

**PALIARE  
ROLAND**

B A R R I S T E R S

Chris G. Paliare  
Ian J. Roland  
Ken Rosenberg  
Linda R. Rothstein  
Richard P. Stephenson  
Nick Coleman  
Donald K. Eady  
Gordon D. Capern  
Lily I. Harmer  
Andrew Lokan  
John Monger  
Odette Soriano  
Andrew C. Lewis  
Megan E. Shortreed  
Massimo Starnino  
Karen Jones  
Robert A. Centa  
Nini Jones  
Jeffrey Larry  
Kristian Borg-Olivier  
Emily Lawrence  
Tina H. Lie  
Jean-Claude Killey  
Jodi Martin  
Michael Fenrick  
Ren Bucholz  
Jessica Latimer  
Lindsay Scott  
Alysha Shore  
Denise Cooney  
Paul J. Davis  
Lauren Pearce  
Elizabeth Rathbone  
Daniel Rosenbluth  
Glynnis Hawe  
Emily Home

COUNSEL  
Stephen Goudge, Q.C.

COUNSEL  
Ian G. Scott, Q.C., O.C.  
(1934 - 2006)

**Richard P. Stephenson**

T 416.646.4325 Asst 416.646.7419  
F 416.646.4301  
E richard.stephenson@paliareroland.com  
[www.paliareroland.com](http://www.paliareroland.com)

File 92867

January 22, 2018

**VIA RESS FILING and COURIER**

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

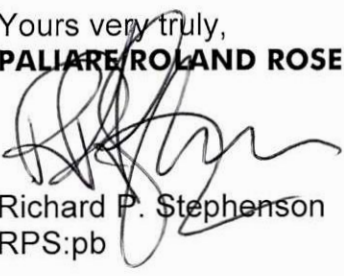
Dear Ms. Walli:

**Re: Hydro One Networks Inc. - Notice of Motion to Review and Vary EB-  
2016-0160 Decision and Order dated September 28, 2017**

Attached please find the Power Workers' Union's Submissions in connection with the above-noted proceedings. An electronic copy has been filed through the Board's RESS filing system, and two paper copies will follow by courier delivery.

Yours very truly,

**PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**

  
Richard P. Stephenson  
RPS:pb

Attach.

c: Applicant (via email)  
Intervenors (via email)

Doc 2395480 v1

**PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**

155 WELLINGTON STREET WEST 35TH FLOOR TORONTO ONTARIO M5V 3H1 T 416.646.4300

**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.

**PWU Submission – OPG Motion (EB-2014-0369)**

1. These are the submissions of the Power Workers' Union ("PWU") in respect of Hydro One Networks Inc. ("Hydro One") motion for review and variance of the Ontario Energy Board ("OEB" or "Board") panel's Decision and Order dated September 28, 2016 in EB-2016-0160 (the "EB-2016-0160 Decision") .
2. Rule 45.1 of the OEB Rules of Practice and Procedure sets out that the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting a review on the merits of the motion. In Procedural Order No.1, dated December 19, 2017, the Board determined that Hydro One's motion met the threshold for review and invited parties to make submission on the ultimate merits of the Motion.
3. The PWU was an intervenor and active participant in EB-2016-0160. The PWU supported Hydro One's application, including its position with respect to the subject matter of this motion.

4. The PWU's submissions are in response to the Board's request to the parties to make submissions on the ultimate merits of Hydro One's motion. These submissions do not specifically address all of the OEB's determinations in Hydro One's Motion. Where a determination has not specifically been addressed, the PWU supports the Motion as filed, and supports and adopts the submissions of Hydro One in support of the Motion.

## Overview

5. In its Submissions dated January 15, 2018, Hydro One sought, by way of its motion, an Order:

- a) that a portion of tax savings resulting from the Government of Ontario's decision to sell its ownership interest in Hydro One Limited by way of an Initial Public Offering on October 28, 2015 and subsequent sale of shares ("IPO") should be applied to reduce Hydro One's revenue requirement for 2017 and 2018 (Section 15 of the Decision) (the "**Tax Savings Determination**");
- b) 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
- c) that the costs attributable to the Ombudsman Office should not be included in rates (paragraphs 7.2.2 and pp. 47 of the Decision) (the "Ombudsman's Office Determination").

6. As outlined by Hydro One in its Submission, the Board's Decision made four principal errors in the Tax Savings Determination, namely:

- a) erroneously finding that the tax paid by Hydro One to exit the payment in lieu of taxes regime (the "PILs Departure Tax") under the *Electricity Act* (Ontario) ("Electricity Act") was "variable";
- b) misinterpreting and misapplying RP-2004-0188 to the facts of this case;
- c) failing to apply the stand-alone utility principle and the fair return standard; and
- d) making errors with respect to the applicable tax concepts.

...the cumulative consequence of which was the adoption of a flawed benefits follows costs methodology.

## **The Merits of the Motion**

### **a. Tax Savings Determination**

7. The Province is both the taxing authority for Hydro One, and its shareholder. It is apparent that the Board would not have come to the result it did if Hydro One had been wholly owned by a non-provincial shareholder, such as a municipality. In this case, the Board did not apply the “benefits follow costs” principle. It is clear that its reason for doing so, was that it did not accept that Hydro One had, in substance, paid the departure tax such that it should benefit from the principle. Obviously, the Board accepted that Hydro One paid the departure tax in a technical sense, in that it generated the fund transfer whereby the tax was paid. However, it is apparent that the Board did not consider this to be a “real” cost to Hydro One because of the manner in which it had been funded by the Province (i.e. through the share purchase).

8. Of course this conclusion ignores the fact that the Departure Tax would have been payable by Hydro One, entirely in the absence of the share purchase by the Province. As a practical matter, this would simply have resulted in Hydro One having a valuation on the IPO which was \$2.27B less than it actually was (assuming that such a payment could have been made without violating Hydro One’s lending covenants).

9. Further, as Hydro One correctly notes, the manner in which Hydro One chose to fund the expenditure that it made in relation to the Departure Tax does not make that expenditure any less real. Essentially, the Board violated the fundamental legal concept of corporate separateness, erasing the lines between the corporation and its shareholder (in regulatory terms, the “stand alone” doctrine). This is inappropriate, regardless of the identity of the shareholder.

10. The Board compounded its error, by not only looking past Hydro One to its shareholder, but moreover, looking to the specific identity of that shareholder, i.e. the Province of Ontario. It is clear the Board considered that, neither Hydro One nor the Province bore the cost of the Departure Tax, because the Province was essentially “paying itself”. This is an error in two distinct respects.

11. First, the conclusion is factually incorrect, in the sense that the monies paid to Hydro One by the province were paid from the Consolidated Revenue Fund ("CRF"), whereas the Departure Tax was paid by Hydro One to the Ontario Electricity Financial Corporation. The OEFC is an entity legally separate from the Province and entirely distinct from the CRF. Secondly, the finding is incorrect in that it conflates the Province's role having all the powers of a natural person owning the shares of an OBCA corporation, from the Province's role as a taxing authority. The Province is entitled to be treated as a shareholder like any other shareholder, with no greater or lesser rights or obligations.

12. The Board was correct that the Province in its capacity as Crown can exercise its regulatory authority under various statutes to determine taxation rules. However, it is not for the Board to make normative judgments regarding the laws that the Province could have made, or arguably should have made. The task of the Board is to apply the laws that the Province did make.

### **Conclusion**

13. The PWU agrees with Hydro One that the Board has made the errors in the EB-2016-0160 Decision as identified by Hydro One and therefore submits that it is appropriate for the Board to vary its decision in the manner submitted by Hydro One.

**All of which is respectfully submitted.**