



April 27, 2018

Via RESS and Courier

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, Suite 2700
Toronto, Ontario M4P 1E4

**Re: Draft Report of the Board: Corporate Governance Guidance for OEB Rate-Regulated Utilities
Board File No.: EB-2014-0255**

Dear Ms. Walli:

Hydro Ottawa Limited ("Hydro Ottawa") is pleased to provide these comments on the *Draft Report of the Board: Corporate Governance Guidance for OEB Rate-Regulated Utilities* ("Draft Report").

I. Introduction

In the Draft Report, the Ontario Energy Board ("OEB") sets out the following: (i) guidance on best practices for the corporate governance of rate-regulated utilities; and (ii) a description of new mandatory Reporting and Record Keeping Requirements ("RRRs") for utilities. OEB describes the development of the Draft Report as having been informed by reports from KPMG and Elenchus, as well as by consultations with stakeholders which were convened by OEB staff and Elenchus in 2016.

As a regulated local distribution company ("LDC"), Hydro Ottawa has a direct and substantial interest in the outcome of this consultation, as it will be impacted by the proposals outlined in the Draft Report. Hydro Ottawa actively engaged in earlier stages of this consultation, including as a participant in the stakeholder sessions.

In this submission, Hydro Ottawa offers comments on the OEB's proposed guidance and RRR requirements. As a reference point for those comments, Hydro Ottawa first provides a brief description of the governance structure and practices of the larger corporate enterprise of which it is a member, as well as its own experiences with different approaches to the composition of its Board.

II. Description of Hydro Ottawa's Corporate Governance

Hydro Ottawa is committed to establishing and maintaining leading governance practices for a company of its size and mandate. Its governance practices are guided not simply by legal obligations, but by best business practices and standards established by independent agencies. Because governance standards and best practices are always evolving, the company seeks to continuously improve its governance practices.

In recent years, the evolution of Hydro Ottawa's governance practices has unfolded in conjunction with significant expansion of the group of companies in which Hydro Ottawa is a member.



The parent company in this corporate family is Hydro Ottawa Holding Inc. (“HOHI”), which is 100% owned by the City of Ottawa, and is registered and incorporated under Ontario’s *Business Corporations Act*. HOHI is overseen by an 11-member Board of Directors, appointed by Ottawa’s City Council. Of these 11 Directors, eight (8) – or approximately 70% – are independent of management and the shareholder. Rounding out the roster are two (2) municipal councillors, along with HOHI’s President & CEO. A Shareholder Declaration issued by the City guides the work of the HOHI Board.

Hydro Ottawa Limited, the regulated local distribution utility, is the largest subsidiary within the group of companies, representing approximately 80% of the corporation’s overall business. Its Board is comprised of three (3) members – HOHI’s Chair, HOHI’s President & CEO, and the Chief Electricity Distribution Officer for the utility.

The remaining 20% of the corporation’s business rests with an assortment of non-regulated subsidiaries, whose business activities include renewable energy generation, energy services, streetlighting, electric cable testing, power quality monitoring and analysis, and other energy infrastructure management.

The corporate enterprise is guided by an overarching strategic plan. Presently, the *Strategic Direction 2016-2020* is anchored in four strategic objectives and areas of focus: (i) Customer Value; (ii) Financial Strength; (iii) Organizational Effectiveness; and (iv) Corporate Citizenship. The current plan continues the trend established in prior versions of a strong focus on governance as a key aspect of good corporate citizenship.

In step with its focus on robust governance, the corporation undertook significant reforms in 2009 and 2014. These included reconfiguration of the holding company and regulated utility Boards, revisions to Board and committee charters, and establishment of term limits for Directors. A key driver for these changes was the set of challenges encountered in having two Boards of a large size providing oversight in parallel – one at the holding company level and the other at the utility level. The experience resulted in inefficiencies, redundancies, additional costs, and duplication of effort, and prompted a reduction in the composition of the utility Board (i.e. from seven [7] Directors to three [3]).

The reforms undertaken in recent years, coupled with the mature foundation of effective governance established through prior actions and enduring practices, form the basis for the corporation’s present governance model. With respect to best practices, those which are firmly embedded into the corporation’s governance model include the following:

- Adherence to a written charter acknowledging the Board’s responsibilities for company stewardship;
- Substantial voluntary adherence to the Canadian Securities Administrators’ National Policy 58-201 on Corporate Governance Guidelines;¹
- Regular review of a Board competency matrix to ensure an optimal mix of diverse skills and competencies among Directors, and to identify Board orientation, training, and development requirements in a given year;
- Regular and formal Board performance assessments;

¹ While the corporation is not a reporting issuer under Ontario’s *Securities Act* and is therefore not subject to governance standards that apply to publicly-traded companies, it is guided by these standards and seeks to meet or exceed them.

- Consideration of stakeholder interests and promotion of effective communication with stakeholders; and
- Regular comparison of the corporation's governance to best practices in the private and public sectors.

Hydro Ottawa also wishes to underscore that the strength of the corporation's governance model has been formally corroborated by external bodies such as the Institute on Governance ("IOG").² Additionally, in light of its municipal ownership structure, the corporation takes seriously its responsibilities to be accountable both to its shareholder and the general public.

In sum, Hydro Ottawa shares the OEB's view that good governance is a significant contributor to utility performance. Hydro Ottawa believes that the information outlined above is indicative of an enduring commitment to achieving excellence in governance practices and corporate citizenship.

In the comments below, Hydro Ottawa elaborates further upon a few of the details and themes presented in this section.

III. Comments on the Draft Report

1. Hydro Ottawa respectfully requests additional information from the OEB on the following: (i) the expected benefits associated with OEB oversight of utilities' corporate governance; (ii) how the OEB will apply its guidance and act upon the disclosures filed by utilities; and (iii) how OEB oversight and guidance will account for diversity within the utility sector.

(i) Expected Benefits of OEB Oversight

The Draft Report offers the following insight into the OEB's rationale for introducing mandatory RRR requirements for governance, along with guidance for best governance practices:

"By implementing these new reporting and record keeping requirements, the OEB expects to encourage more robust governance practices throughout the sector. This in turn will strengthen management accountability, enhance overall utility performance, and improve outcomes for consumers."³

Hydro Ottawa respectfully observes that these statements are accompanied by only limited qualitative and quantitative analysis regarding the overall state of governance in Ontario's utility sector. While KPMG's report did examine governance structures and practices in place for electricity distributors, the scope of that review was limited – not only within the distribution sector itself, but also within the broader utility sector landscape (i.e. many other classes of rate-regulated utilities were excluded).

² IOG is an independent, Canada-based, not-for-profit institution whose mission is to advance better governance by exploring, developing, and promoting the principles, standards, and practices which underlie good governance in the public sphere. In 2011, IOG prepared a report assessing Hydro Ottawa's corporate-wide governance practices against emerging best practice trends in both the private and public/not-for-profit sectors. IOG found that the corporation's governance model had evolved significantly to incorporate many general good governance practices observed in IOG's research.

³ Draft Report, p. 3.

It therefore remains unclear if the OEB's proposed action is intended as a response to the diagnosis of a specific problem (or set of problems) that has been observed in the utility sector, or if the proposed action is intended to serve as a pro-active measure to guard against the prospect of sub-optimal outcomes in relation to governance practices. Moreover, it is not clear if the OEB believes that the utility sector, or a certain subset thereof, is falling short in fulfilling the requirements and expectations set forth for corporations in the *Business Corporations Act*. While the Draft Report signals the OEB's interest in seeing "more robust governance practices" adopted throughout the sector, there is no information provided on what constitutes the baseline level of governance performance in the sector.

In the absence of such information, it is challenging for regulated utilities and other stakeholders to gauge the likely benefits of the OEB's proposals. What's more, the difficulty in assessing the potential benefits of OEB action are compounded by the absence of any discussion of the expected costs associated with compliance with the new RRR requirements and implementation of the guidance. As a general principle, Hydro Ottawa believes that the prospects of stakeholders understanding and accepting the expected benefits of a proposed regulatory action are maximized when data is presented which illustrate how the intended benefits are commensurate with the attendant costs.

Accordingly, based upon the above, Hydro Ottawa requests additional detail on what benefits will flow from the OEB's proposed action on governance and how those benefits will be realized.

(ii) OEB's Application of the Guidance and Action in Response to Utility Reporting

The Draft Report states the following, with respect to the OEB's intent as it relates to applying the proposed guidance and utilizing RRR reports submitted by utilities: "Following the implementation of the new RRR requirements related to utility governance, the OEB will consider utilities' governance practices in the context of its ongoing evaluation of utility performance and rate setting."⁴

Respectfully, Hydro Ottawa observes that the Draft Report's explanation of the intended use cases of governance-related information submitted by utilities to the OEB presents more questions than answers.

For example, it is unclear if the OEB intends to develop specific metrics (whether in consultation with regulated entities or not) to measure utilities' governance practices, and if the intent is for any metrics to be included in documentation such as electricity distributors' Scorecards or the OEB's annual yearbook of distributors. The introduction of RRR requirements for governance also introduces the prospect of OEB compliance or performance auditing, for which the potential benchmarks and metrics likewise remain unclear at present.

Furthermore, good governance has been identified as an area of focus for determining the level of review to which a utility will be subject for purposes of a rate application, as part of the OEB's "Proportionate Review" initiative. Nevertheless, the expected metrics and evaluation criteria in that context remain unknown as well, including on the matter of whether and how a utility's decision not to apply the voluntary guidance will factor into the OEB's evaluation of the utility's governance practices.⁵

⁴ Draft Report, p. 16.

⁵ Hydro Ottawa observes that the early experience with the first Proportionate Review Pilot has not yet yielded any insights into how a utility's governance practices will be factored into the level of review applied by the OEB in a rate application proceeding. See: OEB Staff Report to the Registrar dated February 14, 2018, Board File No.: EB-2017-0073.

In light of the above considerations, Hydro Ottawa believes that it would be appropriate for the OEB to provide more specific information on its intended application of the guidance and utilization of governance-related reporting.

(iii) Accounting for Diversity within the Utility Sector

A hallmark of Ontario's utility sector is the significant diversity among participants on numerous fronts – ownership structure, investment and revenue requirements, size, and geographic footprint, to name a few. The OEB itself has recognized the diverse demographics within the sector, including most recently in its new five-year Strategic Blueprint.⁶

However, the Draft Report does not appear to consider the practical implications and effects of applying guidance and imposing reporting requirements on a uniform basis across such a diverse sector. The proposals outlined in the Draft Report are presented such that they will have equal relevance to the following such entities: a provincially-owned utility with rate-regulated generation assets and a revenue requirement valued at several billions of dollars; investor-owned, provincially-owned, and municipally-owned utilities which are reporting issuers and are therefore subject to oversight under financial securities legislation; utilities with customer bases ranging in size from approximately two million to just over one thousand customers; utilities with a diverse mix of business activities, both regulated and unregulated; and electricity distributors whose governance practices are imbued with a unique ethos of accountability to both ratepayers and the public, as a result of their municipal ownership structures.

The Draft Report states that “the OEB’s guidance reflects best practice while also drawing attention to areas of specific importance that result from the unique nature and circumstances of utilities, their ownership structures, and the risks assumed relative to other corporations.”⁷ However, Hydro Ottawa would have anticipated discussion of how the guidance and reporting requirements account for diversity within the sector, and of how the proposed actions would carry equal weight and relevance when applied in the context of significantly different business and operational environments for utilities.

As such, Hydro Ottawa requests additional information from the OEB on how its guidance and reporting requirements will account for the sector’s diverse demographics.

2. Hydro Ottawa is concerned with proposals in the Draft Report that are inconsistent with the stated intent for the OEB’s guidance to be non-binding and for utilities’ adherence to remain voluntary. Hydro Ottawa respectfully questions the basis for mandatory reporting on non-binding guidance and likewise requests that the OEB refrain from codifying requirements through amendments to the Affiliate Relationships Code (“ARC”).

With respect to the mandatory and voluntary nature of the core proposals being introduced by the OEB, the Draft Report states that “[n]ew, annual reporting and record-keeping related to utility governance will be mandatory for the utilities. However, it will remain the choice of each utility whether to adopt the OEB’s guidance in its governance architecture and functions.”⁸ Moreover, with respect to the

⁶ *Strategic Blueprint: Keeping Pace with an Evolving Energy Sector, 2017-2022*, p. 5.

⁷ Draft Report, p. 7.

⁸ *Ibid*, p. 4.

proportion of independent Directors which the OEB deems to be appropriate, the Draft Report declares the following: “The OEB is of the view that a majority (over 50 percent) of directors should be independent. The OEB will consider amending the ARC in due course to reflect governance best practice in this regard.”⁹

As a general matter, Hydro Ottawa sees an inherent contradiction between the introduction of guidance, the adherence to which is intended to remain voluntary, and the imposition of requirements to report against provisions set forth in this guidance, for which compliance will be mandatory. Hydro Ottawa is concerned that these approaches will work at cross-purposes. In addition, consistent with the discussion in comment #1 above, Hydro Ottawa is concerned about the practical effects that the OEB’s proposed approach may have. For example, utilities which may be inclined on wholly legitimate grounds to adopt only certain provisions in the guidance (or none at all) may see risk in doing so, not knowing how their decision and the accompanying obligation to report on it may adversely impact the OEB’s evaluation of their overall performance or the OEB’s assessment of the appropriate level of review to apply to their next rate application.

While Hydro Ottawa sees a conflict between the concepts of voluntary guidance and mandatory reporting, it has stronger concerns regarding the proposed amendment to the ARC. The ARC is a mandatory code promulgated by the OEB, carrying the force and weight of law. Furthermore, in the hierarchy of OEB codes, the ARC prevails over all others. The proposal to amend the ARC to reflect a specific provision in the guidance therefore has the effect of conferring a legal, binding status upon that provision. In Hydro Ottawa’s view, the end result of such action would be at total odds with the OEB’s stated intent for the guidance to be non-binding in nature and would incur the risk of undermining the integrity of the OEB’s broader policy program on corporate governance.

In lieu of proceeding with amendments to the ARC of this nature, Hydro Ottawa encourages the OEB to adopt more of an incentives-based approach. The stakeholder sessions held in 2016 featured very good discussion on the relative merits of the OEB taking a “carrot” versus a “stick” approach, in relation to oversight of utility governance. For example, Hydro Ottawa believes that it would be a more effective and appropriate approach for the OEB to signal that the proportion of independent Directors on a utility’s Board will rank high (or perhaps highest) in the OEB’s evaluation of a utility’s governance practices for performance monitoring and rate application purposes.

3. Hydro Ottawa is strongly supportive of utility sector corporations having the ability, based upon their unique circumstances, to centralize corporate governance at the holding company level, with governance measures guiding the regulated utility. Based on its own experience, Hydro Ottawa does not believe that centralizing governance requirements and practices at the level of the regulated utility is an effective, appropriate, or necessary approach.

Hydro Ottawa observes that the OEB’s proposals appear to be rooted in a view that a utility’s governance practices should be concentrated and centralized at the utility level, and not at the holding company level. The Draft Report seems to share the support expressed in Elenchus’ report “for governance at the utility level since this approach ensures a more dedicated focus on the regulated business rather than all the activities of a corporation.”¹⁰ While the theory underlying this perspective

⁹ Draft Report, p. 9.

¹⁰ *Ibid*, p. 8.



may have merit, Hydro Ottawa cautions that its own experience has demonstrated the shortcomings of this approach in practice.

Hydro Ottawa was formed in the year 2000, following the consolidation of five distribution utilities located in the Ottawa region.¹¹ As part of its compliance with amendments to the ARC which took effect in 2006, Hydro Ottawa increased the size of its Board to include seven (7) directors. This Board provided oversight of Hydro Ottawa, concurrently with the oversight performed by the HOHI Board of the larger corporate enterprise.

Over the ensuing years, this approach led to negative outcomes for the utility and the wider corporation alike, through additional costs, inefficiencies, redundancies, and duplication in the governance structures and processes. Based on this experience, Hydro Ottawa undertook significant governance reforms in 2009 and 2014 – in particular, reconfiguration of both the holding company and utility Boards. These reforms included adjustments to the composition of Hydro Ottawa’s Board, with the number of Directors being lowered from seven (7) to three (3).

As a result of these changes, Hydro Ottawa believes that it has achieved greater efficiencies and effectiveness in its governance practices. Moreover, it is Hydro Ottawa’s view that these governance reforms have better positioned the utility to succeed in the evolving business and policy landscape in which the sector operates, and to achieve outcomes which are consistent with the performance-based approach to regulation enshrined in the *Renewed Regulatory Framework*.

In addition, Hydro Ottawa’s experience in practice has induced the utility to take the view that the need for a separate, comprehensive Board structure for the utility is obviated if the holding company Board is independent from the shareholder and boasts the necessary skills, competence, and expertise to discharge its oversight responsibilities effectively. Hydro Ottawa strongly believes that the establishment of these foundational building blocks is the primary determinant of the quality and success of a utility’s governance practices, with other considerations (including the optimal number of Directors on a Board) occupying a secondary rung on the ladder of priorities.

A final observation based upon Hydro Ottawa’s own experience is that Boards of Directors which are involved in larger areas of responsibility are more likely to be actively engaged in the work of the Board. Hydro Ottawa agrees with Elenchus’ assertion that “[d]iligence is not passive; it requires active questioning and thoughtful discussion.”¹² Hydro Ottawa believes that fulfillment of this imperative can be optimized by offering a broad spectrum of responsibilities and areas of focus to a Board.

(i) Other Considerations – Sector Diversity and Existing OEB Tools (E.g. Utility Business Plan in Rate Applications)

Beyond its own governance history and experience, Hydro Ottawa believes that there are other grounds for supporting centralization of governance practices at the holding company level.

¹¹ The major impetus for consolidation of these utilities was the amalgamation of several local municipalities into the new City of Ottawa in 2001.

¹² Elenchus Research Associates, “Corporate Governance for Regulated Natural Gas and Electricity Utilities,” (December 19, 2016), p. 18.

First, as discussed under comment #1 above, the utility sector in Ontario continues to be characterized by considerable diversity. It seems altogether appropriate for the OEB to recognize such diversity, and safeguard the conditions under which it can thrive for the benefit of the sector and consumers alike. This can be achieved by not pre-supposing the manner in which diverse and diversified utilities organize and execute their governance processes and practices.

Second, Hydro Ottawa believes that there are other tools at the OEB's disposal which can offer valuable insights into governance practices at the utility level. These include the governance-related information that the OEB has historically required utilities to submit as part of their rate applications. In addition, the OEB's updated *Handbook for Utility Rate Applications* ("Handbook") released in 2016 introduced a new requirement for utilities to submit a formal business plan as part of their rate applications. As described in the Handbook, the utility's business plan must speak to the overall strategy for the regulated business and must be informed by engagement with customers. What's more, the "utility business plan may differ from the corporate business plan that may include matters that go beyond the scope of the OEB's review in a rate application."¹³ Hydro Ottawa respectfully suggests that, as part of any new oversight activity that the OEB may assume in relation to corporate governance, particular focus be given to these utility business plans. The quality of these plans will offer unique insights into the utility's business strategy, and by extension, into the effectiveness of the governance practices that were utilized to support the formulation of this strategy.

Taken together with the preceding discussion on the company's own experiences, these considerations represent a firm basis in Hydro Ottawa's view to support the consolidation and centralization of governance practices at the holding company level, rather than at the utility level. Hydro Ottawa is confident that it is not unique amongst its peers in taking this view. Any analysis of governance trends in Ontario's utility sector would reveal that numerous utilities – of varying sizes and mandates – have opted to concentrate their governance practices at the holding company level, for a variety of reasons that are specific to their business interests and circumstances.

4. If the OEB ultimately chooses to proceed with the proposals set forth in the Draft Report, Hydro Ottawa requests the following:

- a. That the OEB refrain from adopting, or in the alternative, amend the proposed reporting requirements related to Board Directors' skills, as these requirements raise concerns around the confidentiality of the information requested.

Hydro Ottawa is concerned by the nature of the information that the OEB is requesting with regards to the skills of Directors and the expertise and experience that Directors have gained in previous positions.¹⁴ In many instances, Hydro Ottawa anticipates that such information will not be available in the public domain. Moreover, the definition of "personal information" which is protected from unauthorized disclosure under Ontario's *Municipal Freedom of Information and Protection of Privacy Act* specifically includes information relating to the education or employment history of an individual, or to financial transactions in which the individual has been involved. Similarly, Hydro Ottawa foresees a likelihood of some requested information being commercially sensitive in nature (for example, in

¹³ Handbook, p. 6.

¹⁴ Draft Report, pp. 14-15.



situations where an individual may have cultivated skills or expertise through participation in ventures or transactions that were subject to confidentiality and non-disclosure obligations).

Accordingly, Hydro Ottawa strongly encourages the OEB not to adopt these requirements, or in the alternative, to modify them such that they no longer present concerns from a confidentiality perspective and do not risk potential conflicts with provincial privacy legislation.

- b. That utilities be granted the opportunity to explain through their baseline and annual reporting how their governance practices are effective, how such practices are consistent with the OEB's goals, and how such practices meet or exceed the best practices included in the guidance.

In discussing the topic of Director independence in its report to the OEB, Elenchus recommended that a utility should explain in its baseline reporting how its governance practices address the OEB's applicable goals and concerns.¹⁵

Hydro Ottawa believes that Elenchus' recommendation touches upon an important concept. With limited exceptions, the standard form of RRR reporting does not allow for utilities to input additional context or explanation, alongside the information that is submitted to the OEB. In light of the RRR requirements that are proposed in the Draft Report, as well as the OEB's stated intent for the guidance to be non-binding, Hydro Ottawa requests that the OEB incorporate into the form and design of the RRR report an opportunity for a utility to elaborate further on its submission – particularly in instances where the utility chooses not to adhere to the OEB's guidance, whether in whole or in part. For example, this opportunity could take the form of a specific comment box which would grant ample space to a utility to insert an appropriate explanation or description of its governance architecture.

IV. Conclusion

Hydro Ottawa appreciates the opportunity to provide comments on the Draft Report, and respectfully requests that any subsequent action taken by OEB be consistent with the comments set forth herein.

Hydro Ottawa looks forward to remaining engaged in this consultation.

Sincerely,

Original signed by Gregory Van Dusen

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¹⁵ Elenchus, p. 57.