should be for 2009 and 2010. HON did not seek a higher return on equity than that generated by the then-existing formula. What HON now seeks to do is to reverse its own position on what the applicable return on equity should be, and it seeks to do so without leading any evidence that a different return on equity should apply.

27. It is important to remember that the Board's original decision on the cost of capital was made in its May 28th Decision. HON waited six months to challenge that Decision. CCC submits that the delay alone should be a bar to the Board's consideration of the Motion.

28. The proceeding subsequent to the May 28th Decision dealt with a narrow, discrete issue, namely whether four capital projects should be approved. The issue was made narrower by HON's choice, on September 30, 2009, to deal with only two of the four capital projects. The issue of what HON's cost of capital ought to be was not part of the continued proceeding.

29. As noted in paragraph 8, above, HON was only allowed to continue the original application, and to do so on a narrow, discrete issue, because of its own failure to file sufficient evidence in support of four capital projects. It now seeks to "capitalize" on its own failure by seeking additional relief in the form of a higher return on equity. That, the CCC submits, is tantamount to an abuse of process.

30. The CCC submits that HON is trying to get around the problem of delay by arguing, in effect, that the December 16th Decision is a fresh decision on all aspects of the Application it filed in September of 2008. The reality is that the December 16th Decision dealt with a narrow, discrete issue, namely whether to approve the two capital projects. The Board's letter of November 5, 2009 and the December 16th Decision are not decisions on the cost of capital. They simply reiterate the May 28th Decision on that matter.

31. In the exercise of its discretion, the CCC submits that the Board should rule that HON cannot wait six months to challenge a Decision on an issue that reflected HON's own position on the issue.

32. Whether the formula in the *Cost of Capital Report* should apply to HON for its 2010 rates is a question on which HON has offered no evidence. Accordingly, CCC submits that there is no basis on which the Board can now conclude that there should be a different return on equity.

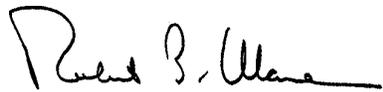
33. The *Cost of Capital Report* makes it clear that the revised formula for the calculation of return on equity is to be applied to applications made after the issuance of the Report. To grant HON's Motion would invite many, if not all, LDCs to apply to vary their rates for 2010 to reflect the new formula. The Report makes it clear that that was not what was intended.

V ORDER REQUESTED

34. The CCC asks that the Board dismiss HON's Motion.

35. The CCC asks that it be awarded 100% of its reasonably-incurred costs for its participation in the Motion.

All of which is respectfully submitted.



Robert B. Warren
2048083.1