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February 10, 2010

**VIA MAIL and E-MAIL**

Ms. Kirsten Walli  
Board Secretary  
P.O. Box 2319  
2300 Yonge St.  
Toronto, ON  
M4P 1E4

Dear Ms. Walli

**Re: Hydro One Networks Inc. (Tx) Motion to Review EB-2010-0003**

Please find enclosed the submissions of VECC in the above noted proceeding.

Yours truly,

Michael Buonaguro  
Counsel for VECC  
Encl.

**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 RESPONDENT  
THE VULNERABLE ENERGY CONSUMERS' COALITION  
("VECC")**

1. These are the submissions of VECC with respect to the motion for review of Hydro One Networks Inc. ("HONI").

**THE THRESHOLD FOR REVIEW HAS NOT BEEN MET**

2. HONI submits that the threshold for review has been met on the basis that there has been a change in circumstances that HONI could not have predicted, in that the 2009 Report of the Board on the Cost of Capital for Ontario's Regulated Utilities, EB-2009-0084, dated December 11, 2009 (the "2009 Report") was released subsequent to the hearing and decision in EB-2008-0272.<sup>1</sup>
3. HONI relies on a perceived inconsistency between:
  - a) the release of the 2009 Report on December 11, 2009, and
  - b) a decision of the Board dated December 16, 2009.<sup>2</sup>
4. HONI frames its motion for review as a motion relating to the December 16, 2009 decision of the Board.<sup>3</sup>

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<sup>1</sup> HONI Factum paragraph 15.

<sup>2</sup> HONI Factum paragraph 17.

5. VECC respectfully submits that HONI is incorrect in its implicit assertion that the December 16, 2009 decision of the Board concerned itself with the appropriate methodology for the determination of HONI's 2010 ROE. While, as a procedural matter, the Board reiterated the figures outlined in the November 5, 2009 letter to HONI, the December 16, 2009 Decision did not purport to make any determination relating the appropriate methodology for the determination of HONI's 2010 rates.<sup>4</sup> In VECC's view there is no determination of an issue relating to ROE in that Decision to review.
6. Likewise, the Board's November 5, 2009 letter to the Board did nothing more than implement the Board's May 28, 2009 Decision<sup>5</sup>, the only Decision relevant to HONI's 2010 rate year in which the Board received evidence of, turned its mind to and approved a methodology for the derivation of HONI's 2010 ROE.
7. Accordingly VECC submits that HONI's motion to review is appropriately considered as an attempt to review the May 28, 2009 Decision of the Board, an attempt that is materially out of time.
8. As noted below, there was no separate issue relating to Cost of Capital methodologies EB-2008-0272, the issue having been left off of the issues list on the evidence of HONI that it was subject to the methodology contained within the Report of the Board on Cost of Capital and 2nd Generation Incentive Regulation for Ontario's Electricity Distributors, EB-2006-0088/EB-2006-0089, issued December 20, 2006 (the "2006 Report").<sup>6</sup> The only contested issue was the information used for the calculation of HONI's ROE, which the Board determined, for 2010, would be based on September 2009 data.<sup>7</sup>
9. The ROE for HONI's 2010 was subject to, in the Board's words, a "mechanistic update"<sup>8</sup> on November 5, 2009 in order to account for the September 2009 data. At that time the only impediments to HONI developing a draft order were the outstanding issues determined in the December 16, 2009 Decision, none of which related to ROE.

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<sup>3</sup> HONI Factum paragraph 17.

<sup>4</sup> EB-2008-0272, Decision dated December 16, 2009, page 12.

<sup>5</sup> EB-2008-0272, letter from the Board to HONI dated November 5, 2009, page 2.

<sup>6</sup> EB-2008-0272 Exhibit B1 Tab 1 Schedule 1 page 1.

<sup>7</sup> Decision dated May 28, 2009, EB-2008-0272, page 52.

<sup>8</sup> Decision dated May 28, 2009, EB-2008-0272, page 52.

10. HONI would have the Board treat the release of the 2009 Report as a decision of the Board that definitively determined the methodology to be used to determine HONI's 2010 ROE; such is simply not the case. As the 2009 Report acknowledges:

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>9</sup>

11. VECC submits that the panel deciding the appropriate methodology for determining HONI's 2010 ROE did so on May 28, 2009 after a hearing that did not (and obviously could not) include evidence testing the applicability of the 2009 Report, since the Report did not yet exist.
12. The panel could not have, obviously, looked to the non-existent policy for guidance or justify departure from it before it was written.
13. Accordingly, VECC submits, HONI is essentially arguing that despite any decision the Board may have made confirming the methodology to be used to determine ROE for its 2010 rates, the actual methodology to be used to determine 2010 rates remained subject to change without a hearing up until HONI filed its draft rate order, if not until the implementation date of 2010 rates. In VECC's respectful submission that simply cannot be the case.
14. VECC submits that the proposition advanced by HONI is similar to the situation in EB-2008-0138, another motion to review, decided on January 22, 2010. In that motion Toronto Hydro sought to review a decision based on changes in circumstances and new facts as a result of the passage of time caused by its appeal of another aspect of the decision. The Board

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<sup>9</sup> Report of the Board on the Cost of Capital for Ontario's Regulated Utilities, EB-2009-0084, dated December 11, 2009, page 13.

denied the motion on the basis that the threshold test had not been met, explaining that:

In refusing to accept the interpretation of Rule 44.01(a) proposed by Toronto Hydro, the Board reiterates that certainty and finality are a necessary and important outcome of any adjudication, and finds that the passage of time, and the events which occur or do not occur during its passage, do not constitute changes in circumstances or new facts as contemplated by Rule 44.01(a).

15. HONI's claim is that it was the release of the December 11, 2009 Report that made the May 28, 2009 Decision incorrect with respect to the methodology to be employed by HONI. That claim necessarily concedes that the May 28, 2009 was entirely correct right up until the 2009 Report was released on December 11, 2009.

16. The passage of time between the May 28, 2009 decision and the release of the 2009 Report was caused by two factors:

- a) the need to resolve outstanding issues with respect to the certain capital projects, left outstanding as a result of the insufficient evidence filed by HONI, and
- b) the filing for rates by HONI on the basis of two test years, providing for a minimum lag of approximately 5-6 months until the September 2009 forecast data would be available.

17. In VECC's view, consistent with the Decision in EB-2008-0138, the mere fact that within the passage of time between the May 28, 2009 Decision and the ability to implement rates as a result of the December 16, 2009 Decision the Board introduced a new policy does not make the May 28, 2009 Decision any less correct or final then when it was released. The risk that policy may change in favour of HONI prior to the finalization of its rates during the passage of time caused by its two year rate application and its failure to adduce adequate evidence to support its capital spending in the original proceeding is a risk that HONI must bear.

**INCORPORATING THE 2009 COST OF CAPITAL PARAMETERS IS INCONSISTENT WITH THE EVIDENCE IN EB-2008-0272**

18. At paragraph 25 of its factum HONI cites the thousands of pages of pre-filed evidence and responses to hundreds of interrogatories in EB-2008-0272 as evidence in support of the application of the new Cost of Capital

policy, and at paragraph 29 asserts that the rate impact of the new Cost of Capital policy is an irrelevant consideration. With respect, VECC disagrees with both of these assertions.

19. In VECC's submission, HONI explicitly relied on the operation of the 2006 Cost of Capital ROE methodology as opposed to some other mechanism for determining ROE, and did so as a specific rate mitigation measure.
20. In its pre-filed evidence for EB-2008-0272, HONI filed the material detailing the consultative process leading up to its filing for 2009 and 2010 rates.<sup>10</sup>
21. Included in that material was a table outlining the issues that HONI believed would not be of concern in the proceeding; that table included the issue of the appropriate ROE, eliminated as an issue of concern by HONI on the basis that it will be following the Board's Decision in EB-2006-0501, which determined that the 2006 Report was applicable to HONI.<sup>11</sup>
22. In summarizing the consultative, it was specifically noted that although HONI did not accept that the ROE produced by the 2006 Board Report was an appropriate level of ROE, it asserted that it would be inappropriate to pursue a higher level of ROE in recognition of already high rate impacts it was seeking in the application.<sup>12</sup>
23. Accordingly, VECC submits, HONI specifically tied ROE to rate impacts, asserting in evidence that although it believed a higher ROE was appropriate, it specifically refrained from seeking a higher ROE in order to mitigate rate impacts.
24. In proposing a draft issues list for the hearing, HONI left out any issues relating to Cost of Capital on the basis that, as described in their consultation documentation, it was not an issue of concern.<sup>13</sup> More specifically, HONI's pre-filed evidence asserted that:

In accordance with the Decision in EB-2006-0501, Hydro One Transmission's submission is based on the capital structure, debt rates and return on equity formulas prescribed in the "*Report of the*

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<sup>10</sup> EB-2008-0272 Exhibit A Tab 17 Schedule 1 plus Appendices 1-8.

<sup>11</sup> EB-2008-0272 Exhibit A Tab 17 Schedule 1 Appendix 6, page 18.

<sup>12</sup> EB-2008-0272 Exhibit A Tab 17 Schedule 1 Appendix 7, page 6.

<sup>13</sup> EB-2008-0272 HONI Letter re proposed Issues List dated October 30, 2008.

*Board on Cost of Capital and 2nd Generation Incentive Regulation”*  
(December 20, 2006).<sup>14</sup>

The Board agreed that HONI’s assertion that it was relying on the Board guidelines as approved for use by HONI in EB-2006-0501 was sufficient to release an issues list that did not identify any separate issue relating to the methodology used to determine ROE.<sup>15</sup>

25. In final argument, HONI again linked the operation of the 2006 Cost of Capital Report to mitigation, asserting that the operation of the 2006 methodology in the 2010 rate year was projected to provide mitigation in the order of a \$58.8 million reduction in rates;<sup>16</sup> by contrast, the proposal to use the 2009 Report is projected to add \$64.5M to rates.<sup>17</sup>

26. Accordingly, VECC submits that:

- a) the scope of the original hearing was intentionally limited at the urging of HONI with respect to the issue of the appropriate methodology for determining ROE, on the assurance that HONI was content to apply the 2006 Report for 2009 and 2010, and
- b) the operation of the 2006 Report in determining ROE was intentionally linked to the issue of rate mitigation by HONI, first in its assertion to stakeholders (as placed into evidence) that it consciously agreed to the “status quo” methodology in recognition of the rate impact an increased ROE would have, and then again in its submissions to the Board asserting that concerns over rate mitigation would be addressed in part by the updated forecasted operation of the 2006 methodology to reduce rates by \$58.8M.

27. In view of these facts, VECC submits that it is inappropriate for HONI to suggest either that the evidence in EB-2008-0272 supports the incorporation of the 2009 Cost of Capital policy, or that the issue of rate mitigation is irrelevant to the issue of an appropriate ROE in this case.

**ALL OF WHICH IS SUBMITTED THIS 10<sup>th</sup> DAY OF FEBRUARY 2010**

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<sup>14</sup> EB-2008-0272 Exhibit A Tab 3 Schedule 2, page 1.

<sup>15</sup> EB-2008-0272 Procedural Order 2, dated December 1, 2008, page 8.

<sup>16</sup> EB-2008-0272 Transcript Volume 7 pages 22-23.

<sup>17</sup> HONI Factum paragraph 5.