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ONTARIO ENERGY BD

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

BETWEEN:

**POWER WORKERS' UNION,
CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1000**

Appellant

- and -

**THE ONTARIO ENERGY BOARD and
HYDRO ONE NETWORKS INC.**

Respondents

**APPEAL MADE UNDER the
*Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, s. 33***

NOTICE OF APPEAL

THE APPELLANT APPEALS to the Divisional Court from the decision with reasons ("Decision") of the Ontario Energy Board ("Board"), dated December 23, 2010 in Board proceeding EB-2010-0002 ("Proceeding") made at Toronto, Ontario, which approved the transmission revenue requirement and rates and other charges for the transmission of electricity for 2011 and 2012 for Hydro One Networks Inc. ("HONI") pursuant to the *Ontario Energy Board Act, 1998*.

THE APPELLANT ASKS that the Appeal be allowed and orders be granted as follows:

1. An order that the Board's determination regarding HONI's revenue requirement with respect to Operations, Maintenance and Administration ("OM&A") costs and the rates arising therefrom be set aside, and that the matter be remitted to a differently constituted panel of the Board for a new hearing with respect to these issues, with such directions as the Court considers just;
2. In the alternative, an order that the Decision be set aside in its entirety and that the matter be remitted to a differently constituted panel of the Board for a new hearing, with such directions as the Court considers just;
3. Costs to the Appellant on the appeal; and
4. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

1. In EB-2010-0002, HONI applied to the Board for orders pursuant to s. 78 of the *Ontario Energy Board Act, 1998* to approve just and reasonable rates and charges for the transmission of electricity for 2011 and 2012 on a cost of service basis.
2. On a cost of service application, rates are determined on the basis of the annual revenue requirement for the applicant as approved by the Board. The applicant is entitled to recover, and the Board is required to approve the applicant's prudently incurred costs. The failure to permit an applicant to recover its prudently incurred costs is a legal error.

3. A major category of costs that HONI sought to recover in EB-2010-0002 was its OM&A costs. In particular, HONI sought recovery of \$436.3MM for 2011 and \$450.0MM for 2012 for OM&A. HONI's OM&A request was a significant issue in the proceeding.

4. In the Decision, the Board disallowed a portion of the OM&A costs sought by HONI. In particular, the Board reduced HONI's claimed OM&A by 3% for 2011 (i.e. approximately \$13MM) and 4% for 2012 (i.e. \$18MM). In doing so, the Board committed the following errors:

- (a) The Board erred in law by failing to permit HONI to recover its prudently incurred costs. In particular:
 - (i) Nowhere in the Decision does the Board identify the categories or specific items of costs that it concludes are not prudently incurred;
 - (ii) The Board did not identify any legal test to be applied by it in the assessment of the prudence of the costs submitted;
 - (iii) The Board failed to consider the evidence before it in accordance with relevant law. Nowhere in the Decision does the Board identify the evidence that it considers relevant to its assessment of whether the costs claimed were prudently incurred;

- (iv) Nowhere in the Decision does the Board apply any legal test to any category or item of costs in light of the relevant evidence to form a conclusion regarding whether the costs claimed were not prudently incurred, and if so, the extent to which they were not prudently incurred;
 - (v) The Board acted arbitrarily in deciding to disallow costs requested by HONI and in dictating the amount of the disallowance. Nowhere in the Decision does the Board refer to any evidence or demonstrate any calculation to justify or support the \$13MM or \$18MM disallowances, or any other quantum of disallowances.
- (b) In rendering a decision pursuant to s. 78 of the *Ontario Energy Board Act, 1998* the Board has a duty to provide reasons for its decision. In the Decision, the Board erred in law and breached its duty of procedural fairness to provide reasons which are legally sufficient. The reasons set out in the Decision regarding the Board's determination of HONI's revenue requirement with respect to OM&A are not comprehensible, transparent or legally sufficient, because:
- (i) Nowhere in the Decision does the Board identify the categories or specific items of costs that it concludes are not prudently incurred;

- (ii) Nowhere in the Decision does the Board identify the legal test that it is applying to assess whether the costs claimed were prudently incurred;
 - (iii) Nowhere in the Decision does the Board identify the evidence that it considers relevant to its assessment of whether the costs claimed were prudently incurred;
 - (iv) Nowhere in the Decision does the Board apply any legal test to any category or item of costs in light of the relevant evidence to form a conclusion regarding whether the costs claimed were not prudently incurred, and if so, the extent to which they were not prudently incurred;
 - (v) Nowhere in the Decision does the Board refer to any evidence or demonstrate any calculation to justify or support the \$13MM or \$18MM disallowances, or any other quantum of disallowances.
- (c) One of the major elements of the OM&A costs requested by HONI related to the compensation paid to employees, including employees represented by the Appellant, Power Workers' Union ("PWU"). The Board concluded that HONI's compensation costs, including the compensation costs pertaining to PWU represented employees were excessive. The Board stated that this finding should "provide a signal for upcoming bargaining" with the PWU. In

making this finding the Board breached its duty of procedural fairness in the following manner:

- (i) The PWU was an intervenor in the proceeding, and actively participated in all aspects of the proceeding;
- (ii) The PWU made extensive written submissions to Board with respect to the compensation issue, arguing that HONI's compensation costs were reasonable and prudently incurred costs;
- (iii) The PWU's submissions included submissions with respect to the legal test to be applied, the relevant evidence to be considered, and the conclusions that should be drawn from applying the law to the facts;
- (iv) In the aspect of the Decision on HONI's compensation costs, the Board makes reference to the written submissions of a number of intervenors, all of whom argued that HONI's compensation costs were excessive. The Decision makes no reference to the PWU having made submissions on this issue. The Decision does not refer or respond, explicitly or implicitly, to any of the issues raised or arguments made by the PWU with respect to this issue.

5. Such further and other grounds as this Honourable Court may deem just.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. The *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B, s. 33 provides a right of appeal to the Divisional Court from any Order of the Board on questions of law or jurisdiction;
2. Leave to appeal is not required under section 33 of the *Ontario Energy Board Act, 1998*; and
3. Such further grounds as counsel may advise and this Court may accept.

THE APPELLANT requests that this appeal be heard at Toronto, Ontario.

January 17, 2011

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POWER WORKERS' UNION et al
Appellant

Court File No.
- and - **THE ONTARIO ENERGY BOARD et al**

**ONTARIO SUPERIOR COURT OF
JUSTICE
(Divisional Court)**

Proceeding commenced at Toronto

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