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January 15, 2018

VIA RESS, EMAIL AND COURIER

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

RE: EB-2017-0336 – Motion to Review and Vary – Hydro One argument, motion record and book of authorities

Pursuant to Procedural Order No. 1 issued by the Ontario Energy Board ("**OEB**") on December 19, 2017, with respect to a Notice of Motion by Hydro One Networks Inc. ("**Hydro One**") to review and vary EB-2016-0160 Decision and Order dated September 28, 2017, we enclose Hydro One's argument, motion record and book of authorities.

Please contact the undersigned if you have any questions in regards to the foregoing.

Yours truly,

McCarthy Tétrault LLP

Gordon M. Nettleton
GMN

cc: Intervenors in EB-2016-0160

cc:

ONTARIO ENERGY BOARD

IN THE MATTER OF a cost of service application made by Hydro One Networks Inc. on May 31, 2016 under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to its transmission revenue requirement and to the Ontario Uniform Transmission Rates, to be effective January 1, 2017 and January 1, 2018 (EB-2016-0160);

AND IN THE MATTER OF the Decision and Order dated September 28, 2017 in proceeding EB-2016-0160;

AND IN THE MATTER OF the Decision and Order dated November 9, 2017 in proceeding EB-2016-0160; and

AND IN THE MATTER OF sections 40 and 42 of the Ontario Energy Board's *Rules of Practice and Procedure.*

WRITTEN ARGUMENT OF THE MOVING PARTY, HYDRO ONE NETWORKS INC. (motion for review and variance)

Date: January 15, 2018

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PART I - OVERVIEW

1. On September 28, 2017, the Ontario Energy Board (the "**Board**") released its decision and order in EB-2016-0160 (the "**Decision**"). In that Decision, the Board concluded that a portion of the tax savings ("**Future Tax Savings**") resulting from the Government of Ontario's decision to sell more than 10% of the shares of Hydro One Limited by way of an Initial Public Offering on October 28, 2015 ("**IPO**") and to fund the consequential payments in lieu of corporate tax ("**PILs**") under the *Electricity Act, 1998* (Ontario)[1] ("**Electricity Act**") should be applied to reduce Hydro One's revenue requirement for 2017 and 2018 (Section 15 of the Decision) (the "**Tax Savings Determination**"). That conclusion was incorrect as it was based on errors of fact and law.

2. In particular, the Board erred because:

   (a) utility rate-making principles including cost causation, benefits follows costs and the stand-alone utility principle, as well as the fair return standard were ignored or misapplied or both;

   (b) the statutory framework applicable to Board decisions was not considered; and

   (c) the allocation methodologies adopted in the Decision were made without the necessary factual record.

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[1] 1998, S.O. 1998, c. 15, Book of Authorities of the moving party, Hydro One Networks Inc. ("**BOA**"), Volume 1, Tab 1.

3. The cumulative consequence of the Board's errors is the implementation of allocation methodologies that do not result in just and reasonable rates. One of the methodologies singles out and regulates the financial interests and affairs of the Province of Ontario as a shareholder of Hydro One Limited. Rates under the methodology will vary based on the sale by the Province of Ontario of shares of Hydro One Limited and should vary when Hydro One Limited issues shares, transactions which have nothing to do with the provision of a rate-regulated service and thus do not pertain to the Board's rate-making authority.

4. There was no opportunity for submissions concerning, and thus no consideration was given to:

   (a) how the Board's allocation methodologies are in sharp contrast to the outcomes that would have occurred had Hydro One funded the departure tax obligation through either a debt offering or an equity issuance to shareholders other than the Province. No justification has been given as to why these alternatives should give rise to different rate-making outcomes; and

   (b) why the Province of Ontario's decision to sell shares of Hydro One Limited, and the Province's fluctuating level of share ownership are relevant considerations in the provision by Hydro One Networks Inc. ("**Hydro One**") regulated utility services.

5. As a result, Hydro One moves for a variance of the Tax Savings Determination.

6. Hydro One also moves for a variance of two other aspects of the Decision, namely:

(a) that Allowance for Funds used During Construction ("**AFUDC**") in respect of the Niagara Reinforcement Project ("**NRP**") should not be included in rates for 2018 (Section 13 of the Decision, the "**NRP Determination**"); and

(b) that the costs attributable to the Ombudsman Office should not be included in rates (paragraphs 7.2.2 and pp. 57-58 of the Decision) (the "**Ombudsman's Office Determination**").

PART II - THE FACTS

A. Pre-IPO PILs Regime

7. Subsection 149(1) of the *Income Tax Act* (Canada) ("**ITA**")[2] exempts certain corporations from the payment of federal tax. Prior to the IPO, Hydro One was exempt from tax under subsection 149(1) of the ITA.[3] Where a corporation is exempt from tax under subsection 149(1) of the ITA, it will also be exempt from Ontario corporate income taxes pursuant to subsection 27(2) of the *Taxation Act, 2007*[4] (Ontario) ("**OTA**").

8. Pursuant to sections 89 and 90 of the Electricity Act, so long as Hydro One[5] was exempt from tax under subsection 149(1) of the ITA and subsection 27(2) of the OTA, Hydro One was obliged to pay PILs to the Ontario Electricity Financial Corporation

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2 *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp) at s. 149(1), BOA, Volume 1, Tab 2. References to the ITA should be read as including the *Taxation Act, 2007* (Ontario). Ontario corporate taxes are imposed under the *Taxation Act, 2007* (Ontario), which incorporates by reference the provisions of the ITA.

3 Exhibit C1, Tab 8, Schedule 1, Motion Record of the moving party, Hydro One Networks Inc. ["**MR**"], Tab 9.

4 *Taxation Act, 2007*, S.O. 2007, c. 11 (Schedule A) at s. 27(2), BOA, Volume 1, Tab 5.

5 Hydro One is a wholly-owned subsidiary of Hydro One Inc. which in turn, is wholly owned by Hydro One Limited, the publicly-traded corporation. Unless otherwise indicated, references to shareholders of Hydro One are to the ultimate shareholders of Hydro One, being the Province of Ontario and the public.

("**OEFC**") in amounts equivalent to the federal and provincial taxes that it would have paid if it were a taxable entity.

9. Each year while Hydro One was subject to the PILs regime, it was permitted to claim certain deductions in computing its income (capital cost allowance ("**CCA**") and cumulative eligible capital claims ("**CEC**")) for the purposes of calculating its PILs liability under the Electricity Act (such deductions being calculated under the relevant provisions of the ITA and OTA) and to recover the costs of PILS from ratepayers.

10. Prior to the IPO, Ontario ratepayers benefited from the reduced amount of PILs Hydro One was obliged to pay under the Electricity Act due to the deductions that Hydro One claimed in respect of its depreciable and intangible capital assets.[6] However, to the extent that these tax depreciation deductions were taken in respect of asset classes where the fair market value ("**FMV**") of assets in the class had not correspondingly depreciated, Hydro One was passing on to ratepayers the tax savings that would be subject to future recapture and effectively reversed. This is what occurred as a consequence of the IPO: both the latent recapture amounts and the unrealized gains on Hydro One's assets were crystallized through a deemed disposition at FMV of all of Hydro One's assets, causing Hydro One to be liable for departure tax under section 16.1 of O. Reg. 207/99[7] under the Electricity Act (the "**PILs Regulation**" and the tax triggered thereunder, the "**PILs Departure Tax**").

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6 Exhibit C2, Tab 4, Schedule 1, Attachment 3, page 1, lines 6-7, MR, Tab 10. N.B., for an example of a provision for this type of deferred liability as recorded in the Hydro One Limited Consolidated Financial Statements, see: Exhibit I, Tab 9, Schedule 2, Attachment 1 "Deferred Income Tax Liabilities", F-35, F-51, MR, Tab 12.

7 *Payments in Lieu of Corporate Taxes*, O. Reg. 207/99 at s. 16.1, BOA, Volume 1, Tab 4.

B. Hydro One incurs the PILs Departure Tax and realizes a step-up in the tax basis of its assets

11. Section 16.1 of the PILs Regulation contains the applicable rules when a corporation subject to the PILs regime under the Electricity Act ceases at any time to be exempt from tax under subsection 149(1) of the ITA and subsection 27(2) of the OTA. It provides, in part:

> (2) The taxation year of the corporation is deemed to end immediately before the time that the corporation ceases to be exempt under subsection 149(1) of the Federal Act.
>
> (3) Subject to subsections (4) and (5), the corporation shall pay the amount determined under sections 89 and 90 of the Act calculated by reference to the deemed disposition under paragraph 149(10)(b) of the Federal Act (as that paragraph applies for the purposes of determining the amount payable under sections 89 and 90 of the Act).

Paragraph 149(10)(b) of the ITA (referred to as the Federal Act in the PILs Regulation) deems the corporation to have both disposed of all of its assets at FMV and to have reacquired them at FMV.

12. Upon the Province's sale of more than 10% of its shares in Hydro One Limited, that company and its subsidiaries, including Hydro One, ceased to be exempt from tax under subsection 149(1) of the ITA. This triggered the deemed disposition of all of Hydro One's assets at FMV and the liability to pay the PILs Departure Tax under section 16.1 of the PILs Regulation.

13. The amount of the PILs Departure Tax owing by Hydro One was fixed[8] at $2,271 million[9], representing the PILs payable on: (I) capital gains and gains on intangible

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[8] Hydro One's tax filing position reflects this fixed amount as indicated in the stamped annotations on pages 47 and 49 of Exhibit C2, Tab 5, Schedule 1, Attachment 1, Schedule 8 and Schedule 10 to the Hydro One T2 Corporation Income

capital properties; and (II) recaptured CCA and CEC claims, being the CCA and CEC amounts deducted prior to the IPO, the benefit of which had already been passed on to ratepayers.

14. Under the same deemed disposition and reacquisition by Hydro One of its assets at FMV that gave rise to the liability to pay the PILs Departure Tax, Hydro One obtained a step-up in the tax basis of its assets, increasing the amount of CCA and CEC that it, as a taxable entity, could deduct in computing its income for federal and provincial corporate tax purposes. The amount of this step-up was determined to be $9,794 million, which gives rise to an estimated $2,595 million in Future Tax Savings at Hydro One's present combined federal and provincial rate of tax (26.5%).[10]

15. Hydro One paid the $2,271 million in PILs Departure Tax to the OEFC using funds it obtained by issuing shares to Hydro One Inc. as part of a trickle-down recapitalization of the company by its ultimate shareholder, the Province.[11] Like all of the costs associated with the IPO, it did not seek to recover the costs of the PILs Departure Tax from ratepayers.

16. Neither the step-up amount of $9,794 million nor the $2,595 million in Future Tax Savings are "windfall" benefits accruing to Hydro One. While the $9,794 million step-up gives rise to increased deductions in computing Hydro One's income for federal and provincial tax purposes, which will over time give rise to an estimated $2,595

Tax Return for the Period Ending October 31, 2015, MR, Tab 11. See also: Exhibit I, Tab 9, Schedule 2, Attachment 1 "Deferred Income Tax Liabilities", F-35, F-51, MR, Tab 12.

9 Exhibit J11.13, MR, Tab 14.

10 Exhibit J11.13, MR, Tab 14.

11 Exhibit A, Tab 8, Schedule 1, Attachment 1, Hydro One Limited 2015 Annual Report, p. 68 and Note 18 to the Consolidated Financial Statements, MR, Tab 8. See also, Oral Hearing Transcript Volume 2, pp. 172-173, MR, Tab 6 in which the trickle-down recapitalization is discussed.

million in Future Tax Savings, these are not "windfall" benefits because Hydro One was required to immediately pay $2,271 million in PILs Departure Tax in order to exit the PILs regime under the Electricity Act. In effect, the Future Tax Savings are not a benefit, but a recovery over time of the cost of the PILs Departure Tax.

17. Hydro One paid the PILs Departure Tax. If Hydro One does not fully recover the Future Tax Savings, parity and balance between the two taxation schemes will be lost. If ratepayers are allocated Future Tax Savings through reduced rates without any allocation of the PILs Departure Tax cost through increased rates, a ratepayer windfall will ensue to the detriment of Hydro One and its shareholders. Hydro One and its shareholders will not be afforded the benefit and value of the Future Tax Savings under the ITA and OTA to recover and offset the real cost incurred in exiting the PILs regime.

18. The PILs Departure Tax and the Future Tax Savings arise solely because of the Province's decision to sell part of its ownership interest in Hydro One Limited on the IPO. The disposition of this shareholding does not pertain to the costs, or the provision of rate-regulated utility services. Moreover, by only taking into account Future Tax Savings benefits and ignoring the PILs Departure Tax that was necessarily incurred and gave rise to those benefits results in a windfall to ratepayers at the expense of Hydro One and its shareholders, which is neither fair nor just.

C. Hydro One's submissions concerning the Future Tax Savings

19. In Hydro One's submissions to the Board in EB-2016-0160, it took the position that under the rate-making principles of cost causation and benefits follow costs, as a result

of paying 100% of the costs of the IPO (including the upfront $2,271 million in PILs Departure Tax), 100% of the benefit of the Future Tax Savings (an amount that is only realized over time) should be retained by Hydro One.[12]

D. The Board's Decision

20. The Board reached a different conclusion, making the Tax Savings Determination that Hydro One should be entitled to only a portion of the Future Tax Savings for 2017 and 2018, based on the application of the more favourable[13] of two methodologies:

(a) a recapture methodology, under which Hydro One (and therefore its shareholders) would receive the Future Tax Savings attributable to the portion of the $2,271 million of PILs Departure Tax paid as a result of recaptured CCA and CEC deductions ("**Recapture Methodology**"); and

(b) a benefits follow costs methodology, under which Hydro One would receive *partial* credit[14] for the $2,271 million in PILs Departure Tax it had paid according to an allocation factor, based in part on shares of Hydro One Limited sold by the Province of Ontario, which when multiplied against the tax savings in the year will give the portion of the tax savings which the company is allowed to retain ("**Share Ownership Methodology**").

21. Neither the Recapture Methodology nor the Share Ownership Methodology addressed the causation of the PILs Departure Tax. No explanation was given as to how the

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12 Hydro One Networks Inc., Argument-In-Chief re: EB-2016-0160, p. 76, MR, Tab 17.

13 Decision, p. 103, MR, Tab 2.

14 *Ibid*, p. 100, MR, Tab 2.

incurrence of the PILS Departure Tax was in any way caused by or due to the rate-regulated services that Hydro One offers to its customers, the costs of which it is permitted to recover in rates. Notwithstanding this, the allocation methodologies adopted in the Decision inappropriately allocate to ratepayers part of the Future Tax Savings, thereby precluding Hydro One and indirectly its shareholders from recovering the PILs Departure Taxes. Thus, an unexplained and erroneous mismatch occurred in failing to recognize the cause of the PILS Departure Tax and the recognition of benefits resulting from the payment of the PILS Departure Tax.

22. The methodologies selected by the Board to allocate the Future Tax Savings were never addressed in advance of, or during, the hearing by Hydro One, the Board, Board Staff, or the intervenors. As a result, there was no opportunity for Hydro One to make, or for the Board to have the benefit of, submissions based on the allocation methodologies being considered by the Board.

23. The difficulties presented by the lack of submissions on the Future Tax Savings allocation methodologies were amplified by the nature of the issue, which involved determinations of complex tax concepts, corporate law principles, and discretionary decisions by the Province. All of these are matters that are not typically considered by the Board – particularly without the benefit of comprehensive submissions and a complete factual record.

24. Only now that the Board has made its Decision, and has identified the allocation methodologies it selected, is Hydro One able to respond to the provided particulars,

and make submissions concerning the facts that were overlooked and the legal and factual errors that were made in arriving at the chosen allocation methodologies.

PART III - ISSUES AND THE LAW

25. There are three issues on this motion to review and vary the Decision:

(a) Did the Board err in allocating part of the Future Tax Savings to ratepayers;

(b) Did the Board make an error in disallowing the recovery of the AFUDC in rates for 2018; and

(c) Did the Board make an error by not including the costs attributable to the Ombudsman's Office in rates.

26. Hydro One relies on its Notice of Motion for issue (b).

A. The test on a review and variance motion

27. The determinations addressed in this written argument contain errors of fact and law that meet the threshold for a review of the Decision as specified in Rule 42 of the Board's *Rules of Practice and Procedure* and Board decisions applying that rule.[15] Namely, that these determinations contain:

(a) significant questions as to the correctness of the Decision;

(b) one or more of (i) findings that were contrary to the evidence before the panel; (ii) failure to address a material issue by the panel; (iii) inconsistent findings by

[15] See, in particular, *Decision with Reasons*, EB-2006-0322/0338/0340, dated May 22, 2007, pp. 16-18, BOA, Volume 1, Tab 13.

the panel; or (iv) something of a nature similar to (i), (ii) or (iii) (Hydro One relies on grounds (i) and (iv) in this written argument); and

(c) enough substance to the issues raised such that a review could result in the Board varying its Decision; that is, the errors made by the panel are material and relevant to the outcome of the Decision such that if the errors were corrected, the reviewing panel would change the outcome of the Decision.

B. The Board erred in allocating part of the Future Tax Savings to ratepayers

28. The Decision to allocate part of the Future Tax Savings to ratepayers was an error because the hearing panel:

(a) failed to apply well-understood regulatory rate-making principles, including cost causation, benefits follow costs, stand-alone utility, and the fair return standard;

(b) did not address the statutory framework in which the Decision is made; and

(c) made its allocation decision without the necessary factual record.

i. The Decision Failed to Properly Apply the Stand-alone Utility Principle and the Fair Return Standard

29. When allocating the Future Tax Savings, the Board did not properly apply the fair return standard – a legal requirement, nor did the Board properly apply the stand-alone utility principle – a fundamental rate-setting principle.

30. The "stand-alone utility" principle provides that the only risks and costs that are recoverable in rates are those that are caused and incurred for the provision of rate-regulated services. The Board recognized this principle in the "Guiding Principles":

> This principle limits the amounts recoverable in utility rates to costs related to the provision of regulated utility services. For ratemaking purposes, costs related to unregulated or non-utility business activities are excluded from the ambit of the "standalone" or "pure" utility activities.[16]

31. In previous decisions, the Board has routinely applied the stand-alone principle in the context of tax costs and benefits by holding that tax costs and benefits related to the activities of non-regulated affiliates should not be taken into account in setting rates.

32. In EB-2009-0408, the Board considered whether the calculation of income taxes by the regulated entity, Great Lakes Power Limited ("**GLPT**"), should be reduced or take into account the tax losses that had been incurred by an affiliated but non-regulated entity. The Board applied the stand-alone principle and held that it should not:

> Tax losses or deductions from outside the regulated business may result in no tax being paid by a particular entity (depending upon the corporate structure), but that does not mean the tax liability is not a real cost to the regulated business. The benefit of the tax losses arise from expenditures which remain outside the regulated business. ***Ratepayers have not borne those expenses, and therefore are not entitled to the benefits arising***. The Board has addressed this issue in a number of different circumstances in the past. The most recent case involved Great Lakes Power Limited ("GLPL"), a predecessor company to GLPT, and the treatment of tax losses arising from the unregulated business of a different division within the same corporation. In that decision, the Board stated:
>
> The pre-2007 expenses and losses of GLPL's unregulated businesses were borne by GLPL's shareholder, not ratepayers.

[16] Decision, p. 10, MR, Tab 2.

> It would be fundamentally unfair to take such tax losses into account when setting rates for regulated service. To abandon the stand alone principle in this case would give rise to the inappropriate result that rates for regulated service would be affected by the income or loss of a non-regulated business.[17]

33. The Decision did not refer to this case. It also did not apply the principle correctly when considering the Future Tax Savings. Rather, the Board stated that the stand-alone principle "does not operate to change the nature of the issue to something other than an issue of allocation". The basis of that conclusion is that "[t]he operation of the utility as a going concern produces the cash flows that give rise to the FMV Bump in the tax values of Networks' utility assets", and, therefore, "[t]hese items do not lie outside of the ambit of the OEB jurisdiction."[18]

34. With respect, this statement ignores the fundamental determination that underscores the Board's rate-making authority: the exercise of ensuring that costs are caused and incurred for the purpose of providing rate-regulated services. The FMV Bump in tax values of Hydro One's utility assets arises from a policy decision of the Province to sell a portion of its ownership in Hydro One Limited. Such a decision has no impact upon the utility's costs of providing rate-regulated services. The PILS Departure Tax and Future Tax Savings are not derived from regulated utility operations, but from a change in tax treatment arising from a shareholder's decision to sell its shares. Allocating benefits, such as the Future Tax Savings, without properly considering whether those benefits arose from costs to provide rate-regulated service, or costs incurred outside of this context, offends the stand-alone principle. Cost causation grounds the Board's rate-making authority; the stand-alone principle is what drives the

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17 *Decision with Reasons*, EB-2009-0408, dated July 21, 2010, pp. 9-10, BOA, Volume 1, Tab 15. [emphasis added]

18 Decision, p. 86, MR, Tab 2.

allocation of costs and benefits – but only when those costs are first demonstrated to be incurred for the provision of rate-regulated service.

35. The Board's reasoning does not therefore address the central question before it: were the costs incurred, and resulting benefits earned, caused by or related to the provision of regulated transmission services.[19] The evidence is clear they were not. The cost was incurred because the Province exercised its discretion to dispose of its shares. The Province then funded Hydro One to enable it to pay the resulting PILs Departure Tax and Hydro One was then entitled to Future Tax Savings. None of this involved a rate-regulated service, or Hydro One's customers and, as a result, there was no basis for the Board to intervene and allocate a portion of the Future Tax Savings to ratepayers.

36. While the Board's rate making authority is broad, it must be exercised in a manner consistent with the regulatory task at hand: determining the costs of providing rate utility services. As the Divisional Court held in *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, "[t]he Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service."[20]

37. The result of the Board's Decision is that the rates paid by Hydro One's customers are not being determined based on the cost of providing the utility service. Rather, utility rates are being established based on circumstances irrelevant to the provision of the

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[19] This is why none of the IPO transaction costs, such as underwriters' fees, legal fees, accounting fees and the PILS Departure Tax, were included in Hydro One's applied-for rates revenue requirement.

[20] *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 2008 CanLII 23487 (ON SCDC) at p. 39, BOA, Volume 1, Tab 6.

rate-regulated service, namely, the number of shares of the utility's parent company, Hydro One Limited, which the Province determined to sell to the public.

38. In *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, the Court of Appeal held that there were two relevant concerns for the Board to consider: a utility could "easily pass on the expense of business decisions to ratepayers through increased utility prices," or it could degrade "the quality of service, without the usual risk of losing customers".[21] Neither concern is present in this case. Hydro One made the decision that it could not pass the cost of the shareholder's business decision onto ratepayers because the costs did not pertain to the rate-regulated service. Instead, it was caused by the business decision of Hydro One's shareholder and was to be borne by its shareholders. The allocation of the Future Tax Savings is also clearly unrelated to the quality of service.

39. The Decision is inconsistent with prior applications of the stand-alone utility principle. In EB-2007-0905, a decision regarding Ontario Power Generation Inc. ("**OPG**") payment amounts, the Board held:

> Many regulated utilities are part of a broader entity that includes affiliates or nonregulated operations. Under the stand-alone principle, the regulated operations of the utility are treated for regulatory purposes as if they were operating separately from the other activities of the entity. **The intent is that the cost of capital borne by customers, in respect of the regulated operations, should not reflect subsidies to or from other activities of the firm and should only reflect the business risks associated with the regulated operations.**[22] (emphasis added)

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21 *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284 at para 48, BOA, Volume 2, Tab 26.

22 *Decision with Reasons*, EB-2007-0905, p. 136, BOA, Volume 1, Tab 14. [emphasis added]

40. Sound application of the Board's rate-making authority should not ignore or discount well established cost causation rate-making principles. The proper exercise of rate-making authority causes the Board to apply its expertise in the review and assessment of costs that are necessarily caused by and incurred for the provision of rate-regulated services. Where costs are neither caused by the provision of a rate-regulated service, nor incurred for this purpose, it is an unreasonable exercise of rate-making authority to effectively establish rates in this manner. Allowing future utility rates to be established based on entirely arbitrary and discretionary investment decisions made by a shareholder and paid for by that shareholder and that bear no relationship to the provision of utility services under the Board's jurisdiction is an unreasonable exercise of the Board's rate-making authority.

41. Accordingly, the allocation of Future Tax Savings to ratepayers under the Recapture Methodology and the Share Ownership Methodology are not supportable by the principles governing rate-regulation.

42. The Share Ownership Methodology has unique defects which can be demonstrated by considering the arbitrary results it produces in different transactions that have no bearing on the provision of rate-regulated services:

    (a) The Share Ownership Methodology distinguishes between shares sold in "actual FMV sales" and shares "deemed" to have been sold and reacquired at fair market value as a result of the application of section 149(10)(b) of the ITA

but which continue to be held by the Province.[23] Consider a scenario in which the Province sells 100% of its remaining shares in Hydro One Limited in an "actual FMV" transaction and subsequently repurchases a number of shares equal to the number it sold. Despite no change in the Province's percentage shareholdings in Hydro One Limited before and after the transactions, under the Share Ownership Methodology, 100% of the shares of Hydro One Limited will have been sold and paid for in "actual FMV sales" such that shareholders would be entitled to 100% of the Future Tax Savings and Hydro One's rates would increase.

(b) The Share Ownership Methodology fails to take into account the fact that shares of the same class are identical properties. If the Province were to acquire shares in the public market but thereafter decided to sell some of its shareholding, which shares would the Board consider the Province to have disposed of: the new shares or the existing shares? The answer, despite having no bearing on the provision of rate-regulated services, would have an impact on rates under the Share Ownership Methodology.

(c) The Decision did not explain why the Share Ownership Methodology shouldn't apply to vary the allocation of Future Tax Savings where Hydro One Limited issues additional shares from treasury to the public in exchange for a fair market value subscription price. In these circumstances, the percentage of

[23] Decision, p. 96, MR, Tab 2 and *Decision and Order*, EB-2016-0160 dated November 9, 2017 ("**DRO**"), p. 11, MR, Tab 3. As discussed in greater detail below, the Share Ownership Methodology gives the shares sold at "actual FMV" full credit towards the Tax Savings but unsold shares held under the "deemed" reacquisition event only partial credit towards the Tax Savings.

shares of Hydro One Limited "held under the auspices of the deemed sale"[24] by the Province would represent a smaller percentage of the total issued and outstanding shares of Hydro One Limited. However, based on the DRO, it seems that the shareholder portion of the Future Tax Savings would not increase. The DRO states:

> The Decision's Actual FMV Sales and Payments allocation factor achieves the same outcome. The tax savings related to the components of the FMV Bump that remain attributable to **the portion of the Province's shares that are held as a result of the "deemed" sale** and acquisition under the ITA are allocable to ratepayers. **When some or all of that portion of the shares are sold at FMV**, then the tax savings related to the additional shares sold shift to the shareholders.[25] (emphasis added)

This is an inappropriate result because the Province's indirect interest in the assets of Hydro One, including those owned at the time of the IPO, will have decreased.

It is a violation of cost-causation and rate-making principles to establish rates that fluctuate based on shareholder decisions to sell or acquire their property interests. Such decisions have no bearing on the provision of utility services.

43. The Supreme Court held in *Ontario (Energy Board) v. Ontario Power Generation Inc.* that "to encourage investment in a robust utility infrastructure and to protect consumer

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[24] DRO, p. 11, MR, Tab 3.

[25] *Ibid*, p. 16, MR, Tab 3.

interests, utilities **must be** allowed, over the long run, to earn their cost of capital, no more, no less."[26]

44. This legal requirement has been recognized by the Board. In its *Report of the Board on the Cost of Capital for Ontario's Regulated Utilities* the Board stated that meeting the Fair Return Standard "is not optional; it is a legal requirement." [27] It also stated that "the Fair Return Standard frames the discretion of a regulator, by setting out three requirements that must be satisfied by the cost of capital determinations of the tribunal."[28] One of these three requirements is the "comparable investment standard": the requirement that a fair or reasonable return on capital should "be comparable to the return available from the application of invested capital to other enterprises of like risk."[29]

45. One component of the comparable risk/return principle is that the Board is required to treat a government-owned utility in the same way as it would a privately-owned utility.[30] Past Board decisions confirm that the fair return standard does not compensate utilities for any additional risks attributable to government ownership.[31]

46. Thus, in EB-2007-0905, in determining the appropriate rate of return for OPG, the Board applied the stand-alone principle by assessing the risks to which OPG was

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26 *Ontario (Energy Board) v. Ontario Power Generation Inc.*, [2015] 3 SCR 147 at para 76, BOA, Volume 2, Tab 21. [emphasis added]

27 *Report of the Board on the Cost of Capital for Ontario's Regulated Utilities*, EB-2009-0084, dated December 11, 2009, page (i), BOA, Volume 2, Tab 30.

28 *Ibid*, BOA, Volume 2, Tab 30.

29 *Ibid*, p. 18, BOA, Volume 2, Tab 30, citing the National Energy Board's RH-2-2004 Phase II decision.

30 See, for example, *Decision and Order*, EB-2007-0905, dated November 3, 2008, pp. 136-142, BOA, Volume 1, Tab 14. See also Ontario Energy Board, *Reference respecting Ontario Hydro*, Chapter 11, H.R. 16, Report of the Board, Volume I dated September 15, 1987, BOA, Volume 2, Tab 28.

31 See *Decision with Reasons*, EB-2007-0905, dated November 3, 2008, pp. 136-142, BOA, Volume 1, Tab 14.

exposed, but it explicitly excluded public ownership as a risk for which a government owned utility should be compensated.[32] Further, according to, the Board:

> The Board concludes that if OPG is operated at arm's length, then it should be examined in the same way as Hydro One, another energy utility owned by the Province. **In other words, Provincial ownership will not be a factor to be considered by the Board in establishing capital structure.**[33]

47. The principal that public ownership is not to be considered in rate setting has not been followed in the Decision - a violation of the fair return principal.

48. The Decision characterized the PILs Departure Tax as a cost that was "variable at the discretion of the Province".[34] The Decision also speculated upon the tax elimination options that the Province could have used to help Hydro One avoid the cost of the PILs Departure Tax.[35]

49. As a result of the Board holding that Hydro One's shareholder (i.e. the Province) had discretion to waive the PILs Departure Tax, and as a result of the Board's reliance on the percentage of shares transferred as a basis for ratemaking, Hydro One was treated differently than other utilities because of its ownership by the Province. The recovery of taxes payable by a privately-owned utility would not be subjected to speculative scenarios of how the government *could have* taxed it.

50. The Decision therefore treated Hydro One's public ownership as a reason for reducing recoverable costs. However, as indicated, Hydro One's rate of return is deliberately

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32 *Ibid*, BOA, Volume 1, Tab 14.

33 *Ibid*, p. 142, BOA, Volume 1, Tab 14. [emphasis added]

34 Decision, p. 98, MR, Tab 2.

35 *Ibid* at p. 99, MR, Tab 2.

determined by excluding public ownership as a relevant consideration. As a result, by exposing Hydro One to a risk which is specifically excluded in determining its risk-based rate of return, the Decision has effectively exposed Hydro One to a risk for which it is not compensated.

ii. The Board's Decision overlooked the statutory framework in which it was made

51. The Board has broad rate fixing power under section 78 of the *Ontario Energy Board Act, 1998*[36] (the "**OEB Act**"). However, when exercising that power, the Board, like all administrative tribunals, is required to apply standard canons of statutory interpretation, frequently described as "the Driedger test." It is required to (i) assess the plain meaning of the words used, (ii) consider those words within the context in which they appear, and (iii) evaluate the language in light of the legislative purpose which motivated its enactment.[37]

52. This approach obligated the Board to consider section 78 of the OEB Act, together with the provisions and purposes of extrinsic, but related, enactments. As the Supreme Court of Canada has emphasized, Driedger's principle "gives rise to … the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter".[38]

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36 *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B) at s. 78, BOA, Volume 1, Tab 3.

37 *Erickson v. Ontario*, [2011] O.E.R.T.D. No. 29 at paras 498, 509 & 648, BOA, Volume 1, Tab 16, citing *Re Rizzo & Rizzo Shoes*, [1998] 1 SCR 27.

38 *Bell ExpressVue Limited Partnership v. Rex* [2002] 2 SCR 559 at para 27, BOA, Volume 1, Tab 8. See also *R. v. Ulybel Enterprises Ltd.*, [2001] 2 SCR 867 at paras. 51-52, BOA, Volume 2, Tab 23.

53. The Court of Appeal for Ontario has reiterated this principle in numerous cases[39] and the Supreme Court has affirmed that they apply to administrative tribunals. Even when a tribunal interprets its own statute, it may not act in a manner that undermines or disregards a parallel regime under a second statute.[40]

54. Finally, the Supreme Court has confirmed that "the question of compatibility [between statutes] must be subject to the strictest standard of review … correctness".[41]

55. Thus, when considering its jurisdiction under section 78(3) of the OEB Act, the Board must interpret that test "harmoniously, coherently, and consistently" with the relevant provisions of the Electricity Act that govern the Province's dealings with Hydro One shares. Those provisions establish a statutory framework for dealing with Hydro One's shares that the Board did not address when it made its decision concerning Future Tax Savings.

56. The Future Tax Savings arose due to the decision by the Province to undertake the IPO. Section 86 of the OEB Act excludes from the Board's approval a transaction such as the IPO. More specifically, subsection 86(5.1) of the OEB Act explicitly excludes a transaction described in section 50.1 or 50.2 of the Electricity Act from the Board's usual review of acquisition transactions under section 86 of the OEB Act.

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39 See *Dam Investments Inc. v. Ontario*, 2007 ONCA 527 at para 17, BOA, Volume 1, Tab 12, *Greater Toronto Airports Authority v. International Lease Finance Corp.* (2004), 69 O.R. (3d) 1 (C.A.) at paras 28-31 & 113-114, BOA, Volume 2, Tab 17, affirmed on this point, *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, [2006] SCR 865 at paras 50 & 54, BOA, Volume 1, Tab 9 and *R. v. Stucky*, 2009 ONCA 151 at para 41, BOA, Volume 2, Tab 24. See also *Kerr Interior Systems Ltd. v. Kenroc Building Materials Co. Ltd*., 2009 ABCA 240 at para 62, BOA, Volume 2, Tab 18.

40 *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at paras 2, 13, 42-45, BOA, Volume 2, Tab 25.

41 *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 SCR 591 at para 23, BOA, Volume 2, Tab 19 [*Lévis*].

57. Sections 50 and 51 give broad discretionary rights to the Lieutenant Governor in Council and the Minister to create and manage corporations for the "acquiring, holding, disposing of or otherwise dealing with, directly or indirectly securities, assets, liabilities, right, obligations, revenues and income of Hydro One Inc."[42]

58. This was recognized by the Superior Court of Justice in *Canadian Union of Public Employees v. Ontario (Premier)*, which held that sections 50.1 and 50.2 (as well as section 50.3) of the Electricity Act "give the Crown discretionary powers over the manner in which it may hold and dispose of interests in Hydro One."[43]

59. Further, section 49 of the Electricity Act gives the Minister discretionary powers on behalf of the Crown, to dispose of its interest in Hydro One:

> (1) The Minister, on behalf of Her Majesty in right of Ontario, may acquire, hold, dispose of and otherwise deal with securities or debt obligations of, or any other interest in, Hydro One Inc. or any of its subsidiaries subject to the restrictions set out in section 48.2.
>
> (2) The Minister, on behalf of Her Majesty in right of Ontario, may enter into any agreement or arrangement that the Minister considers necessary or incidental to the exercise of a power under subsection (1).[44]

60. Thus, the Legislature of Ontario has enacted a legislative scheme designed to give broad discretion to the Province concerning the disposition, retention, and management of Hydro One's "securities, assets, liabilities, rights, obligations, revenues and income". Nowhere in that legislative scheme is the Board given

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42 *Electricity Act 1998*, S.O. 1998, c. 15 at s. 50, BOA, Volume 1, Tab 1.

43 *Canadian Union of Public Employees v. Ontario (Premier)*, 2017 ONSC 4874 at para 29, BOA, Volume 1, Tab 10.

44 *Electricity Act 1998*, S.O. 1998, c. 15 at s. 49, BOA, Volume 1, Tab 1.

authority to intercede or involve itself in decisions made by the Minister or the Lieutenant Governor in Council concerning those matters.

61. Yet the decision of the Board does just that: the Board has reviewed a decision made by the Province concerning the "dealing with" of a "liability" of Hydro One, the PILs Departure Tax, which arose due to the "disposing" of "securities" of "Hydro One". This result was not intended by the Legislature. The legislative regime is one in which the Province is given broad discretion to manage its holdings of Hydro One. The scope of the Board's rate-making authority must take this into account.

62. By adopting the Share Ownership Methodology which is based, in part, on the Board's erroneous view that the PILs Departure Tax was "variable" and could be "waived" and which allocates Future Tax Savings based on Provincial decision(s) to dispose of its shares of Hydro One Limited, the Board is adding a factor to be taken into account by the Province in deciding whether to sell shares of Hydro One Limited and thus is interfering with the Province's exercise of discretion. This falls outside the Board's rate-making authority. This result is inconsistent with the intention of the Legislature, as demonstrated by the statutory scheme it has enacted for the Province's management and control of Hydro One.

63. Further, the Board is required to consider and explain how its decision is consistent with the statutory scheme in which it operates, which it did not do.

iii. The Board's Decision was made without the necessary factual record

64. The Board also made findings of fact in the absence of evidence, a well-recognized error.[45] In its application of the benefits follow costs principle, the Decision characterized the PILs Departure Tax as a cost that was "variable at the discretion of the Province".[46] The Decision also speculated upon the tax elimination options that the Province could have used to help Hydro One avoid the cost of the PILs Departure Tax.[47] As a consequence of its erroneous finding that the PILs Departure Tax was variable, the Board found that it was justified in adopting, for regulatory purposes, "a departure tax value that is materially less than $2,271 million for use in conjunction with an application of the Benefits follow Costs principle".[48] Based on this finding, rather than giving Hydro One full credit for the Future Tax Savings generated as a result of the IPO, the Board designed a "Benefits follow Costs allocation factor"[49], which was erroneously applied to reduce the tax savings allocable to Hydro One so long as the Province remained a shareholder.

65. The Board's finding that the PILs Departure Tax was a variable cost (not a real or true cost) was an error. There is no factual basis for this finding because:

(a) The Minister of Energy for the Province fixed the $2,271M PILs Departure Tax liability of Hydro One under the PILs Regulation;

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45 *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 SCR 197 at para 25, BOA, Volume 2, Tab 22; *Coachman Insurance Company v. Lombard Canada*, 2009 ONCA 80, BOA, Volume 1, Tab 11.

46 Decision, p. 98, MR, Tab 2.

47 *Ibid* at p. 99, MR, Tab 2.

48 *Ibid* at pp. 99-100, MR, Tab 2.

49 *Ibid*, MR, Tab 2. In respect of the portion of the Tax Savings embedded in the Province's remaining shareholdings, rather than give Hydro One credit for each dollar of PILs Departure Tax paid ($2,271 million) against each dollar of Tax Savings ($2,595 million) generated from the IPO, the Decision dilutes the value of the $2,271 million PILs Departure Tax cost by crediting it against the amount of the FMV Bump ($9,794 million), effectively discounting Hydro One's cost by a factor of approximately 3.77.

(b) The PILs Departure Tax was a real cost, paid by Hydro One via wire transfer and recorded in the consolidated financial statements of Hydro One;[50]

(c) Hydro One ceased to be a corporation exempt from tax under the ITA on the IPO, which caused it to be liable for PILs Departure Tax under the Electricity Act; and

(d) No options were available to Hydro One to avoid paying the PILs Departure Tax liability.

66. According to the Decision, the Province could have eliminated the PILs Departure Tax by making a regulation under paragraph 114(1)(m) of the Electricity Act exempting Hydro One from the obligation to pay the PILS Departure Tax, or by granting a remission order in respect of the PILs Departure Tax to Hydro One under section 95.1 of the Electricity Act.[51]

67. However, the Province did not, in fact, either make such a regulation or issue such a remission order. Further, there was no evidence before the Board regarding the circumstances in which the Province would consider it an appropriate policy decision

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50 See Exhibit J11.16, Attachment 1, pp 1-3, MR, Tab 15.

51 Page 98 of the Decision, MR, Tab 2, states that the "PILs Regulation empowers the Province, as the taxing authority, to exempt an obligated utility, in whole or in part" citing section 16.1 of O. Reg. 207/99, BOA, Volume 1, Tab 4. In fact, O. Reg. 207/99, s. 16.1, BOA, Volume 1, Tab 4, does not grant the Minister such a power. It provides:

> With the consent of the Minister, the corporation pays to the Financial Corporation an amount that, in the Minister's opinion, reasonably approximates the additional amounts, if any, that would be payable by the corporation under sections 89 and 90 of the Act[.] (emphasis added)

O. Reg. 207/99, s. 16.1, BOA, Volume 1, Tab 4, grants the Minister a limited authority to fix the amount of the PILs Departure Tax payable to the OEFC to an amount that "reasonably approximates" the amount calculated under ss. 89 and 90 of the Electricity Act, BOA, Volume 1, Tab 1—it does not grant the Minister authority to exempt an obligated utility in whole, and limits any exempted amount such that the obligated utility remains liable to pay a reasonable approximation of the amount otherwise due. It is assumed that the Decision meant to refer to the Governor in Council's power to grant a regulatory exemption under ss. 114(1)(m) and or a remission order under s. 95.1 of the Electricity Act, BOA, Volume 1, Tab 1, as referred to above.

to take either such action. There was also no evidence before the Board regarding the reasons for the Province's policy decision to not exercise its discretion to promulgate a regulation or issue an order in council to waive or reduce the PILs Departure Tax. The only fact in evidence before the Board was that the Minister of Energy *had* exercised his discretion to fix the cost of the PILs Departure Tax at $2.6 billion in respect of Hydro One Limited and its subsidiaries.[52]

68. The Board's speculation regarding the possibility of the Province reducing or waiving the PILs Departure Tax is an error of fact and denied Hydro One procedural fairness. Courts have long recognized that it is inappropriate for administrative decision makers to speculate regarding hypothetical government action. For example, in *Lindsay v Manitoba (Motor Transport Board)*, the Manitoba Transport Board determined that an applicant's proposed extra-provincial truck undertaking would be detrimental to the public interest.[53] A basis of the Transport Board's decision was an assumption that all other applications for extra-provincial licenses would be granted. The Manitoba Court of Appeal held that this was an error and amounted to a denial to the applicants of natural justice and procedural fairness as it was not justified by facts that had been established before the Transport Board; rather, it was based on an assumption made by the Transport Board about the Province's conduct.

69. Here, the Board had before it no evidence suggesting why it would be within the discretionary authority of the Province to waive the PILs Departure Tax payable by

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[52] Exhibit I, Tab 9, Schedule 2, Attachment 1, p. 108, F-35, F-51, MR, Tab 12. See also: Exhibit A, Tab 8, Schedule 1, Attachment 1, pp.68 and 91, MR, Tab 8. Hydro One's portion of this amount was $2,271 million.

[53] *Lindsay v. Manitoba (Motor Transport Board)*, 62 D.L.R. (4th) 615 (Man CA) (leave to appeal refused (1990), BOA, Volume 2, Tab 20.

Hydro One. The Board had no evidence before it concerning the policy reasons for the decision to fix Hydro One's PILs Departure Tax liability at $2,271 million and gave no reasons why the Province had the discretion to waive that amount in the circumstances other than because the Electricity Act purported to delegate to the Lieutenant Governor in Council such a power.[54]

70. Similarly, in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, the Supreme Court criticized the Alberta Energy and Utilities Board for allocating proceeds "on an unquantified future potential loss" and for finding a "presumption of bad faith… that appears to underlie the Board's determination to protect the public from some possible future menace."[55] The allocation in this case is perhaps more problematic, as it was not done on the basis of a future potential loss, but rather a hypothetical exercise of discretion (to waive the PILs Departure Tax), that knowingly did not occur. Rather than being concerned about some "possible future menace", the Decision speculated about what could have happened if Hydro One's shareholder, the Province, had made a different decision about collecting a tax.

71. The panel further erred in finding that the PILs Departure Tax paid by Hydro One and funded by the Province was "effectively a payment from itself to itself" to preserve the "Exempt Utility FMV".[56] The payment of the PILs Departure Tax was not a payment by the Province to itself. The evidence on the record, ignored in the Decision, was that

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54 See Footnote 51: once more we assume that when the Board cited s. 16.1 of the PILs Regulation, the Board actually intended to cite the Province's power to make a regulation under s. 114(1)(m) of the Electricity Act, BOA, Volume 1, Tab 1, exempting Hydro One from the obligation to pay the PILS Departure Tax, or to grant a remission order in respect of the PILs Departure Tax to Hydro One under s. 95.1 of the Electricity Act, BOA, Volume 1, Tab 1.

55 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 SCR 140 at para 84, BOA, Volume 1, Tab 7.

56 Decision, p. 98, MR, Tab 2.

the PILS Departure Tax was paid by Hydro One to the Ontario Electricity Financial Corporation ("**OEFC**").[57] The payment was financed by an equity infusion from Hydro One's shareholder, the Province.[58]

72. Under the Electricity Act, the PILs Departure Tax, once paid to the OEFC, did not form part of the Province's consolidated revenue fund, and the OEFC was obliged to use the amount for the purpose of carrying out its statutory objectives,[59] which include servicing and retiring debt obligations.[60] The Board had no evidence about the policy decisions made by the Province that resulted in a determination that Hydro One should pay the PILs Departure Tax to OEFC so that OEFC could fulfill its statutory obligations.

73. Based on the foregoing, the Board had no evidence before it to adopt a finding that the PILs Departure Tax was variable at the discretion of the Province. The Board premised its application of the Benefits follow Costs principle on its view that it was justified in recognizing less than the full amount of the PILs Departure Tax paid by the Province. Had the Board correctly recognized that the PILs Departure Tax was a real (non-variable) cost incurred by the Province in order to undertake the IPO, it would not have adopted the allocation factor that it did.

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57 See Exhibit J11.16, Attachment 1, pp. 1-3, MR, Tab 15, in which there is a description of the five wire transfers made to the OEFC by Hydro One's Manager, Treasury Operations on November 4, 2015.

58 Exhibit J11.16, Attachment 2, p. 36, MR, Tab 16.

59 *Electricity Act 1998*, S.O. 1998, c. 15 at s. 62, BOA, Volume 1, Tab 1.

60 *Ibid* at s. 55, BOA, Volume 1, Tab 1.

iv. The Board disregarded the factual record that it did have available

74. In addition to lacking facts on certain key issues, as discussed, above, the Board disregarded facts that were before it in the course of making its decision. In particular, the Board disregarded the evidence that was before it concerning the rationale behind the method of payment of the PILs Departure Tax.

75. Mr. Vels testified on behalf of Hydro One that other options did exist for the financing of the PILs Departure Tax: raising debt or seeking recovery of the costs from the rate-payers.[61] Mr. Vels also testified that those alternatives would have adversely affected the financial well-being of Hydro One.

76. If Hydro One incurred debt to pay the PILs Departure Tax, and had sought to include those debt costs in rates (through the allowed return on rate base), it would have needed to respect the matching principle and to have provided ratepayers with the benefit of that cost (Future Tax Savings). Equally, if Hydro One had sought to recover in rates the cost of the equity infusion used to finance the payment of the PILs Departure Tax, (also through the allowed return on rate base), adherence to the matching principle would have required that it pass through to ratepayers the Future Tax Savings. Neither the cost of debt (which was not used), nor the cost of equity (which was used) was sought to be included in rates, nor has it been paid in any manner by ratepayers. If Hydro One had debt financed and did not pass the debt costs onto ratepayers, it is reasonable to expect that the benefits resulting from these costs (Future Tax Savings) would also have fallen outside the rate-setting context.

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[61] Oral Hearing Transcript Volume 1, p. 29, line 25, to p. 35, line 23, MR, Tab 5; Oral Hearing Transcript Volume 11, p. 15, line 21 to p. 78, line 28, MR, Tab 7.

Importantly, parity and balance would be maintained because the "benefits follows costs" principle would have been applied consistently. This is in contrast to what has been decided in this Decision. Here, the PILs Departure Tax costs have entirely been incurred by Hydro One and excluded from cost recovery in rates, but a portion of the Future Tax Savings benefits has been arbitrarily allocated to ratepayers based on the share ownership of one shareholder in Hydro One Limited.

77. If the Board wanted to proceed on a basis that the PILS Departure Tax was not incurred as a result of the decision of the Province to undertake the IPO and to consider the PILS Departure Tax to be a cost incurred in the provision of a rate-regulated service, it should have provided for the recovery of the PILs Departure Tax from ratepayers in accordance with RP-2004-0188.[62] In such case, it would be appropriate for Hydro One's ratepayers to have received all of the Future Tax Savings, as the ratepayers would have paid the tax cost for the benefit they are receiving. In contrast, under the EB-2016-0160 Decision, ratepayers have received a benefit, a portion of the Future Tax Savings, without having paid any cost as the tax cost was borne entirely by the shareholders. The result is a patently unreasonable windfall for the ratepayer.

C. The Board erred in disallowing costs attributable to the Ombudsman's Office

78. Section 48.3 of the Electricity Act requires that Hydro One establish and fund an Office of the Ombudsman to "to act as a liaison with customers and shall establish procedures for the ombudsman to inquire into and report to the board of directors of

[62] *Report of the Board*, RP-2004-0188, dated May 11, 2015, BOA, Volume 2, Tab 29.

Hydro One Inc. on matters raised with the ombudsman by or on behalf of customers."[63]

79. As set out at paragraphs 36-37 of Hydro One's Notice of Motion, in the Decision, the Board incorrectly characterized the Office of the Chair's budget of $1.4 million as being the compensation cost of the Chair of the Ombudsman's Office. This is factually incorrect and must be corrected as it suggests that the compensation of the Chair has meaningfully changed when it has not.

80. Further, in the Decision, the Board disallowed the recovery of costs attributable to the Ombudsman's Office in rates. This was an error. The Office of the Ombudsman is established by statute and provides a demonstrable benefit to ratepayers by acting as an independent office of last resort to resolve customer complaints, investigate systemic issues and report to the Board of Directors of Hydro One regarding matters raised by or on behalf of ratepayers.

81. Disallowing the recovery of costs associated with the Office of the Ombudsman also undermines the independence of the Ombudsman's office, as it suggests that the Ombudsman should be funded by shareholders rather than ratepayers. In order to preserve the independence of the Ombudsman, the decision should be varied so that 53% of $1.4 million of the costs associated with the Office of the Ombudsman, or $742,000, are recovered in transmission rates.

82. Hydro One also relies on the submissions in its Notice of Motion for this issue.

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63 *Electricity Act* 1998, S.O. 1998, c. 15 at s. 48.3, BOA, Volume 1, Tab 1.

PART IV - CONCLUSION

83. In conclusion and based on the foregoing reasons, Hydro One requests variation to the Decision and its corresponding rate order to reflect that:

(a) the payment of the PILs Departure Tax is caused by a change in statutory tax schemes resulting from the Province's decision to sell its ownership interests in Hydro One Limited by way of IPO, and does not result from any change in the provision of rate-regulated service, and therefore is not a cost applicable Hydro One's rates-revenue requirement;

(b) the Future Tax Savings are, correspondingly, caused by the change in statutory tax schemes resulting from the Province's decision to sell its ownership interests in Hydro One Limited by way of the IPO and do not result from any change in the provision of rate-regulated service, and therefore the Future Tax Savings are inapplicable to Hydro One's rates revenue requirement;

(c) none of the Future Tax Savings should be allocated to ratepayers to reduce Hydro One's rates revenue requirement for 2017 and 2018 (Section 15 of the Decision);

(d) the AFUDC in respect of the NRP shall be included in rates for 2018 (Section 13 of the Decision); and

(e) the costs attributable to the Ombudsman Office shall be included in rates (paragraphs 7.2.2 and pp. 57-58 of the Decision).

84. In the alternative to paragraph 85 (a)-(c) Hydro One requests that:

(a) if Future Tax Savings (in whole or in part) are included in Hydro One's rates revenue requirement, then the Decision should be varied to include the PILs Departure Tax amount as a cost recoverable from ratepayers; and

(b) a new Panel should be established to determine the amounts of the Future Tax Savings and the PILs Departure Tax that are applicable to Hydro One's rates revenue requirement.

85. Hydro One also asks for such further relief as it may request and that the Board may deem appropriate in these circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of January, 2018.

Signed in the original
Gordon Nettleton
McCarthy Tétrault LLP
Counsel for Hydro One Networks Inc.

Signed in the original
Douglas Cannon
McCarthy Tétrault LLP
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Hydro One Networks Inc.
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SCHEDULE "A"
LIST OF AUTHORITIES

Tab	Authority
	Volume 1
	Statutes
1	Extract of *Electricity Act 1998*, S.O. 1998, c. 15
2	Extract of *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp)
3	Extract of *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B)
4	*Payments in Lieu of Corporate Taxes*, O. Reg. 207/99
5	Extract of *Taxation Act, 2007*, S.O. 2007, c. 11, (Schedule A)
	Cases and Regulatory Decisions
6	*Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 2008 CanLII 23487 (ON SCDC)
7	*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 SCR 140
8	*Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 559
9	*Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 SCR 865
10	*Canadian Union of Public Employees v. Ontario (Premier)*, 2017 ONSC 4874
11	*Coachman Insurance Company v. Lombard Canada*, 2009 ONCA 80
12	*Dam Investments Inc. v. Ontario*, 2007 ONCA 527
13	*Decision with Reasons*, EB-2006-0322/0338/0340, dated May 22, 2007
14	*Decision with Reasons*, EB-2007-0905, dated November 3, 2008
15	*Decision with Reasons*, EB-2009-0408, dated July 21, 2010
16	*Erickson v. Ontario*, [2011] O.E.R.T.D. No. 29
	Volume 2
17	*Greater Toronto Airports Authority v. International Lease Finance Corp.* (2004), 69 O.R. (3d) 1 (C.A.)
18	*Kerr Interior Systems Ltd. v. Kenroc Building Materials Co. Ltd.*, 2009 ABCA 240
19	*Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 SCR 591

20	*Lindsay v. Manitoba (Motor Transport Board)*, 62 D.L.R. (4th) 615 (Man CA)
21	*Ontario (Energy Board) v. Ontario Power Generation Inc.*, [2015] 3 SCR 147
22	*R. v. J.M.H.*, [2011] 3 SCR 197
23	*R. v. Ulybel Enterprises Ltd.*, [2001] 2 SCR 867
24	*R. v. Stucky*, 2009 ONCA 151
25	*Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68
26	*Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284
	Secondary Sources
27	Extract of Ontario Energy Board, *Filing Requirements for Electricity Transmission Applications*, Chapter 2, "Revenue Requirement Applications," dated February 11, 2016
28	Extract of Ontario Energy Board, *Reference respecting Ontario Hydro*, Chapter 11, H.R. 16, Report of the Board, Volume I, dated September 15, 1987
29	Extract of *Report of the Board*, RP-2004-0188, dated May 11, 2005
30	*Report of the Board on the Cost of Capital for Ontario's Regulated Utilities*, EB-2009-0084, dated December 11, 2009