Ontario Energy Board
Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2016-0255

MILTON HYDRO DISTRIBUTION INC.

Motion to review and vary the Decision and Order dated July 28, 2016 on Milton Hydro Distribution Inc.'s electricity distribution rates and charges beginning May 1, 2016 (EB-2015-0089)

BEFORE: **Christine Long**
Vice Chair and Presiding Member

Cathy Spoel
Member

Peter C. P. Thompson, Q.C.
Member

February 22, 2018

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1 INTRODUCTION AND SUMMARY

This is a motion brought by Milton Hydro Distribution Inc. (Milton Hydro) to review and vary certain aspects of the decision of the Ontario Energy Board (OEB) dated July 28, 2016 (the Decision) concerning Milton Hydro's electricity distribution rates for 2016.[1]

Milton Hydro asserts that the OEB panel that heard the case (the Hearing Panel) erred in fact in making its findings related to:

1. The fair market value of the property located at Fifth Line and Main Street in Milton (the Property), which was sold by Milton Hydro to an affiliate in December 2015;

2. The allocation to ratepayers of the capital gain on the portion of the Property not included in rate base; and

3. The mechanism by which the gain allocable to ratepayers is to be paid to them.

The Decision found the market value of the Property on the date of its sale to the affiliate to be $2.73 million using a per acre value of $425,000 for the 6.43 acre parcel. For the purpose of rate-making, the Decision allocates to ratepayers the entire capital gain of almost $506,000. This amount includes the gain realized on portions of the Property included and excluded from Milton Hydro's rate base.

The Decision directs the use of a permanent rate base reduction mechanism, rather than a time limited revenue offset mechanism, to credit ratepayers with the amount of the gain for the purpose of setting rates.

The members of this Review Panel disagree on the disposition of the motion.

The majority grants variance relief in relation to all three of the errors of fact alleged by Milton Hydro, while the dissenting decision would limit the grant of variance relief to the mechanism for crediting, for rate-making purposes, the portion of the capital gain on the land allocable to ratepayers.

The majority's reasons are found in chapter 4. The minority's reasons are found in chapter 5. This introductory chapter, as well as chapters 2 (Process) and 3 (Facts) were jointly authored by the majority and minority.

[1] EB-2015-0089.

2 THE PROCESS

Milton Hydro's August 28, 2015 cost of service application for OEB approval of 2016 rates was partially settled under the terms of a Settlement Proposal dated February 9, 2016 and an addendum dated April 7, 2016.[2]

An oral hearing of the issues remaining in dispute was held on April 4 and 5, 2016. Milton Hydro made oral submissions in chief on April 5, 2016 and written reply submissions on April 28, 2016 to the written arguments made by intervenors and OEB staff.

The Decision approving the settled issues and determining the disputed issues was released on July 28, 2016.

The Motion to Review and Vary (the Motion) was filed with the OEB on August 17, 2016. The Motion relied upon an affidavit sworn on that date making certain changes to the August 5, 2015 appraisal report that was before the Hearing Panel.

In its September 1, 2016 Procedural Order No. 1, the Reviewing Panel determined that the threshold under Rule 43 of the OEB's *Rules of Practice and Procedure* (Rules) had been met and that it would proceed to review, on the merits, each of the issues raised by Milton Hydro in the Motion.

Procedural Order No. 1 established a schedule for the presentation of further written submissions from Milton Hydro and from the other parties who participated in the proceedings giving rise to the Decision.

On September 15, 2016, Milton Hydro filed submissions in support of the Motion. Written submissions followed on September 20, 2016 from the School Energy Coalition (SEC) and, on September 22, 2016, from Energy Probe Research Foundation (Energy Probe) and OEB staff. Milton Hydro delivered its reply submissions on October 5, 2016.

After considering these submissions, the Reviewing Panel determined that it wished to obtain additional information from Milton Hydro and its appraiser of facts on the record of this case related to the Property valuation and capital gain allocation findings in the Decision.
The OEB asked its staff to arrange with Milton Hydro a suitable date for a brief oral hearing to deal with the issues raised. In a December 22, 2016 letter to the Chair of the

[2] EB-2015-0089 Settlement Proposal, February 9, 2016, Addendum April 7, 2017.

OEB, the president of Milton Hydro objected to this proposal and requested that the OEB consider written responses to any questions that needed to be answered to enable the OEB to render an informed decision on the Motion.

Procedural Order No. 2 was issued on January 17, 2017, attaching 16 questions for Milton Hydro and the appraiser. Written responses to these questions (PO2 Responses) were filed by Milton Hydro on January 29, 2017.

3 FACTS

Chronologically, the facts in the record before the Hearing Panel,[3] in the Affidavit, and in the PO2 Responses that are relevant to the Property valuation, capital gain allocation and payment mechanism issues include the following:

a) In 2009 Milton Hydro purchased the 6.43 acre Property for $2,218,530. The vacant land was acquired for future use as the utility's office and service center. A Royal LePage real estate agent assisted Milton Hydro in this transaction.[4]

b) Immediately adjacent to the Property was a privately owned 1.3 acre parcel that Milton Hydro wished to acquire to increase the size of its development land to about 7.7 acres.

c) In 2010 Milton Hydro had the adjacent 1.3 acre parcel appraised by Royal LePage. The appraised value range was between $600,000 and $700,000 or between about $461,000 and $538,000 per acre.[5]

d) In December 2010, Milton Hydro offered to buy the 1.3 acre parcel for $699,000 or about $538,000 per acre. The property owner would not sell for less than $750,000 or about $577,000 per acre.[6]

e) In Milton Hydro's EB-2010-0137 Application for 2011 cost of service rates, 50% of the $2,218,530 cost of the Property was included in rate base because that portion of the Property was being used for the outside storage of utility materials and equipment. The remaining 50% of the Property, being held for future utility use as the location for the new office and service centre, was not included in rate base.[7]

f) In November 2012, at a time when locations for the future office and service centre other than the Fifth and Main location were being examined,[8] Milton Hydro ascribed a $2.7 million value to the Property and a per acre value of $450,000.[9] The record showed that by the end of March 2012 Milton Hydro had

[3] All of the references in the footnotes that follow are to the EB-2015-0089 record unless otherwise noted.
[4] Interrogatory Responses, December 18, 2015 at pages 787-790; PO2 Responses, February 3, 2017 at page 3.
[5] PO2 Responses, February 3, 2017 at page 6.
[6] Transcript Vol. 1 at page 152 and Exhibit K1.3 Option 11.
[7] Transcript Vol. 2 at page 108 and Exhibit 1, August 28, 2015, page 32.
[8] See Interrogatory Responses, December 18, 2015 at pages 739-743.
[9] Interrogatory Responses, December 18, 2015 at page 756 of 901. The document containing the $2.7 million and $450,000 per acre amounts (a presentation by the President/CEO to the Relocation.

investigated the suitability and pricing of 12 properties and had identified three sites to be pursued. This evidence notes prices in Milton had been skewing upwards since August 2011.[10]

g) In or about May of 2014, Milton Hydro decided to replace the Property as the location for its new office and service centre with lands and premises at 200 Chisholm Drive in Milton. The serviced land at Chisholm Drive was valued at $4.040 million or about $575,000 per acre. The purchase was completed in September in 2014. The building was renovated and the utility moved in to the premises in late 2015.[11]

h) Having acquired the 200 Chisholm Drive premises to replace the land at Fifth and Main, Milton Hydro decided to sell that land to its affiliate Milton Energy and Generation Solutions Inc. (MEGS).To that end it retained Colliers International Inc. (Colliers) to appraise the Property.[12]

i) Colliers prepared an appraisal report dated August 5, 2015. In the cover letter to the report, and in the signed certification included as Appendix E to the report, the market value "as at August 5, 2015", was estimated at $2.4 million. This estimate was based on Colliers analysis and was subject to the "Contingent and Limiting Conditions" listed in Appendix A. This Appendix states that: "This report has been prepared… for the purpose of providing an estimate of value of the development site located at 5th Line and Main Street… for Internal Purposes". This condition also notes that the OEB "... may rely on the appraisal for regulatory purposes."[13]

j) The Executive Summary, in the analysis section of the report, showed the "rate per acre" as $425,000 (which multiplied by 6.43 acres would produce $2.73 million). At page 33 in the analysis section, under a heading entitled "Final Estimate of Value", the opinion that the Property "should achieve a rate per acre in the narrowed range of $339,217 to $442,213 per acre" is expressed. The report then refers to the value range for the five key comparable sales from $339,217 to $478,723 followed by the opinion that "a rate in the range of

Committee of the board of directors on November 14, 2012) was referenced in the Decision text at pages 46 and 55 in statements that reflect the allocation of the gain amount related thereto to defray total project costs.

[10] Interrogatory Responses, December 18, 2016 Relocation Committee Minutes, April 2, 2012, pages 739-743.

[11] Interrogatory Responses, December 18, 2015, page 845 of 901.

[12] Exhibit 1, August 28, 2015, page 32.

[13] Exhibit 1, August 28, 2015, Attachment 1-3, page 149 of 920.

$400,000 and $450,000 would be reasonable". Immediately below that finding is a table showing a range per acre of $350,000 to $400,000.[14]

k) Before completing its August 2015 report, Colliers did not investigate and Milton Hydro did not inform Colliers of the market activity related to the 1.3 acre parcel adjacent to the property including the 2010 appraisal done by Royal LePage of that parcel; Milton Hydro's offer to purchase that parcel for $699,000 (about $538,000 per acre); or of Milton Hydro's 2012 internal estimate ascribing to the Property a value estimate of $2.7 million based on a per acre value of $450,000.[15]

l) The initial draft of the appraisal report estimated a $2.7 million value for the Property using a per acre value of $425,000 being the mid-point of a $400,000 to $450,000 per acre subset of the comparable sales value range.[16]

m) A peer review process at Colliers involving another appraiser resulted in a reduction in the initial value estimate value from $2.7 million to $2.4 million in the report sent to Milton Hydro. This report used the same information set out in the initial draft. The report establishes the reasonable range of value outcomes by stating "The Subject should achieve a rate per acre in the narrowed range of $339,217 to $442,213."[17]

n) In their reviews of the report, which was eventually finalized and filed with the OEB, neither Milton Hydro nor Colliers staff noticed that the value range of $400,000 to $450,000 that the report described as reasonable and the mid-point rate per acre value of $425,000 had not been changed as a result of the peer review process.[18]

o) Evidence in the EB-2015-0089 Application dated August 28, 2015 stated that "The land Milton Hydro owns at Main and Fifth has been appraised at $2,400,000 and will be put up for sale". The evidence refers to the August 5, 2015 appraisal done by Colliers.[19]

[14] Exhibit 1, August 28, 2015, Attachment 1-3, page 149 and table at page 179 of 920.
[15] PO2 Responses, pages 6-7 and Attachment B.
[16] Exhibit 1, August 28, 2015, Attachment 1-3, page 149 of 920.
[17] PO2 Responses, Attachment B, page 28 (page 117 of 140).
[18] PO2 Responses, page 28 of 20.
[19] Exhibit 1, August 28, 2015, page 32.

p) In interrogatory responses filed in December 2015, Milton Hydro reported that the land had been sold in December of 2015 for its appraised value.[20]

q) Minutes of Milton Hydro meetings held in 2015 stated that the property would be sold to MEGS "until a decision regarding final disposition or use has been made".[21]

r) The Settlement Proposal that the OEB was asked to approve included a term stating, "Other Revenue: The parties accept the evidence of Milton Hydro that its Other Revenue in the amount of $2,018,810 is appropriate and correctly determined in accordance with OEB policies and Practices". Within this amount was Milton Hydro's calculation of the capital gain amount of $87,975 per annum related to the 50% portion of the Property that was in rate base.[22]

s) At the oral hearing on April 4, 2016, Milton Hydro relied on the property owner's rejection of an arm's-length offer that it made in 2011 of $750,000 to support its use of a cost of $800,000 to acquire the 1.3 acre parcel adjacent to Milton Hydro's Property at Fifth and Main (about $615,000 per acre). Milton Hydro treated its own arm's length market activity in prior years related to the adjacent parcel as a reliable indicator of current value.[23] This cost estimate was being used to support the presentation of the total costs of the 200 Chisholm Drive project as being less than the total costs of acquiring the 1.3 acre parcel for use in combination with the Property to develop an appropriately sized office and service centre.[24]

t) No questions were asked during the oral hearing about the $2.4 million valuation of the Property or the allocation of the capital gain realized on the portion of the Property not in rate base. There were no submissions in chief from Milton Hydro or from intervenors on these points.

u) Milton Hydro's April 28, 2016 written reply argument contained a request that the OEB reduce the Settlement Proposal allocation to ratepayers of the $87,595 per annum capital gain amount related to the portion of the Property in rate base in the event that the amount was not brought into account when

[20] Interrogatory Responses, December 18, 2015, 4.0 Staff 63, page 217 of 901.
[21] Interrogatory Responses, December 18, 2015, SEC 14, Report to the Board of Directors, August 26, 2015, page 851 of 901.
[22] Settlement proposal, February 9, 2016, page 18.
[23] When testifying about the $800,000 cost to acquire estimate at Tr. Vol.1 at page 152, the CEO of Milton Hydro stated "The owner had in 2011 turned down 750, so we felt that's quite a realistic estimate of what it might cost us to purchase that corner property."
[24] Exhibit K1.3, page 5 and Tr. Vol. 1, page 152.

considering possible rate base disallowances.[25] The evidence in the record relating to the calculation of that $87,595 capital gain amount included the evidence pertaining to the affiliate transaction sale price for the Property of $2.4 million.[26] The Hearing Panel considered this evidence to inform its response to the new point raised by Milton Hydro in its reply submissions.

[25] Reply Argument, April 28, 2016, page 34.
[26] Interrogatory Responses, December 18, 2015, 4.0-Staff 63, page 217 of 901.

4 REASONS FOR DECISION OF VICE-CHAIR LONG AND MEMBER SPOEL

4.1 INTRODUCTION AND SUMMARY

We have read the reasons of our colleague. We agree with his analysis and conclusion in respect of Issue 3: the Hearing Panel erred in applying the capital gain on the Property as a permanent reduction to rate base, because that approach would result in ratepayers being overcompensated for their contribution to the cost of the Property.

We are, however, unable to agree with our colleague on Issues 1 and 2. On Issue 1, we find that the Hearing Panel erred in deeming the market value of the Property to be $2.73 million, rather than the actual sale price of $2.4 million. Although the Hearing Panel was correct to point out discrepancies in the appraisal report that supported the $2.4 million valuation, we find that those discrepancies have now been adequately explained by Milton Hydro and the appraiser.

On Issue 2, we find that the Hearing Panel erred in returning the entire amount of the capital gain on the Property to ratepayers. In our view, only half of the capital gain should have been returned to ratepayers, because ratepayers had only paid for half of the cost of the Property in the first place.

4.2 NATURE OF THE OEB'S REVIEW

Milton Hydro's motion is brought under Rule 40.01 of the OEB's *Rules of Practice and Procedure*, which provides that, "Subject to **Rule 40.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision." Rule 42.01 states that every motion brought under Rule 40.02 must:

> Set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error in fact;
> (ii) change in circumstances;
> (iii) new facts that have arisen; [or]
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

Under Rule 43.01, the OEB may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits. In this case, the OEB determined that the threshold had been met, and therefore established a process for reviewing the motion on the merits:

> Milton Hydro's notice of motion raises questions concerning the correctness of the Decision insofar as it relates to the disposition of the property at Fifth Line and Main Street; it would appear that Milton Hydro does not seek merely to reargue its case.[27]

The OEB has said that in a motion to review, the original hearing panel is entitled to deference. In its decision on a motion to review brought by Brant County Power Inc. in connection with the distribution rates for Brantford Power Inc., the OEB found, "A reviewing panel should not set aside a finding of fact by the original panel unless there is no evidence to support the decision and [it] is clearly wrong."[28] The OEB referred to the decision of the Ontario Court of Appeal in *Toronto Hydro-Electric System Ltd. v. Ontario Energy Board*, 2010 ONCA 284, where the Court confirmed that it was appropriate to review the impugned OEB decision (to require the utility's dividends to be approved by a majority of the independent directors) on the standard of reasonableness. The OEB added that, "We believe that the standards that a court would use in reviewing a Board Decision are no different than those this panel should use in reviewing a prior Board Decision."[29]

4.3 FAIR MARKET VALUE AND THE GAIN AMOUNT

The facts concerning this issue are set out above. In brief, Milton Hydro bought the Property at Fifth and Main in 2009 for $2,218,530 and sold it to an affiliate in 2015 for $2.4 million. The 2015 price was based on an appraisal report prepared for Milton Hydro by Colliers.

The Hearing Panel noted discrepancies in the appraisal report:

> This appraisal states, in the "Final Estimate of Value" section, that "Given the Subject's location, development potential, land use controls in place and other influencing factors of employment land sites, a rate [per acre] in the range of $400,000 and $450,000 would be reasonable for the Subject Parcel". The

[27] Notice of Hearing and Procedural Order No. 1.
[28] EB-2009-0063, Decision and Order, August 10, 2010, para. 35.
[29] EB-2009-0063, Decision and Order, August 10, 2010, para. 38.

> "Executive Summary" section of the appraisal ascribes a "Rate per Acre" of $425,000 to the land having an area of 6.43 acres.
>
> The appraisal inexplicably presents a chart for values per acre ranging between $350,000 and $400,000 rather than the $400,000 to $450,000 already found to be reasonable. The value of $2.4 million that Milton Hydro has used to derive the capital gain realized on the sale of the land falls well below the $2.73 million value that results from multiplying the appraiser's $425,000 "Rate per Acre" by the area of the parcel consisting of 6.43 acres. At a sale value of $2.73 M, the capital gain is $505,950 and not the amount of $175,950 used by Milton Hydro for rate-making purposes. Milton Hydro proposes to deduct 50% of its calculation of the gain of $175,950 or an amount of $87,975 from the 2016 base revenue requirement.[30]

The Hearing Panel deemed the sale price to be $2.73 million, based on the $425,000 rate per acre found in the appraisal, rather than the $2.4 million appraised value:

> With respect to the first question, the OEB finds that for rate-making purposes, the appraisal evidence supports a sale value of $2.73 million for the 6.43 parcel rather than the $2.4 million amount presented by Milton Hydro. This sale value is derived by multiplying the $425,000 per acre mid-point of the value range, as determined by the appraiser, by the land area of 6.43 acres. The OEB finds that the capital gain realized on the sale is $505,950 and not the $175,950 calculated by Milton Hydro.[31]

In its motion materials, Milton Hydro asserted that the discrepancy in the appraisal report was due to "typographical errors". It filed a "corrected appraisal" showing a rate per acre of $375,000, and confirming the original total Property value of $2.4 million.

In Procedural Order No. 2, the OEB requested further information about the discrepancy in the appraisal report as filed in the original proceeding. In response, Milton Hydro explained that certain portions of the appraisal report had not been adjusted to reflect the appraiser's final decision. In its response to questions asked in Procedural Order No. 2, Milton Hydro confirmed that no communications/discussions took place between Milton Hydro and Colliers as to the values to be included in the appraisal report.[32]

[30] Decision and Order, page 46 (footnotes omitted).
[31] Decision and Order, page 54.
[32] PO2 Responses, page 15.

We accept Milton Hydro's explanation, which is supported by Colliers. There was a mistake in the rate per acre shown on page 33 of the appraisal report. The mistake has now been corrected. It is important to note that the actual signed certification included in the report attested to a value of $2.4 million.

Although the rate per acre, before the correction was made, was shown on page 33 of the report as $400,000 to $450,000, the very same page also had a table with a rate per acre of $350,000 to $400,000, which is what Colliers says was the correct amount. Although the mix-up was regrettable, and has caused considerable confusion, we are satisfied that it has now been resolved.

In his reasons below, our colleague suggests that Milton Hydro should have advised Colliers about its efforts to purchase a 1.3 acre property next to the Fifth and Main Property in 2010. Milton Hydro had obtained an appraisal for that neighbouring property showing a rate per acre of $461,000 to $538,000 per acre, and Milton Hydro's offer of about $538,000 per acre was rejected by the owner for being too low. In our view, it was not improper for Milton Hydro to keep that information to itself. Providing such details might have been seen as interfering with the independence of the appraiser.

In any case, local property markets can change considerably in five years, and it is not apparent that having 2010 data would have been relevant for Colliers's 2015 appraisal.

The Decision also refers to an internal presentation by the President/CEO of Milton Hydro to the Relocation Committee of the Board of Directors in which a value of $2.7 million was ascribed to the Property based on a value of $450,000 per acre.[33] While the Hearing Panel considered the internal presentation in coming to its decision, we find that the evidence of the appraiser (Colliers) as corrected, to be of more weight than a reference in an internal presentation.

In conclusion, we find that, in light of the new information provided in this motion by Milton Hydro, the Decision of the Hearing Panel was not within the range of reasonable outcomes. The Hearing Panel deemed the property to have a value of $2.7 million. This conclusion was reached as a result of ambiguity in the appraisal report. Now that the new information has resolved that ambiguity, deeming the Property to be a different value than the appraised value is not reasonable. The appraised value should be varied to reflect a purchase price of $2.4 million, and a corresponding capital gain of $175,950, as presented in Milton Hydro's Motion to Review and Vary application.

[33] EB-2015-0089 Decision, pages 38 and 55, referring to a November 14, 2002 presentation.

4.4 PORTION OF THE CAPITAL GAIN ALLOCATED TO RATEPAYERS

The Decision allocated 100% of the capital gain to ratepayers while expressly acknowledging that only 50% of the asset which created the capital gain was in rate base. Our colleague's view is that the allocation of the gain is a discretionary exercise which is within the purview of the Hearing Panel and as such falls within the reasonableness standard of review.

The Decision finds that the entire Property was initially purchased for future use as a utility asset. By 2011, 50% of the Property was in rate base as it was being used for storage. The Decision finds that the other 50% was for future utility use. On that basis, the Hearing Panel determined that the gain on the second 50% should be credited to ratepayers. With one property replacing another, the Hearing Panel determined that it was appropriate for 100% of the capital gain to be attributed to ratepayers.

The Decision clearly sets out the Hearing Panel's rationale for including 100% of the capital gain. These reasons are highlighted in the dissenting reasons below. The Decision also clearly demonstrates that the Hearing Panel was aware that only 50% of the Property was included in rate base.

Our colleague's reasons rely on the premise that a panel is permitted to exercise discretion and that it is not the Reviewing Panel's role to substitute its discretion for the Hearing Panel's exercise of that discretion.

We are of the view that the costs vs. benefits concept is a key regulatory principle that should not be easily strayed from. It is unclear to the Majority in this review decision how the fact that the original Property (of which only 50% was allocated to rate base) was replaced by a future utility property would precipitate a move to include 100% of the capital gain to the benefit of ratepayers.

Our colleague is of the view that the discretion exercised by the Hearing Panel was within the range of reasonable outcomes and therefore cannot be changed by the Review Panel.

At outlined at the beginning of this decision, the Review Panel agrees that the standard of review is reasonableness.

We find that the allocation of 100% of the gain is not a reasonable outcome in this case. There was nothing in the record to support a departure from one of the OEB's key

regulatory principles. In our view, consistency of approach is important for the OEB, the utilities and the ratepayers. In this case, neither the applicant nor any of the other parties had an opportunity to make submissions on the appropriateness of this treatment of the capital gain. In our view, it is unreasonable to depart from the OEB's usual approach without affording the affected party an opportunity to address the issue. As such, the motion to review on this point succeeds.

4.5 MECHANISM FOR CREDITING THE GAIN AMOUNT TO RATEPAYERS

We are in full agreement with our colleague's reasons for varying the Hearing Panel's decision to allocate the capital gain to ratepayers by way of a permanent reduction to rate base. However, our approach to implementing the variance differs from our colleague's proposed approach.

4.6 IMPLEMENTATION

The Review Panel, in agreeing with Milton Hydro that the sale price of the Property was $2.4 million rather than $2.7 million, reduces the capital gain from $506,000 to $175,950, and credits half of that gain to ratepayers ($87,975). The Review Panel also finds that this amount should have been returned to ratepayers as an annual revenue offset of $17,595 for five years, starting May 1, 2016, the effective date of the Decision.

In the Decision, the Hearing Panel reduced Milton Hydro's rate base by $506,000 to address the capital gain issue, rather than the requested revenue offset. This reflected 100% of the deemed capital gain on the Property.

That aspect of the Decision is varied. The Review Panel finds that the sale price of the Property was $2.4 million, which means the capital gain was $175,950 rather than $506,000. Only half of that amount ($87,975) should have been credited to ratepayers, which Milton Hydro proposed to be disposed of by way of an annual revenue offset of $17,595 over five years, effective May 1, 2016.

This means that Milton Hydro's rates (as determined in the Decision) have been lower than they should have been over the 2016 and 2017 rate periods. Accordingly, a revised rate order for 2016 and 2017 is required. Milton Hydro shall prepare a draft rate order for approval by the Review Panel, reflecting this Decision and Order, in the manner set out below:

1) For the 2016 Cost of Service year, Milton Hydro is directed to calculate its revised revenue requirement by increasing its rate base by $506,000 and then offsetting this revenue requirement amount by $17,595. The difference between the 2016 approved revenue requirement and the revised revenue requirement will determine the lost revenue total for 2016.

2) For 2017, a year where Milton Hydro's rates were adjusted using the IRM formula, Milton Hydro is directed to create a revised 2016 rate schedule, and use this schedule to produce a revised 2017 rate schedule by applying the 2017 IRM formula and any other aspects of its 2017 IRM Decision. (The revised 2017 rate schedule will be used to determine the 2018 IRM rate schedule.)

3) Milton Hydro is then directed to calculate 2017 lost revenue by applying the revised 2017 rate schedule to 2017 actual and forecast loads to April 30, 2018, compare these revenues to the actual/forecast revenues using the actual approved 2017 rate schedule. This lost revenue shall also be offset by the $17,595 annual capital gain credit.

4) Milton Hydro shall then add the 2016 and 2017 lost revenue totals and subtract the remaining capital gain amount, $52,785, to arrive at the net lost revenue to be collected from ratepayers through a rate rider in the 2018 rate year (if a material amount).

4.7 COST AWARDS

Provision for cost awards will be made when the OEB issues a decision with the final rate order.

5 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The Decision and Order dated July 28, 2016 (EB-2015-0089) is varied so that:

    a) The capital gain on the Property is determined to be $175,950
    b) 50% of the capital gain shall be allocated to ratepayers
    c) The allocation to ratepayers shall be effected through an annual offset of $17,595 over five years, effective May 1, 2016.

2. Milton Hydro shall file a draft rate order reflecting this Decision and Order, providing detailed calculations of all steps to arrive at the lost revenue amount, no later than **March 9, 2018**.

3. OEB staff and intervenors may make submissions on the draft rate order no later than **March 16, 2018**.

4. Milton Hydro may reply to any submissions of OEB staff and intervenors no later than **March 20, 2018**.

DATED at Toronto February 22, 2018

ONTARIO ENERGY BOARD

Original Signed By

_____

Christine Long
Vice Chair and Presiding Member

Original Signed By

_____

Cathy Spoel
Member

6 DISSENTING REASONS OF MEMBER THOMPSON

6.1 INTRODUCTION AND SUMMARY

All members of this Review Panel agree that the reasonableness standard of review is to be applied when assessing Milton Hydro's challenges to the findings of fact and exercises of discretion made by the Hearing Panel. These findings relate to the fair market value, gain allocation and gain repayment issues. We also agree that the principle that findings of fact and exercises of discretion made by a hearing panel are to be accorded a high degree of deference is embedded within an application of the reasonableness standard.

The reasonableness standard of review implies that two or more alternatives are available to a decision-maker to appropriately determine a matter in dispute. Each of the alternatives falls within a range of reasonable outcomes supported by the record before the decision-maker. In contrast, the correctness standard of review implies that there is a single defensible answer.[34]

A proper application of the reasonableness standard of review calls for the reviewing panel to scrutinize the entire record under review to consider the range of reasonable outcomes that it supports. If the outcome of the initial decision falls within that range, then, on review, that outcome cannot be varied and replaced with another outcome within the range.

Under the auspices of the reasonableness standard of review, an OEB review panel cannot substitute its preferred decision outcome for an initial decision that falls within the range of reasonable outcomes supported by the record being reviewed. When determining this range of reasonable outcomes in a particular case, the reviewing panel is obliged to consider the record under review in its entirety. Pieces of information in the record are not to be considered in isolation.

In conducting a reasonableness analysis, it is not within a review panel's authority to substitute its decision for a decision that it may disagree with. Rather, it is obliged to

[34] See *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770 at para. 23 for the limited class of cases to which the correctness standard applies. That standard of review is limited to (i) constitutional questions regarding the division of powers; (ii) true questions of jurisdiction; (iii) questions of general law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise; and (iv) questions regarding the jurisdictional lines between two or more competing specialized tribunals.

make an assessment of whether the conclusion reached by the hearing panel falls within the range of reasonable outcomes supported by the entire record under review. I disagree with the majority decision on the market value and gain allocation issues because it does not adhere to the requirements of the reasonableness standard of review. The entire record under review in this case reveals that the determinations made by the Hearing Panel on the market value and gain allocation issues were decision outcomes that fell within the range of reasonableness. These determinations are not subject to variance under an application of the reasonableness standard of review.

The majority decision is one that the reasonableness review standard does not allow. It constitutes an impermissible substitution of the majority's preferred outcomes for the decisions made by the Hearing Panel that fall within the range of reasonable outcomes supported by the entire record under review.

My disagreement with the majority decision stems from its failure to properly apply the essential requirements of the reasonableness standard of review to the entire record under review in this case.

An essential feature of a reasonableness review is an objective assessment by the reviewing panel to determine the range of reasonable outcomes that the record under review supports related to each of the challenged findings. The "range of reasonable outcomes" feature of the reasonableness review standard determines whether a challenged finding is or is not subject to variance by a review panel.

If a finding made by a hearing panel falls within the range of reasonable outcomes supported by the record under review, then that finding is "reasonable" and not subject to variance. Findings that fall within the range of reasonable outcomes supported by the record under review cannot be found by a reviewing panel to be "unreasonable". An objective consideration of the breadth of the range of reasonable outcomes that the record under review supports in relation to each of the challenged findings is a prerequisite to a determination of whether each finding is either reasonable and not variable or unreasonable and variable.

The majority decision fails to apply this essential prerequisite of a reasonableness assessment. It finds that the market value finding of $2.73 million was "unreasonable" even though the record under review clearly supports a range of per acre market value alternatives at a level that includes a $425.000 per acre and $2.73 million value for the Property having an area of 6.43 acres.

The $2.4 million amount, which the majority decision prefers, also falls within the range of value outcomes supported by the record under review. However, under the reasonableness standard of review, a review panel cannot substitute its preferred outcome within the range of reasonableness for the outcome within that range that the Hearing Panel has found to be appropriate.

This principle was recently expressed by the Ontario Court of Appeal in its January 25, 2018 decision in *Finkelstein v. Ontario Securities Commission*, 2018 ONCA 61. At paragraph 101 of that decision the Court stated:

> The function of a reviewing court, such as the Divisional Court, is to determine whether the tribunal's decision contains an analysis that moves from the evidence before it to the conclusion that it reached, not whether the decision is the one the reviewing court would have reached: *Ottawa Police Services*, at para. 66. With due respect to the Divisional Court, it failed to do so in the case of the Panel's decision about Cheng. Instead, it impermissibly re-weighed the evidence and substituted inferences it would make for those reasonably available to the Panel. That was an error. The findings of fact made and inferences drawn by the Panel in respect of Cheng were reasonably supported by the record.

The majority decision disregards this principle when it substitutes its $2.4 million market value for the $2.73 million value found by the Hearing Panel. To achieve its preferred result, the majority engages in the impermissible re-weighing of evidence. The majority decision also inappropriately focusses on isolated pieces of evidence in the record being reviewed rather than on the contents of the entire record as a whole.

Similarly, on the gain allocation issue the majority decision finds that the option favoured by the Hearing Panel was "unreasonable" even though that option was among those that fell within the range of gain allocation alternatives that the record under review supported. Under a proper application of the reasonableness standard, the finding made by the Hearing Panel is not subject to variance. Under the principles applicable to a reasonableness assessment, the Hearing Panel's finding is "reasonable" and cannot be found by the Review Panel to be "unreasonable".

Once again, the majority decision impermissibly ascribes greater weight to the benefits follow costs allocation alternative that it favours, as a substitute for the different allocation option falling within the range of allocation options supported by the record that the Hearing Panel found to be appropriate.

The findings that the majority decision makes in relation to the market value and gain allocation issues are a result of a misapplication of the principles embedded in the reasonableness standard of review.

The concern expressed in the majority decision about the process followed by the Hearing Panel in relation to the gain allocation issue is irrelevant to a determination of whether the Hearing Panel's allocation approach fell within the range of reasonable allocation outcomes that the record supported. Process concerns call for a process remedy. They do not tilt the scales one way or the other when considering whether a particular finding does or does not fall within the range of reasonable allocation outcomes supported by the record being reviewed.

The section that follows elaborates upon the principles related to the reasonableness standard of review and its application. Included in this "principles" section is a sub-section that describes the careful approach that the OEB takes to ensure that utility transactions with affiliates do not prejudice ratepayers. This item is relevant to the factual context that gave rise to the market value issue and its gain allocation and credit mechanism derivatives.

That section is followed by a consideration of matters raised by parties in their submissions related to the contents of the record to be considered by the Review Panel. This section considers the admissibility of the Affidavit on which Milton Hydro relies. This section also includes a consideration of the applicability of provisions of the OEB's Accounting Procedures Handbook (APH) to a determination of the gain allocation issue. The analysis in this section leads me to conclude that the record under review consists of the record before the Hearing Panel, Milton Hydro's affidavit, the relevant provisions of the APH and the PO2 Responses.

This dissenting opinion then applies the principles to the facts in the record under review related to each of the challenges made by Milton Hydro. This opinion provides a detailed description of those facts and concludes that:

a) The finding of a $2.73 market value for the land, as of the end of 2015, falls within the range of reasonable value outcomes supported by the record. That finding is not subject to variance on review.

b) The discretionary allocation to ratepayers of the entire gain on property acquired for a specific utility project, but not yet in rate base, was a tenable exercise of discretion in a case where the gain is realized on an item of utility property held for future use that is being sold because of the utility's acquisition of a

replacement property for the same purpose. The benefits follow costs principle applicable to non-utility business activities has no priority status in relation to gains realized on the sale of utility assets being held for future utility-specific project use.

c) The Hearing Panel's direction that rate base be permanently reduced by the amount of the capital gain was unreasonable and incorrect. The gain repayment mechanism should credit ratepayers with the allocable amount of the gain, but no more.

The relief that I would grant Milton Hydro is summarized in the Implementation section of this dissent.

6.2 THE REASONABLENESS STANDARD OF REVIEW AND ITS APPLICATION

6.2.1 The OEB's Standard of Review

The principles that are to be applied in an OEB review proceeding have been articulated in many cases. These principles include a requirement that an applicant for review and variance of a decision by a hearing panel "… must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently."[35]

This principle, expressed in the May 22, 2007 Natural Gas Electricity Interface Decision (NGEIR Review Decision), has been repeatedly adopted in subsequent OEB decisions.[36] In the Ontario Power Generation Inc. (OPG) Review Decision, EB-2009-0038, dated May 11, 2009, the OEB stated, at page 15:

> If a reviewing panel is satisfied that an identifiable error that is material and relevant to the outcome of the reviewed decision has been made, the Board may vary, suspend or cancel the order or decision, or if they find it to be appropriate, remit the matter back to the original panel. As noted above, the

[35] NGEIR Review Decision, EB-2006-0322/EB-2006-0338/EB-2006-0340, page 18.
[36] NGEIR Review Decision, EB-2006-0322/EB-2006-0338/EB-2006-0340, page 18; Connection Procedures Review Decision, EB-2007-0797, pages 7-9; OPG Review Decision, EB-2009-0038; OPG Review Decision, EB-2011-0090, pages 5-7; London Hydro Review Decision, EB-2012-0220, pages 6-8; Hydro One Remote Communities Review Decision, EB-2013-0331, pages 2-3; and OPG Review Decision, EB-2014-0369, pages 5-6.

> Board has determined that identifiable errors that are material and relevant to the outcome of the reviewed decision have been made.

Specific errors in the decision under review are to be identified and shown to be incorrect in a material way before the OEB's power to vary that decision is engaged. Findings of fact and exercises of discretion that lie within the range of reasonable outcomes supported by the record under review cannot be shown to be incorrect in a material way.

There must be a clear, identifiable and material error or new facts that take the case outside the range of reasonable outcomes that the record under review supports. Changes to evidence in the record before a hearing panel that do not alter the range of reasonable outcomes supported by the entire record being reviewed cannot justify a variance to an original decision.

In the Connection Procedures Decision released a few months after the May 27, 2007 NGEIR Review Decision, the OEB addressed the scope of its power to review in response to submissions made by OEB staff that the OEB has a wide latitude in relation to reviews. The OEB stated:

> This panel acknowledges that the scope of the Board's power to review is broad, but remains of the view that a motion for review must raise a question as to the correctness of the decision in issue. The Board has previously indicated, in the NGEIR Motions Decision and in the Notice and PO, that the grounds for review set out in Rule 44.01 are not exhaustive. It may be that the emergence of previously unknown or unforeseen implications of a decision could be considered a ground for review. However, in the circumstances of this case this panel does not need to decide that issue….[37]

This dissent adheres to the NGEIR Review Decision and supports the conclusion that exceptional and unforeseen circumstances would need to occur before any departure from that approach might be justified.

Other cases have elaborated on the standard of review applicable to OEB review proceedings. For example, in a 2010 decision related to a motion for review and variance brought by Brant County Power Inc., the OEB adopted the principle that:

> A reviewing panel should not set aside a finding of fact by the original panel unless there is no evidence to support the decision and is clearly wrong. A

[37] Connection Procedures Review Decision, supra, page 9.

> decision would be clearly wrong if it was arbitrary or was made for an improper purpose or was based on irrelevant facts or failed to take the statutory requirements into account.[38]

The deference that an OEB review panel is to extend to findings of fact that fall within the range of factual outcomes supported by the record being reviewed was recognized in a 2011 Motion for Review brought by OPG as follows:

> …the Board agrees with the submissions made by the parties who argued that a reviewing panel should only interfere with an original finding of fact in the clearest of cases. The law generally afforded original findings of fact considerable deference.[39]

The "submissions" with which the OEB agreed in that case included the submissions made by OEB staff that were quoted earlier in the decision as follows:

> As stated in the Board staff submission, "Only if the review panel determines that the finding reached by the Decision panel was not within the range of reasonable alternatives should its decision be overturned." In Board staff's view, it is not the task of the reviewing panel to substitute its own judgement for that of the original panel unless it is convinced that the original panel made a clear and material error, and that the original panel clearly misapprehended the evidence.[40]

The August 10, 2010 Brant County Power review decision cited earlier adopted the principle that, in conducting its reviews of prior OEB decisions the OEB should use the same "reasonableness" standard that a court uses in reviewing such decisions. After articulating the reasonableness standard of review expressed by the Ontario Court of Appeal in the Toronto Hydro Dividend case[41] and a passage from the Supreme Court of Canada's decision in *Law Society of New Brunswick v. Ryan,*[42] the OEB stated: "We believe that the standards that a court would use in reviewing a Board Decision are no different than those this panel should use in reviewing a prior Board Decision."[43]

[38] Brant County Power Review Decision, EB-2009-0063, page 11, paragraph 35.
[39] OPG Review Decision, EB-2011-0090, page 11.
[40] See footnote 39, page 8.
[41] *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284.
[42] *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247.
[43] Brant County Power Review decision, EB-2009-0063, page 12, paragraph 38.

Descriptions of how reasonableness is determined in a particular case are provided in each of the Toronto Hydro Dividend and *Law Society of New Brunswick v. Ryan* cases and referred to in the Brant County Power case as follows:

> The standard of review with respect to Decisions of the Ontario Energy Board was most recently canvassed by the Ontario Court of Appeal in the *Toronto Hydro Dividend* case. There, the Court of Appeal upheld the Board's Decision that required any future dividends to be approved by the majority of the independent directors. The Court noted that "in judicial review reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process. <u>But it is also concerned with whether the Decision falls within a range of acceptable outcomes which are defensible in respect of facts and law.</u>
>
> In finding that the Decision was justified the Court referred to the often cited passage from *Law Society of New Brunswick vs. Ryan* where Iacobucci J. articulated the relationship between the reasons of the tribunal and the reasonableness of the Decision:
>
> > A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. *This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.*[44]

Two features of a reasonableness assessment contained in these descriptions should be noted. The first is the adoption of the "range of reasonable outcomes" approach expressed in the Toronto Hydro Dividend case. The second, expressed in the *Law Society of New Brunswick v. Ryan* case, is the adoption of the concept that a review panel should refrain from substituting its own decision for a decision of a hearing panel that is supported by a tenable explanation, even though that explanation is not one that the reviewing panel finds compelling.

[44] See footnote 43, page 11, paragraphs 36 and 37 (underlining added by OEB; italics appeared in Brant County Power decision).

The Courts have regularly applied a reasonableness approach when determining motions for judicial review of an exercise of adjudicative decision-making by an administrative tribunal. Reasonableness assessments apply to all questions of fact or exercises of discretion raised in a request for adjudicative review.

In the *Newfoundland and Labrador Nurses* case,[45] the Supreme Court of Canada unanimously confirmed that the standard of review of adjudicative decision-making by an administrative tribunal is reasonableness. In commenting on conducting a reasonableness assessment of the reasoning and outcomes components of decision-making the Court emphasized that "…. the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."[46]

That decision emphasizes that a review panel should show deference and respect for the decision making process of administrative bodies with regard to the facts and that care should be taken to refrain from substituting their own decision of the appropriate outcome when the decision being reviewed falls within the range of outcomes supported by the record being reviewed. The decision states:

> In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.[47]

The decision adds: "Reviewing judges should pay 'respectful attention' to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful."[48] The Court quoted with approval the following with respect to the sufficiency of reasons:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the

[45] *Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708.
[46] See footnote 45, paragraph 14
[47] See footnote 45, paragraph 15
[48] See footnote 45, paragraph 17

> parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive.[49]

The *Newfoundland and Labrador Nurses* case also emphasizes that reasons need not refer to every piece of evidence in the record that is capable of supporting a factual finding. The decision under review is not deficient because it does not specifically refer to each and every item in the record related to the market value and gain allocation issues. The absence of such references does not impugn either the reasons or the result under a reasonableness analysis.[50] Put another way, a reasonableness assessment of findings of fact and exercises of discretion is based on the entire record. It is not limited in scope to only the items of evidence specifically referenced in the reasons for decision.[51]

The case concludes with a statement that the decision under review should not be varied because the hearing panel "… was alive to the question at issue and came to a result well within the range of reasonable outcomes."[52]

Under the reasonableness standard of review that these precedents establish, the factual and discretionary aspects of a decision under review are correct if they fall within the range of reasonable outcomes that the record under review supports. There is no identifiable and materially incorrect error when a particular finding of fact or exercise of discretion under review falls within the range of reasonable outcomes supported by the record under review. A finding of fact or exercise of discretion under review contains an identifiable and materially incorrect error when it is shown to lie outside this "range of reasonable outcomes".

A determination of the range of outcomes that the record under review supports is essential under the reasonableness standard of review articulated in OEB precedent decisions. This essential component of the standard cannot be disregarded. The range of outcomes that the record supports must be determined in this review proceeding to comply with the OEB's review standard.

[49] See footnote 45, paragraph 18
[50] See footnote 45, paragraph 16.
[51] This point was recently highlighted in the Ontario Court of Appeal decision in *Finkelstein v. Ontario Securities Commission* cited in the Introduction and Summary part of this dissent. At para. 84(iii) of that decision the Court endorsed findings made by the Divisional Court in that case that included the proposition that "The evidence must be examined and weighed in its entirety. The evidence should not be viewed in isolation."
[52] See footnote 45, paragraph 26.

6.2.2 Regulatory Treatment of Affiliate Transactions

Within the legal framework that applies to a determination of the Property value issue in this case are the regulatory principles that apply, for ratemaking purposes, to determine the appropriateness of amounts paid by an affiliate to acquire assets owned by the utility.

The need for regulators to protect ratepayers from transactions that benefit a utility affiliate at the expense of utility ratepayers is well established. The Ontario Court of Appeal noted this in paragraph 60 of its decision in the Toronto Dividend case by referring to paragraph 5.1.7 of the OEB decision under appeal and stating: "The decision notes that there is extensive jurisprudence in gas cases with respect to transactions between a regulated utility and an affiliate."[53]

A regulator needs to take care to ensure that the unregulated affiliate is not deriving an inappropriate benefit at the expense of utility ratepayers.

At a high level, the record under review in this proceeding that relates to the appropriateness of the value paid by the affiliate in its acquisition of the Property has three separate components:

a) The August 5, 2015 appraisal report;

b) The sworn testimony of Milton Hydro's CEO at the oral hearing before the Hearing Panel that the realistic 2015 cost of acquiring the 1.3 privately owned parcel at the corner of Fifth Line and Main was about $800,000 or about $615,000 per acre; being an amount substantially in excess of the $375,000 per acre price that that Milton Hydro's affiliate paid to acquire the utility's 6.43 acre parcel at the same location; and

c) The $450,000 per acre and $2.7 million Property value amounts which Milton Hydro's CEO presented to Milton Hydro directors in late 2012, some three years before the 2015 sale to the affiliate, which also materially exceeded the $375,000 per acre and $2.4 million Property value amounts that the affiliate paid to the utility.

The Hearing Panel adopted a $400,000 to $450,000 value range and its mid-point of $425,000 to find, for ratemaking purposes, that the value per acre and the Property values should be $425,000 per acre and $2.73 million for the 6.43 acres of land. The

[53] *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284, paragraph 60.

Hearing Panel rejected the $350,000 to $400,000 value range, and the use of its mid-point of $375,000 per acre to derive the $2.4 million Property value presented in the August 5, 2015 appraisal report. There was nothing ambiguous about the values that the Hearing Panel used to determine a market value for the Property, for ratemaking purposes, of $2.73 million as stated in the majority decision.

I disagree with the majority decision when it states that the Hearing Panel's market value finding was "based on an ambiguity". The Decision unambiguously reveals the value per acre range of $400,000 to $450,000 and mid-point per acre value of $425,000 that the Hearing Panel considered to be appropriate.

The Hearing Panel was alive to sources of land value information other than the appraisal report referenced in the Decision. One of these other sources of information was the 2012 report to directors in which Milton Hydro officials ascribed a $450,000 per acre value to the Property and a total value of $2.7 million. Another consisted of the oral testimony and supporting exhibit provided by a Milton Hydro executive at the OEB hearing to the effect that the 1.3 acre parcel abutting the Property had a market value of $800,000 or about $615,000 per acre.

The foregoing facts are part of the entire record that is to be considered when reviewing Milton Hydro's assertion that the Hearing Panel's findings of fact related to the affiliate transaction are unreasonable and incorrect.

The majority decision uses the phrase "actual sale price" when referring to the $2.4 million affiliate transaction amount. An "actual sale price" has relevance to ratemaking when a transaction between a utility and another is an arm's length open market transaction. The phrase should not be used to refer to an affiliate transaction amount because an affiliate transaction amount derives from an estimate or appraisal of value and not from an open market transaction.

The "price" in an affiliate transaction involving an OEB regulated utility is the amount that the OEB accepts as reasonable. The Hearing Panel made a finding of fact that, for ratemaking purposes, the market value of the property at the time of its transfer to the affiliate was $425,000 per acre and $2.73 million for the 6.43 acre parcel. An adjudicative finding of fact based on supporting evidence does not amount to "deeming" a price as the majority decision suggests. The action of "deeming" an outcome implies that there are no facts to support that result. That is not the situation in this case.

This $425,000 per acre and resulting $2.73 million value are the findings of fact that are to be reviewed and the question is whether these amounts fall within the range of reasonable value outcomes that the entire record under review supports.

The foregoing comprise the well-established principles that should be applied by the Review Panel in this case to determine whether the Hearing Panel's decisions related to the market value of the Property, the portion of the gain to be allocated to ratepayers and the mechanism for crediting the gain amount to ratepayers are incorrect as Milton Hydro asserts.

The sections that follow include a determination of items related to the components of the record being reviewed followed by an analysis of the range of reasonable outcomes that the record under review supports in relation to each of the matters in issue.

6.3 RECORD UNDER REVIEW

Subject to the determination of an issue related to admissibility, the record being reviewed in this case consists of the record before the Hearing Panel, Milton Hydro's August 17, 2016 Affidavit (Affidavit), the accounting policies in the APH, and the PO2 Responses.

6.3.1 Admissibility of the Affidavit

Milton Hydro seeks to change portions of the appraisal evidence referenced in the Decision on the grounds that these portions of the evidence constitute an "error of fact" under Rule 40.01(a) of the OEB Rules. The Affidavit is relied upon to effectively seek a re-opening of the EB-2015-0089 proceeding to reduce the $400,000 to $450,000 value range and the $425,000 amounts contained in the Colliers August 5, 2015 appraisal that was before the Hearing Panel.

These changes are proposed on grounds that Milton Hydro had no opportunity to explain the inconsistencies in the report before the Decision issued and that the numbers in the report that it proposes to change are typographical errors.

In its September 20, 2016 submissions SEC's position is that the OEB should not accept this evidence without affording the parties an opportunity to test it. SEC's submissions detail five topic areas on which it has questions about the appraisal.[54] In

[54] SEC's concerns included: the very low increase in value of the property compared to its purchase price in 2009 and inflation increase over the period 2009-2015; the reason for the lowest comparable of about

their September 22, 2016 submissions, neither Energy Probe nor OEB staff had any objections to the changes being made as proposed by Milton Hydro.

After reviewing these submissions, the OEB sought to have its staff schedule with Milton Hydro a date for a brief oral hearing to deal with questions of this nature. Milton Hydro objected to this process and requested that questions be submitted in writing. Written questions were submitted by the OEB with Procedural Order No. 2 and responses were provided shortly thereafter.

The PO2 Responses reflect the extent to which SEC's concerns have been addressed. The PO2 Responses reveal that the amounts in the Report before the Hearing Panel accurately reflected the opinion of the appraiser who prepared the initial draft of the report. That appraiser used the comparable sale and other information in the report to establish a value range of about $339,000 to about $482,000, a subset value range of $400,000 to $450,000 and a Property value of $2.7 million. This range was a correct expression of the initial appraiser's estimate.

A peer review process at Colliers involving another appraiser led to a lower Property value estimate of $2.4 million. It is unclear from the PO2 Responses whether the second appraiser actually reduced the $400,000 to $450,000 value range contained in the initial draft. Attachment B of the PO2 Responses, being a letter from Colliers, states as follows:

> Within our file there are three Drafts. The third Draft is the only report that was sent to the client. Within Draft 1, we concluded at a market estimate of $2,700,000 (rate per acre ranging from $400,000 to $450,000). This value was never communicated to the client. Following a peer review process (review by a second AACI designated appraiser), we deemed the rate should be at the lower end of the range given that the Subject falls within phase 3 of the Derry Green Corporate Business Park a policy plan that covers approximately 2000 acres of Employment lands.

This statement makes no mention of any value range other than the $400,000 to $450,000 range.

In the course of revising the initial opinion draft to reflect the outcome of the peer review process, Colliers did not revise and Milton Hydro staff did not question the value range subsets and price per acre amounts in the successive drafts of the report.

$339,000 not being eliminated as an outlier; the average of the comparable sales of $433,651; and the contents of successive drafts of the appraisal reports – see SEC Sept. 20, 2016 Submissions.

The e-mail exchanges between the appraiser and Milton Hydro, over the 17 days between July 20 and August 6, 2015, show that Milton Hydro received the draft of the report on July 20, 2015, sent it back with comments on August 4, received a further draft on August 5 that was reviewed and sent back to the appraiser on August 6. The final report containing both the value range supported by the comparable sale and the $400,000 to $450,000 range was sent to Milton Hydro on August 6, 2015.[55]

The PO2 Responses establish that Colliers did not investigate whether there had been any market activity related to the property adjacent to Milton Hydro's property and that Milton Hydro did not disclose to Colliers any of the facts related to its evaluation and offer to purchase the 1.3 acre parcel at Fifth Line and Main Street owned by its immediate neighbour; or the fact that it had ascribed a value of $2.7 million to the Property some three years before its sale to its affiliate.

The PO2 Responses reveal that the changes that the Affidavit makes to the appraisal report that was before the Hearing panel are probably more appropriately characterized as editorial changes that were missed following the peer review process rather than as typographical errors.

Regardless of whether these items are characterized as editorial revisions or typographical errors, they were made by Milton Hydro and Colliers and not by the Hearing Panel. That said, Milton Hydro correctly states that it had no opportunity before the Decision issued to explain the inconsistencies in the appraisal report that was before the Hearing Panel. The Decision reveals that the Hearing Panel, while alive to these inconsistencies, did not reconvene the hearing to receive further submissions on the relief that Milton Hydro requested, for the first time, in its written Reply argument.

That late request for relief triggered the Hearing Panel's consideration of the Property value and gain allocation and recovery issues.

Situations often arise in proceedings before the OEB where submissions made in argument prompt the OEB's examination of evidence in the record upon which no questions have been posed during the course of the oral hearing. A hearing panel has process options that it can consider in such circumstances. These include prolonging the hearing process related to the issue by either calling for submissions on the issue or deferring a determination of the issue to a future proceeding. Another option is to refrain from reconvening or deferring the matter and, instead, dealing with the issue on the basis of the existing record. This was the course taken by the Hearing Panel in this case.

[55] PO2 Responses, Attachment F.

However, because Milton Hydro had no opportunity to address the inconsistencies in the appraisal report before the Decision issued, the affidavit containing the explanation for these deficiencies and PO2 responses pertaining to that explanation should form part of the record being reviewed in this proceeding.

While the Affidavit is admissible and forms part of the record under review, the question for the Review Panel is not whether they do or do not accept the Affidavit's explanation of the circumstances giving rise to the deficiencies in the appraisal. Regardless of this explanation, under the reasonableness standard of review the question is and remains whether the $2.73 million value finding made by the Hearing Panel falls within the range of value outcomes supported by the entire record being reviewed. The question for the Review Panel is, "What range of value outcomes did all of the evidence before the decision-makers reasonably support?"

Milton Hydro's explanation for the portions of the appraisal report that the Hearing Panel found to be "inexplicable" does nothing to reduce the upper limit of the range of per acre values that is supported by a consideration of all of the evidence in the record under review related to that value issue. The changed and unchanged parts of the report remain as one of the items of evidence in the entire record to be considered when determining the range of reasonable value outcomes that the record under review supports.

The explanation provided in the Affidavit does not elevate the $375,000 per acre amount that appeared in the initial report and in the changed and unchanged parts of the revised report to some superior status in the record under review. Reducing the sub-set value range and its mid-point in the August 5, 2015 appraisal report does nothing to alter the evidence in the report of the range of values regarded as achievable. Nor do the changes to the report have any impact of the two other independent sources of value evidence being Milton Hydro's own arm's length marketing activities related to many other properties in the area, its own $2.7 million value estimate in 2012 and the value evidence related to the 1.3 acre parcel immediately adjacent to the Property.

The original and revised appraisal reports each support, as achievable, a rate per acre of up to about $442,000. The Hearing Panel's finding of a value of $425,000 per acre lies below the upper limit of the range that the appraisal regards as achievable. The second appraiser's preference for a subset range of $350,000 to $400,000 and a mid-point value of $375,000 per acre does not take the $425,000 acre amount out of the range of values that the appraisal finds to be achievable.

Moving the appraisal's value range subset and mid-point amount down by $50,000 per acre are not "new" facts or information that lies outside of the range of value outcomes that the record supports. Rather they are revisions to existing facts to support a particular value finding within the value range supported by the record under review being a particular value that the Hearing Panel rejected. Under the OEB's reasonableness standard of review, a post-decision explanation or elaboration in support of one value over another cannot justify a variance when each of the values falls within the range of reasonableness established by the whole of the evidence before the decision-makers.

As more fully discussed below, there is per acre value evidence in the record, independent of the August 5, 2015 appraisal report; that supports values per acre well in excess of $425,000.

The reasonableness standard of review requires an applicant seeking variance of a finding of fact made by a hearing panel to establish that there is no evidence in the record under review that is capable of supporting that finding. Milton Hydro has not and cannot discharge that onus.

6.3.2 OEB Accounting Policies

The APH contains provisions dealing with the recording of the original cost of land used for utility purposes and land held for future utility use. It also includes provisions that specify the accounts that are to be used for dealing with gains or losses arising from the disposition of utility assets and assets held for future utility use.[56]

Milton Hydro relies of the provisions of these accounting rules to support its position that the Hearing Panel erred in directing a permanent rate base reduction in the amount of the capital gain allocable to ratepayers. However, Milton Hydro disregards the provisions of these rules related to land being held for future utility use but not yet in rate base.

Under the APH, gains and losses on land held for future utility use are treated the same as gains or losses on land already being used for utility purposes. These provisions of

[56] APH section 1905 deals with utility land in service. APH 2040 deals with assets held for future utility use but not yet in service. Account 2040 covers land held for future utility use but not yet in service. Gains on Disposition of Utility Property in service are covered by section 4355 of the APH on which Milton Hydro relies to support the revenue requirement offset for ratepayers stemming from the disposition of the portion of the land in service and in rate base. Gains from Future Use Utility Property under section 2040B are to be recorded in APH account 4345. The APH Rules treat utility property in service and property held for future utility use but not yet in service in the same manner.

the APH, as well as those upon which Milton Hydro relies, have relevance to both the gain allocation and credit mechanism issues.

I accept that the accounting rules in the APH are a component of the OEB's policy framework that should be considered when determining the range of outcomes that the record being reviewed supports in relation to each of these issues. As OEB staff point out in their submissions, these rules do not bind the OEB. They do however identify allocation and credit mechanism options that fall within the range of reasonable outcomes for each of these issues.

6.3.3 Conclusions on the Record under Review

For these reasons I would find that the record to be reviewed to determine the range of outcomes that it supports in relation to each of the matters in issue consists of the record before the Hearing Panel, the Affidavit, the OEB's accounting policies in the APH and the PO2 Responses.

6.4 FAIR MARKET VALUE AND THE GAIN AMOUNT

To properly apply the OEB's reasonableness standard of review to the Hearing Panel's market value finding of $2.73 million, the reviewing panel should first examine the Hearing Panel's decision on the value issue. Second, the entire record under review is to be screened to ascertain the range of value outcomes that it supports. Third, the criteria under the reasonableness standard of review that an applicant must satisfy to set aside a finding of fact are to be considered. The reviewing panel concludes by determining whether the criteria for varying the Hearing Panel's finding of fact have been satisfied.

6.4.1 Hearing Panel's Decision on the Value Issue

As a preliminary matter, the Decision found that Milton Hydro's request, presented for the first time in its reply argument, for a reduction in the annual capital gain revenue requirement offset amount of $87,950 in the Settlement Proposal, was a request that fell within the ambit of the unresolved 200 Chisholm Drive issue.[57]

[57] Decision, page 10.

The Decision notes that the sale of the property for $2.4 million was not an open market transaction but an affiliate transaction between Milton and MEGS.[58] The Hearing Panel was alive to the fact that the property had not been put up for sale on the open market. Upon becoming alive to the fact that sale of the Property was to an affiliate, the Hearing Panel had an obligation to take care to ensure that ratepayers were not being prejudiced by that affiliate transaction.

The Decision notes that the body of the analysis section of the August 5, 2015 appraisal report does not support the concluding opinion as to value.[59] The Decision considers but rejects as "inexplicable" the $375,000 per acre value that is the basis for the estimated $2.4 million market value of the land contained in the appraisal report.[60] The Decision finds that, for ratemaking purposes, the appraisal evidence supports a value range of $400,000 to $450,000 and a sale value of $2.73 million based on a per acre value of $425,000 for the 6.43 acre parcel. The Decision unambiguously states the per acre value range and its mid-point value upon which the $2.73 million market value finding is based.

The Decision refers to the November 2012 presentation made by the President/CEO of Milton Hydro to the Relocation Committee of the Board of Directors. That presentation ascribed a $2.7 million sale value to the Property based on a per acre value of $450,000.[61] The Hearing panel was "alive" to that information related to the market value issue.

A review of that entire presentation, in the context of the testimony and exhibits presented at the oral hearing about many properties that Milton Hydro had investigated over the years as alternative sites to Fifth and Main for the location of its utility office/service centre project, demonstrates Milton Hydro's familiarity with land and property values in the area.[62] The oral testimony and exhibits filed at the hearing referred to ten property options that Milton Hydro had investigated since 2010 as alternatives to Fifth Line and Main for the location of its utility office/service centre project.[63]

[58] Decision, page 46.
[59] Decision, page 46.
[60] Decision, page 46.
[61] See Chapter 3 Facts, footnote 9.
[62] See Interrogatory Responses, December 18, 2015, Relocation Committee Minutes April 12, 2014, pages 739-743, listing the 12 properties investigated by Milton Hydro personnel, per acre prices, and the three properties identified for further pursuit, and the November 14 Meeting Minutes and 15 page presentation, pages 744-761.
[63] Exhibit K1.3, pages 17-18, and Tr. Vol 1, pages 150-152.

At the oral hearing Milton Hydro's testimony also referenced the arm's length market activity in which it had engaged in prior years in an attempt to acquire the privately owned 1.3 acre parcel at Fifth Line and Main to give it sufficient development land at that location to satisfy its utility office/service centre needs. That prior market activity was relied upon by Milton Hydro to support a realistic value estimate for the 1.3 acre parcel of $800,000 or about $615,000 per acre. The Hearing Panel was "alive" to this information relating to the market value issue. During their oral testimony about the cost of property at this location the Milton Hydro witnesses never referred to the appraisal certified value estimate of immediately adjacent land at $375,000 per acre.

The Hearing Panel's value finding of $425,000 per acre ($2.73 million for the 6.43 acres) was supported by the appraisal and other evidence specifically referenced in the Decision. There was no need for the Hearing Panel to list in the Decision all of the information in the record that supported a conclusion that a per acre value of $425,000 fell within the range of reasonable per acre value outcomes.[64]

6.4.2 Does the Reasonable Range of Value Outcomes Include $425,000/Acre?

Any estimate of the fair market value of a particular item of property, regardless of whether it is expressed in a written appraisal or in some form of presentation, stems from an analysis of arm's length open market activity. The best evidence of market value is actual arm's length market activity related the particular property being assessed and other properties similarly situated.

An appraisal is nothing more than an estimate of the value of a particular property derived from market activity selected by the appraiser to form the factual basis for the estimate. Appraisers use examples of actual market activity to develop ranges of value that they regard as achievable and then select a point within that achievable range as their value estimate. The certificate in an appraisal merely formalizes the estimate that is based on the market activity described and analyzed in the body of the appraisal report. Such a certificate is not the equivalent of a price in an arm's length open market transaction.

Any appraiser retained by a property owner to support the pricing for a property to be sold in the open market would investigate market activity related to properties that adjoin the property to be sold. Any property seller seeking an appraisal for the purpose of pricing the property for sale in the open market would inform the appraiser of the market activity in which it had engaged in relation to adjoining property. This is particularly so when the seller was planning to rely on that activity to support a

[64] See footnotes 50 and 51.

presentation to the OEB of a current cost to acquire adjoining property of about $615,000 per acre.

One can reasonably ask how Milton Hydro can credibly assert that a per acre value of $375,000 for development land at Fifth Line and Main Street is reasonable when its CEO told the OEB that it would realistically cost $615,000 per acre to purchase a 1.3 acre parcel at that very location.

When an OEB hearing panel is called upon to consider the fair market value of a utility property that has been sold to an affiliate, it is not obliged to accept, as reasonable, the particular value estimate presented by the utility's appraiser. A hearing panel can consider the actual market activity on which the utility's appraiser has relied to formulate its estimate along with other market activity information and value estimates based thereon that the utility's appraiser did not consider. It is open to a hearing panel to find a value different from the appraiser's estimate as the value that should be accepted as reasonable for ratemaking purposes.

The three components of market activity evidence reflected in the record under review relevant to a consideration of the breadth of the range of per acre property values that the record supports are referenced above in Section 5.2.3 and include:

a) The arm's length market activity described in the August 5, 2015 Colliers appraisal that was before the Hearing Panel, which remained unchanged in the revised version of that report presented with the Affidavit. Each version of the August 5, 2015 appraisal supports as achievable per acre values of up to $442,000;

b) The arm's length market activity in which Milton Hydro participated related to the 1.3 acre parcel at Fifth Line and Main. This activity supports a per acre value much higher than $425,000; and

c) The market activity in which Milton Hydro engaged over the years 2010 to 2014 in relation to the many other properties that it investigated as alternatives to completing the development of its office/service centre project on property located at Fifth Line and Main Street. This activity supported the $450,000 per acre value ascribed to the property in the CEO's November 2012 presentation to directors.

Milton Hydro's witnesses referred to and relied upon the second and third sources of these market activities in their oral testimony before the Hearing Panel. This testimony

alerted the Hearing Panel to these sources of information. Milton Hydro made no reference to the Colliers appraisal report during the course of the proceeding. Where errors of fact are alleged, an OEB review panel is obliged to consider all information in the record before the decision makers in determining the range of factual outcomes supported by that record.

A careful analysis of all three sources of the market activity information that was before the Hearing Panel is presented in the "Facts" section of this consolidated decision. This evidence is summarized below.

6.4.3 Colliers' Appraisal Report

The August 5, 2015 appraisal report in the record before the Hearing Panel states that it was being prepared for the purpose of providing an estimate of value to Milton Hydro for "internal purposes" and notes that the OEB may rely on the report for regulatory purposes. As previously noted, this report relies on five comparable property sales; one at $339,217 and the other four falling within a range of $442,000 to $478,000. The report states that: "The Subject Parcel should achieve a rate per acre in the narrowed range of $339,217 to $442,213." This statement supports a finding that a reasonable range of rate per acre outcomes for the Property includes a per acre value of $425,000.

This analysis section of report establishes a value range of $400,000 to $450,000 for the Property with a mid-point rate per acre of $425,000.

The revised August 5, 2015 Report filed with the Affidavit relies on the same market transactions and the same achievable sales range with an upper limit of $442,213. This report makes changes to the initial report by reducing the limits of the value range in the analysis section of the report by $50,000 to conform to the $$350,000 to $400,000 value table in the initial report and the $375,000 per acre value used to estimate the value of the property at $2.4 million.

The Affidavit and PO2 Responses state that the appraiser who prepared an initial draft of the report concluded at a market value estimate of $2.7 million using a value range of about $339,000 to $478,000 per acre established by a set of comparable sales, a subset thereof with a rate per acre of $400,000 to $450,000 and a mid-point per acre value of $425,000. Following a peer review by another appraiser it was deemed that the rate should be at the lower end of the range. On its face this response indicates that the range of $400,000 to $450,000 was not an error. It was the opinion of the appraiser who drafted the initial report that led him to value the Property at $2.7 million.

The PO2 Responses at Attachment F reveal that during the three separate e-mail exchanges between the appraiser and Milton Hydro over the period July 20, 2015 to August 6, 2015 relating to the reviews of the draft report, no one questioned the $400,000 to $450,000 value range.

The August 5, 2015 appraisal report makes no reference to the arm's length market activity in which Milton Hydro engaged in relation to the 1.3 acre parcel at Fifth Line and Main nor to the many other properties that Milton Hydro investigated over the years 2010 to 2014. The PO2 Responses reveal that the appraiser did not ask and Milton Hydro did not disclose the activities in which it had engaged that supported a $615,000 per acre value estimate for development property at Fifth Line and Main that Milton Hydro subsequently presented to the OEB as a "realistic" estimate of current market value.

6.4.4 Milton Hydro's Market Activities Related to the 1.3 Acre Parcel

The record before the Hearing Panel and the PO2 Responses reveal that Royal LePage provided Milton Hydro with a 2010 appraisal of the 1.3 acre parcel of its immediate neighbour at between $461,000 and $538,000 per acre. Milton Hydro made an arm's length offer in 2010 to its immediate neighbour of about $700,000 or a per acre rate of about $538,000. The neighbour wanted $750,000 or about $577,000 per acre. As already noted at the April 4, 2016 oral hearing, Milton Hydro estimated that it would cost $800,000 or about $615,000 per acre to purchase this land and relied on its own arm's length market activity with the property owner to support that cost as a realistic estimate of the 2015 value of that parcel.

6.4.5 Other Market Activities and the 2012 Value Estimate of $2.7 Million

The record under review reveals that by March 2012 and before the CEO made the November 2012 presentation to Milton Hydro directors, Milton Hydro had already investigated the availability and pricing of 12 property alternatives to a Fifth Line and Main Street location for its office/service centre project and had then identified three property options to be pursued.[65]

This activity was in addition to its own arm's length efforts to purchase the adjacent 1.3 acre parcel. These activities and the 15 page November 2012 presentation reveal that Milton Hydro was very involved in and familiar with the prevailing prices for property in the area. Milton Hydro was not a neophyte in matters relating to property values when

[65] See footnote 62.

the CEO made the November 2012 presentation. In that presentation Milton Hydro ascribed a $450,000 per acre and $2.7 million value to the Property.

6.4.6 Impermissible Re-weighing of Evidence

When applying the reasonableness standard of review a reviewing panel is not to examine the evidence in isolation. The evidence is to be examined in its entirety. A reviewing panel cannot re-weigh the evidence to support findings that are substitutes for findings made by a hearing panel that are supported by the record. The majority decision does not comply with these principles. The majority decision impermissibly ascribes little, if any, weight to the following evidence related to the market value issue:

a) Milton Hydro's arm's length market activities related to the adjoining 1.3 acre parcel;

b) Its other market activities and its 2012 value estimate for the Property of $2.7 million;

c) The value of about $442,000 per acre considered by the Colliers appraisal to be achievable; and

d) The diluted quality of the Colliers appraisal report that does not consider all of the market activities in which Milton Hydro itself engaged.

The majority decision discredits the evidence of Milton Hydro's arm's length market activities related to the 1.3 acre parcel on the grounds that "property markets can change considerably in five years". I disagree with this feature of the majority decision.

The majority's observation is in conflict with the record under review and Milton Hydro's testimony at the oral hearing stating, unequivocally, that the market activity in which it engaged some years ago was a realistic indicator of current value. The record under review reveals that, since 2012, property values in the area were increasing and not decreasing as the observation in the majority decision suggests. The Review Panel must respect the record under review.

The majority decision discredits Milton Hydro's $2.7 million value estimate in 2012 for the Property on the grounds that this value estimate made by the CEO was contained in an "internal" document. I disagree with this feature of the majority decision. It is not the form of the presentation but the substance of the information that underpins a value estimate that matters.

At the time that the CEO made his presentation to the directors, Milton Hydro officials had, for years, been personally involved in and were very experienced in property values related to sites at which its new office/service centre might be located. These activities included the investigation and offer on the 1.3 acre parcel and the investigation some 12 other properties as alternatives for the location of its office/service centre project.

Milton Hydro's market based activities that supported the CEO's November 2012 presentation were essentially the same market based activities on which the CEO relied when making his presentation made to the OEB at the oral hearing in this case. Each of the presentations was supported by the significant market activity in which Milton Hydro officials had personally engaged. These presentations and supporting documents and the appraisal prepared for Milton Hydro's "internal purposes" are equivalents.[66] These presentations and the market activities supporting them cannot be discredited on review because they were "internal" and not presented in an appraisal format.

The majority decision disregards the failure of Milton Hydro to disclose and the failure of the Colliers appraisers to ask about the market activities in which Milton Hydro had engaged that supported Milton Hydro's $615,000 per acre value estimate at the hearing for the 1.3 acre parcel at Fifth Line and Main Street. The majority's rationale for this approach is that this non-disclosure and failure to investigate was not "improper" and that the appraisers' knowledge of this information might have compromised their "independence".

An investigation of these activities by the appraiser and/or disclosure of them to the appraiser by Milton Hydro does not compromise the independence of the appraiser as the majority decision finds. The lack of investigation and disclosure do not relate to appraiser "independence". Rather these items relate to the quality of the appraisal report which depends upon the arm's length market activities that are reflected in that report. A failure to include in an appraisal information related to the property adjacent to the property being appraised dilutes the quality of the appraisal.

Similarly I disagree with the majority's disregard of all of the market activity information that is separate and apart from the market activity reflected in the revised appraisal on the grounds that the appraiser's estimate is deserving of greater weight. As already noted the Ontario Court of Appeal has recently confirmed that a review panel is not to re-weigh various items of evidence in the record under review. Rather it considers the probative capability of the entire record to identify the range of outcomes that the record supports.

[66] See Chapter 3, FACTS, subparagraph (i).

There is no factual basis in the record for treating the appraiser's market activity based value estimates any differently than the value estimates derived from the market activities in which Milton Hydro officials participated that the appraiser did not consider. The majority's attribution of greater weight to the appraisal is both inappropriate in a review proceeding and untenable having regard to the extensive participation of Milton Hydro officials in market-related activities over a period of some four years.

6.4.7 Summary

In summary the record under review overwhelmingly supports a range of values that includes a value of $425,000 per acre and a $2.73 million value for the Property's 6.43 acres for ratemaking purposes. That the range of values includes $425,000 per acre value is supported by:

a) the $339,212 to $442,217 per acre range that initial and revised Colliers appraisal reports establishes as achievable for the Property;

b) the value range of the $400,000 to $450,000 per acre range established by the Colliers appraiser who prepared the initial draft of the report;

c) the $400,000 to $450,000 per acre range in the report before the Hearing Panel;

d) the values for four of the five comparable properties in the Colliers reports equal to or greater than $442,000;

e) the per acre values for the 1.3 acre parcel immediately adjacent to the property reflected in Milton Hydro's presentation to the Hearing Panel ($615,000), its arm's length open market offer to purchase the property ($538,000) and the appraisal of the property that it obtained from Royal LePage ($461,000 to $538,000); and

f) the $450,000 per acre and $2.7 million values that Milton Hydro ascribed to the Property in 2012.

6.4.8 Criteria to be Satisfied to Set Aside a Finding of Fact

The applicant for review must show that the challenged finding of fact is contrary to the record under review. A reviewing panel should not set aside a finding of fact by the original panel unless there is no evidence to support the decision and the decision is

clearly wrong. A reviewing panel should only interfere with a finding of fact in the clearest of cases. The law accords considerable deference to findings of fact.

In my view, having regard for the record being reviewed, Milton Hydro has not and cannot satisfy these criteria.
There is no identifiable and materially incorrect error in a finding of fact that falls within the range of reasonable factual outcomes that the record under review supports. Under the OEB's reasonableness standard of review a finding of fact not reviewable if it falls within the range of reasonable factual outcomes that the record under review supports.

A review panel is to refrain from substituting its own decision of the appropriate outcome when the decision being reviewed falls within the range of outcomes supported by the record being reviewed.

6.4.9 Conclusion

The record under review overwhelmingly supports, as reasonable, a range of decision alternatives to the market value issue in excess of $375,000. The August 5, 2015 appraisal report, on which the majority relies, regarded a per acre value of $442,213 per acre as achievable. In 2012 Milton Hydro considered a per acre value of $450,000 to be appropriate. At the 2015 hearing, Milton Hydro was asking the OEB to treat the Property as having a per acre value of about $615,000.

In my view, Milton Hydro cannot credibly contend that the Hearing Panel's $2.73 million Property value finding falls outside the reasonable range of value outcomes when that value is:

a) essentially the same as the $2.7 million value that Milton Hydro ascribed to the Property some three years prior to its sale; and

b) much lower than the $615,000 per acre value for development property at Fifth Line and Main Street presented by Milton Hydro's CEO to the Hearing Panel during the course of his oral testimony on April 4, 2016.

Based on the foregoing review of all of the facts in the record under review pertaining to the Property value issue, I would find that the Hearing Panel's Property value finding of $2.73 million falls within the range of reasonable per acre value outcomes established by that record. The $2.73 million value finding has not been clearly shown to be incorrect in a material way.

Moreover, in the context of Milton Hydro's extensive property investigations that informed its own 2012 value estimate for the Property of $2.7 million, I find the substitution of a $2.4 million year-end value for 2015 for the $2.73 million amount found by the Hearing Panel to be appropriate to be incompatible with the OEB's obligation to ensure that ratepayers are not prejudiced by transactions between a utility and its affiliates. The substituted value of $2.4 million materially reduces the capital gain amount to be considered in setting rates by $330,000, from about $506,000 to about $176,000.

I would deny the request for a variance of the $2.73 million market value finding.

6.5. PORTION OF THE GAIN ALLOCATED TO RATEPAYERS

As with the previous issue, to apply the established standard of review the Review Panel examines the Hearing Panel's decision to determine the rationale for allocating the entire gain on land not in rate base to ratepayers. This is followed by a screening of the record under review to determine the range of gain allocation outcomes that it supports. The criteria that must be satisfied to justify a variance are then applied to determine whether the variance relief requested should be granted or denied.

6.5.1 Hearing Panel's Decision on the Gain Allocation Issue

The question for the Hearing Panel in relation to the gain allocation issue was to determine the allocation as between the utility shareholder and its ratepayers of the amount of the capital gain on the Property attributable to the 50% portion of the land not yet in rate base. Milton Hydro had allocated to ratepayers the gain attributable to the land in rate base. The issue for determination by the Hearing Panel related to the appropriate regulatory treatment of the gain on the remainder not in rate base.

No changes to the record before the Hearing Panel are relied upon to support the requested variance of the hearing Panel's allocation of the entire gain to ratepayers for ratemaking purposes. Rather Milton Hydro's request for variance is effectively based on the proposition that the gain on the portion of the land not in rate base cannot, in any circumstances, be allocated to ratepayers. On this issue the question for the Review Panel is whether the gain allocation alternatives available to the Hearing Panel included the option of an allocation of some or all of the gain to ratepayers.

I agree with that portion of the majority decision on this issue that acknowledges that the Hearing Panel did not disregard the fact that 50% of the land had not yet been included in rate base. The Hearing Panel was clearly alive to that fact.

The Decision reveals that the factors that prompted the Hearing Panel to allocate to ratepayers all of the gain attributable to the portion of the land not in rate base included:

a) The fact that the Property had been acquired by Milton Hydro pursuant to a utility project plan to develop its own office/service centre; and

b) The fact that the land at the 200 Chisholm Drive premises was purchased as a substitute and replacement for the Property as a new location for the utility office/service centre project.

At page 39, the Decision refers to the Settlement Agreement in Milton Hydro's 2011 cost of service proceeding where the parties agreed that the Property would be the site for the future office/service centre. The Decision at page 54 finds that the property was purchased for this specific utility purpose.

At page 54, the Decision notes that the Chisholm Drive premises was a substitute and replacement for the Property.

At page 55, the Decision finds that the appropriate regulatory treatment of a gain realized when one parcel of property, acquired for a future utility use, is replaced with another to serve that same utility use is to allocate that gain to ratepayers. The Hearing Panel's gain allocation rationale referred to the CEO's November 2012 presentation to directors that showed the entire $2.7 million value of the property been applied as a credit to the then total estimated office/service centre project costs budget to defray the costs estimated to be incurred for completing the utility project at a different location.

In that 2012 presentation, the amount of the then estimated sale value of the Property of $2.7 million that was applied to defray the total project costs included, rather than excluded, the portion of the total capital gain amount of about $500,000 attributable the land not included in rate base.[67] The gain of the portion of the land not in rate base was allocated to ratepayers to defray the costs of substituting the land at 200 Chisholm Drive for the Property as a new location for the utility office/service centre project.

The evidence indicated that the land related costs for the 200 Chisholm Drive premises were $4.040 million compared to the costs of the Property of about $2.2 million and the additional $0.8 million that Milton Hydro said that it would likely have to pay for the 1.3 acre parcel that was needed to provide sufficient lands at the Fifth Line and Main Street location to satisfy its utility needs.

[67] The original cost of the land was about $2.2 million. A $2.7 million value produces a gain of about $500,000.

6.5.2 Range of Outcomes Supported by the Record under Review

The Record under review in relation to the gain allocation issue includes the OEB's accounting policies expressed in its APH. What is informative about these provisions in relation to this issue is that gains and losses on land and other assets acquired for future utility use are treated the same; they are allocated to ratepayers.[68]

While I accept the submissions of OEB staff that the accounting rules are not necessarily binding in a particular case, these APH provisions, at the very least, identify gain allocation options that fall within the range of outcomes that the record under review supports.

For ratemaking purposes, it is important to distinguish between assets acquired for a non-utility purpose and assets acquired and held for future use in connection with a specific utility project not yet in service because it has yet to be completed.

Assets acquired and held for the purpose of a specific utility project, but not yet in service because the project has not been completed, are utility assets "in the making" and not assets acquired to support non-utility business activities. Under the provisions of the APH, gains and losses on utility assets "in the making" are treated in the same manner as gains and losses on utility assets.

The majority decision fails to distinguish between assets acquired by a utility company to serve a particular utility project purpose and assets acquired to support a non-utility business activity. All of the land at the Fifth Line and Main Street location was acquired by Milton Hydro for a specific utility project purpose. The fact that Milton Hydro put a fence around the portion of the property that it used for outside storage purposes does not alter the fact that the entire property was acquired for a specific utility project purpose.[69] When one utility asset in the making is disposed of at a gain or a loss because of the acquisition of a substitute asset, the gain or loss allocation options available to the OEB include the allocation of all, some, or none of the gain or loss to ratepayers.

Put another way, the OEB's broad discretion over gains and losses realized on assets in service and in rate base extends to assets acquired and held for the purpose of their use in a specific utility project, but not yet in service because the project has not yet been completed.

[68] See footnote 56.
[69] See PO2 Responses, page 20.

While I readily accept that the benefits follow costs allocation principle traditionally applies to capital gains and losses realized on assets acquired to support non-utility business activities, I disagree with the majority that the benefits follows costs principle has any priority status when considering gains and losses on the disposition of utility-specific project assets acquired and held for future use but not yet in service because the utility project has not yet been completed.

The range of allocation options supported by the record under review includes an allocation of all of the gain to ratepayers to defray the increased costs associated with the utility's acquisition of replacement land at a cost greater that the property initially acquired as the location for the utility office/service centre project.

6.5.3 Criteria to be Satisfied to Set Aside an Exercise of Discretion

The question for the Review Panel is whether the discretion to make an allocation of the entire gain to ratepayers exists, and if so, whether the Hearing Panel's asset replacement and project costs defrayal rationale for allocating the entire amount to ratepayers was tenable.

The majority decision accepts that the Hearing Panel had the discretion to make an allocation of the entire gain to ratepayers, but that it should not have departed from the benefits follow costs allocation principle because the asset was not yet in service and in rate base. The majority decision effectively treats the portion of the Property not yet in rate base as an asset acquired to support a non-utility business activity rather than a utility specific project asset not yet in service because the project has not yet been completed.

An example of an OEB exercise of ratemaking power over utility-specific project assets, not yet in service and rate base because the project has not yet been completed, is the Decision with Reasons in EB-2006-0501 dealing with a transmission rates application by Hydro One Networks Inc. That decision found that circumstances related to an inability to complete the construction of the Niagara Reinforcement Project were sufficiently special to warrant an imposition on ratepayers of some of the carrying charges on the millions of dollars that had been spent on the project even though the project was incomplete and not in service.

The OEB's findings in that case, that the discretion exists to impose costs on ratepayers when they are not receiving any benefits from assets acquired for a utility specific project purpose, supports the conclusion that the discretion exists to do the opposite, namely to transmit benefits to ratepayers even though they have incurred no costs in

connection with utility-specific project costs that are not in rate base because the project has not yet been completed.

I disagree with the majority's conclusion that the Hearing Panel erred in failing to apply the benefits follow costs allocation approach. This conclusion fails to recognize the distinction between assets acquired to support non-utility business activities, to which the benefits follow costs principle traditionally applies, and assets acquired and held for a specific utility project but not yet in service because the project had not been completed.

The breadth of the OEB's discretion over gains or losses on utility project assets held for future use but not yet in service is the same as the breadth of the OEB's discretion over gains of losses on utility assets in service and in rate base. While the benefits follow costs principle lies within the range of outcomes that the record under review supports, this allocation principle has no presumptive priority status as the majority suggests.

Applying the gain realized on a disposition of a utility asset to defray the increases in costs associated with its replacement has been previously accepted by the OEB and affirmed by the Courts as a legitimate exercise of gain allocation discretion.[70] Extending that rationale to utility assets in the making makes good sense and is compatible with OEB accounting procedures that treat gains and losses on utility assets and utility assets in the making in the same manner. The Hearing Panel's rationale for allocating 100% of the gain to ratepayers is tenable even if the majority does not find that rationale to be compelling.

As an alternative to its conclusion that the Hearing Panel erred in departing from the benefits follow costs principle, the majority finds that the Hearing Panel's gain allocation was unreasonable because it was made without calling for submissions on the issue from Milton Hydro. This is a process concern that has no relevance to the question of whether the entire record under review supports the gain allocation alternative that the Hearing Panel found to be appropriate.

In their submissions, SEC and OEB staff supported the Hearing Panel's decision on the gain allocation issue. LPMA supported Milton Hydro's position on the issue. The process concern that the majority decision expresses does not tilt the scales related to the gain allocation alternatives that the record supports one way or another. Put another

[70] EB-2007-0680, Toronto Hydro-Electric System, at page 27 and *Toronto Hydro-Electric System Ltd. v. Ontario Energy Board*, (2009), 252 OAC 188, paragraphs 23, 29 and 32.

way, Milton Hydro's position on the gain allocation does not prevail by default because the majority decision has raised a process concern.

As already noted, the process options available to the Hearing Panel, when the request made by Milton Hydro in its reply argument led to the Hearing Panel's consideration of the market value and gain allocation issues, included reconvening the hearing to receive submissions on the issue, or deferring the matter for consideration in a future proceeding or deciding the issue on the basis of the existing record. The Hearing Panel decided to proceed on the basis of the existing record.

I question whether the majority decision can reasonably assert that the Hearing Panel should have called for further submissions from the utility on an issue raised by the utility, for the first time, in its reply submissions. Regardless of that issue and even if there was procedural error in not calling for further submissions on an issue that arose because of relief requested in reply argument, that procedural error has been remedied by calling for submissions on the gain allocation issue in this review proceeding and by inviting Milton Hydro to express its views on the applicability of the relevant APH provisions in the PO2 Responses.

Milton Hydro's reply submissions addressed the gain allocation issue. Milton Hydro has not sought an opportunity to make further submissions on the point. It resisted the efforts of the OEB to schedule a brief oral hearing related to the market value and gain allocation issues. That resistance led to the issuance of Procedural Order No. 2 and the PO2 Responses in which Milton Hydro provided information relating to the applicability of the APH to the gain allocation issue. What more can Milton Hydro say about this issue?

The majority decision does not provide a process remedy for its process concern. A process concern calls for a process remedy. If the majority is not satisfied with the opportunities that Milton Hydro has had to be heard on the gain allocation issue, then the process remedy is to either call for further submissions in this review proceeding; or send the matter back to the members of the Hearing Panel that continue to be OEB members; or direct that the matter be brought forward by Milton Hydro for determination in its next rate case. The majority decision does not adopt any of these process remedies.

The procedural issue that the majority raises has no relevance to a determination of the range of options that the record under review supports. All members of the Review Panel are obliged to objectively apply the criteria reflected in the standard of review and

determine whether the allocation made by the Hearing Panel falls within the range of reasonable outcomes supported by the entire record being reviewed.

Milton Hydro has now had its say on the gain allocation issue. In my view, its position that benefits follow costs invariably applies to all assets not yet in rate base lacks merit when the OEB is dealing with gains or losses on utility-specific project assets acquired for future use but not yet in rate base because the project has not yet been completed.

6.5.4 Conclusion

The range of reasonable allocation options available to the hearing panel included the option of following the provisions of the APH to allocate to ratepayers the entire gain on the utility-specific project assets being held for future use, but not yet in service because the project had not been completed.

The Hearing Panel's explanation for selecting that allocation alternative, being that the entire gain on the Property should be applied to defray the costs of its replacement, was tenable.

The majority decision disregards the obligation under the reasonableness standard of review to respect the range of outcomes that the record under review supports. In disregarding the range of discretionary outcomes that the record supports, the majority decision impermissibly substitutes its preferred exercise of discretion for that exercise of discretion made by the Hearing Panel that falls within the range of outcomes supported by the record being reviewed.

6.6 MECHANISM FOR PAYING THE GAIN AMOUNT TO RATEPAYERS

6.6.1 Hearing Panel's Decision

The Hearing Panel's Decision directed that a permanent rate base reduction be implemented to credit ratepayers with the gain on the land not in rate base.
The primary matter of concern is whether the Hearing Panel erred in failing to limit the duration of the gain credit mechanism to the time required to pay no more than the total amount of the gain to ratepayers.

All members of the Review Panel agree with Milton Hydro that the Decision erred in making the duration of the reduction permanent rather than time limited. Ratepayers are

entitled to receive the amount of the gain allocable to them, but no more. The Decision shall be varied to achieve that outcome.

6.6.2 Range of Allocation Outcomes Supported by the Record under Review

There were two options available to the Hearing Panel to credit the amount of the gain to ratepayers.

One option was to use a term limited rate base reduction of about $506,000 to effectively credit the gain amount to ratepayers at the rate of $39,400 per year.[71] The duration of this credit mechanism would depend on the dollar amount of the gain allocation to ratepayers.

The other option was to use a revenue offset mechanism of the type specified in the provisions of the APH on which Milton Hydro relies. Under this approach, with an amortization period terminating at the end of Milton Hydro's 2020 rate year, the annual revenue offset amount in the case of a capital gain amount allocable to ratepayers of $506,000 will be considerably larger than the annual reduction amount of $39,400 that results from a rate base reduction of about $506,000. However, the utility's obligation to ratepayers will be discharged much earlier than it would be under the rate base reduction approach.

6.6.3 Criteria to be Applied

The reasonableness standard of review calls for the gain credit mechanism to fall within the range of allocation outcomes that the record under review supports. The permanent rate base reduction directed by the Decision falls outside that range and is unreasonable and an error.

6.6.4 Conclusion

The gain credit mechanism for ratemaking purposes must be corrected. I agree with Energy Probe that a shorter payment period better aligns the credit to ratepayers of the gain amount with the 2015 date of its realization.

For these reasons the gain-related rate base reduction embedded in Milton Hydro's rate base should be eliminated effective May 1, 2018, being the beginning of Milton Hydro's 2018 rate year. At that time the portion of the gain remaining to be paid to ratepayers

[71] Affidavit, paragraph 10.

should be credited by way of a revenue requirement offset, with any amortization thereof to be completed no later than the end of Milton Hydro's 2020 rate year.

6.7 IMPLEMENTATION

For these reasons I would deny the requested variance of the $2.73 million value amount and the resulting capital gain amount of $506,000 of which Milton Hydro will have paid about $78,800 by May 1, 2018. I would also deny the request to eliminate the allocation to ratepayers of the portion of the gain amount attributable to land not in rate base.

For the two years ending April 30, 2018 Milton Hydro will have credited ratepayers with a sum of about $78,800 under the rate base reduction credit mechanism. This leaves about $427,200 to be paid by way of a three-year amortized revenue offset, or about $142,400 per year for each of the years 2018, 2019, and 2020 in the scenario where the entire gain is allocated to ratepayers.

I would direct Milton Hydro to reduce its rate base by $506,000 effective May 1, 2018 and to include in its revenue requirement for each of the years 2018, 2019 and 2020 an annual revenue requirement offset amount of $142,400.

Original Signed By

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Peter C. P. Thompson, Q.C.
Member