

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, as amended;

AND IN THE MATTER OF an application by Niagara-on-the-Lake Hydro Inc. for an order or orders approving electricity distribution rates and other charges commencing as of May 1, 2019.

AND IN THE MATTER OF the Board's Decision and Order dated April 11, 2019 (updated April 23, 2019).

AND IN THE MATTER OF Rules 8 and 40, 42 and 43 of the *Rules of Practice and Procedure* of the Ontario Energy Board.

NOTICE OF MOTION

Niagara-on-the-Lake Hydro Inc. (NOTL Hydro) will make a motion to the Ontario Energy Board (OEB, or the Board) on a date and at a time to be determined by the Board.

PROPOSED METHOD OF HEARING: NOTL Hydro proposes that the Motion be heard by way of a written hearing.

THE MOTION IS FOR:

1. A review and variance of those portions of the Decision and Order in EB-2018-0056 dated April 11, 2019 (updated April 23, 2019) (referred to herein as the Decision) in which the OEB determined NOTL Hydro's Operating, Maintenance and Administration (OM&A) budget for 2019.
2. An Order approving a revised 2019 OM&A budget of \$2,964,765 for NOTL Hydro.
3. An Order that NOTL Hydro satisfies the "threshold test" in Rule 43.01 of the Board's *Rules of Practice and Procedure*.
4. Such further and other Orders as NOTL Hydro may request and the Board approves.

THE GROUNDS FOR THE MOTION ARE:

The proceeding

1. On August 23, 2018, NOTL Hydro filed an application for 2019 distribution rates, to be effective May 1, 2019.
2. NOTL Hydro filed evidence on all aspects of its application, including its proposed 2019 OM&A budget of \$2,964,765 for the Test Year (as updated). NOTL Hydro answered interrogatories from the three participants in the proceeding (Board Staff, SEC and VECC) in November 2018 (with follow-up questions in December 2018), and the parties then participated in a Settlement Conference in December 2018.
3. On January 10, 2019, NOTL Hydro filed a (partial) Settlement Proposal with the OEB. The Settlement Proposal indicated that there are six “Unsettled Items”, including the OM&A cost forecast for the Test Year.
4. After the Settlement Proposal was filed, the evidentiary record in the proceeding was completed, with the filing of Additional Evidence related to OM&A and other unsettled items, along with interrogatory responses on the Additional Evidence.
5. On the issue of OM&A budget, NOTL Hydro provided a total of 356 pages of prefiled evidence and answered 45 interrogatories.
6. On February 8, 2019, the Board issued its Decision on Partial Settlement Agreement and Procedural Order No. 4, accepting the Settlement Proposal and the rates that result, subject to the adjustments arising from the OEB’s decision on the unsettled issues. The Board agreed that no oral hearing was necessary to determine the unsettled issues. The parties filed written argument on the unsettled issues in February and March 2019.

The Decision

7. The Board issued the Decision on April 11, 2019 (with a correction later being issued on April 23, 2019). The Decision addressed each of the unsettled items in the proceeding, including NOTL Hydro’s 2019 Test Year OM&A budget.
8. The Board-approved 2019 OM&A budget for NOTL Hydro set out in the Decision is \$2,671,367. In making this determination, the Board reduced NOTL Hydro’s proposed 2019

OM&A budget by \$293,000, to a level that is \$168,000 lower than NOTL Hydro's actual OM&A expenditures for 2018.

9. The Decision on NOTL Hydro's 2019 OM&A budget does not consider the actual base components of NOTL Hydro's OM&A costs, nor the utility's most recent actual costs. No explanation is provided as to why the approved budget is reasonable in contrast to these items. Additionally, no recognition was given for the fact that NOTL Hydro's existing and proposed rates are among the lowest of its peers.
10. The Decision determined NOTL Hydro's 2019 OM&A budget by starting with the 2014 Board-approved OM&A budget and then applying adjustments to account for inflation, stretch factor and customer growth for each year up to 2019. Contrary to the evidence and the submissions from NOTL Hydro, the Decision declined to include any adjustment to account for cost pressures arising from kWh delivered and system peak capacity.
11. The Decision also included allowances for costs of some (but not all) new requirements identified as cost drivers by NOTL Hydro. No explanation is provided as to how the items and amounts approved were chosen, nor as to why other new requirements described in evidence and argument were not approved.
12. Finally, the Decision recognized that certain costs that had previously been capitalized should be included the 2019 OM&A budget. However, the Decision declined to treat these items as being notionally included in the 2014 base OM&A budget, meaning that NOTL Hydro was not credited with the impact from inflation and growth on these costs.

The errors in the Decision

13. Rule 40.01 of the Board's *Rules of Practice and Procedure* allows any person to 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.
14. Rule 42.01(a) of the Board's *Rules of Practice and Procedure* requires that a notice of motion shall 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;
- (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;

15. The OEB has confirmed that this list of grounds is “not an exhaustive list”. What is required is that the motion to review must raise a question as to the correctness of the order or decision.¹ The moving party must demonstrate that the findings are contrary to the evidence before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings or something of a similar nature. The moving party must also demonstrate that the alleged error is material and would vary the outcome of the decision.²

16. NOTL Hydro respectfully submits that there are several material errors in the Decision on the Test Year OM&A budget. These can be summarized as follows:

- i. The Decision failed to take account of NOTL Hydro’s detailed evidence about its forecast OM&A costs for 2019, and about the actual costs required to run the utility in 2018.
- ii. Despite contrary direction from the Pacific Economics Group Research, LLC (PEG) reports to the OEB, the Decision in this case failed to include the impact of the growth in NOTL Hydro’s kWh delivered and system peak capacity over the years from 2014 to 2019 when determining a reasonable level of OM&A costs for the Test Year.
- iii. While the Decision properly recognized that NOTL Hydro faces extraordinary costs that will not be accommodated in an OM&A budget that is increased only by inflation and growth, the Decision fails to recognize all such extraordinary cost items and provides no explanation as to the items and amounts excluded.
- iv. While the Decision properly determined that NOTL Hydro should be permitted to include in the Test Year budget certain previously capitalized OM&A costs that were

¹ EB-2016-0005 Decision on Motion to Review and Vary by the City of Hamilton, March 3, 2016, at page 4.

² EB-2006-0322/0338/0340 Decision with Reasons on Motions to Review the Natural Gas Electricity Interface Review Decision, May 22, 2007, at page 18.

not included in the base 2014 OM&A budget, it is inconsistent to exclude those costs from the base costs that are adjusted to arrive at the 2019 Test Year budget.

17. Each of the errors raise questions as to the correctness of the Decision, and are material to the outcome of the proceeding. More detail is provided below.

(i) *Failure to consider NOTL Hydro's evidence about forecast and actual costs*

18. As required by the Board's Filing Requirements For Electricity Distribution Rate Applications, as part of its application NOTL Hydro filed detailed pre-filed evidence about its 2019 OM&A budget. NOTL Hydro provided explanations of the main cost drivers and included breakdowns of the changes in OM&A costs from year to year. NOTL Hydro's Argument in Chief and Reply Argument each highlighted the relevant evidence explaining the elements of the 2019 OM&A budget. As was highlighted in NOTL Hydro's written Argument in Chief, the costs NOTL Hydro is incurring for 2019 are current costs developed as NOTL Hydro has responded to the needs of its customers and are not proposed future costs.

19. NOTL Hydro's evidence and argument also highlighted the utility's most recent actual OM&A expenditures (\$2,838,525 for 2018) and asserted that this is the most appropriate starting point to determine a 2019 budget level. NOTL Hydro pointed to a recent Thunder Bay Hydro decision of the OEB where the Board agreed that looking at the most recent OM&A expenditures and adjusting for inflation, growth and stretch factor is an appropriate way to evaluate a forecast Test Year budget.

20. In the "Findings" part of the review of NOTL Hydro's OM&A budget, the Decision did not make any reference to NOTL Hydro's evidence about the components of its OM&A costs, nor to NOTL Hydro's most recent actual expenditures. Instead, the Decision used an "envelope approach to the budget" that adjusted the 2014 OM&A budget for inflation, customer growth and stretch factor, and then made a small number of discrete adjustments. The Decision stated that this envelope approach "helps provide a yardstick that avoids micromanagement of the regulated utility and helps the regulator cope with any asymmetries of information that can be present". Importantly, the Decision does not point to any particular instances of "information asymmetry" in this case. Parties in this case were content to proceed with a written hearing, suggesting that there were no serious concerns about the completeness of the record.

21. The Decision's failure to take account of NOTL Hydro's detailed evidence about its forecast and actual OM&A costs and instead use a "yardstick" calls into question why the OEB's own Filing Guidelines require detailed budget information to be filed and examined. If the OEB requires this information to determine a cost of service application, then it is not correct to ignore the information when making a decision on the application. That is particularly the case when the applicant is relying on the specific evidence filed to support its case.
22. The approach taken in the Decision to set NOTL Hydro's new OM&A budget through a benchmarking exercise rather than evaluate the costs on their own merits is troubling. The stretch factors and elasticity factors found in the PEG reports applied to assess a distributor's costs are meant to be used as a point of comparison in evaluating NOTL Hydro's OM&A and not as the determinant of approved future budgets. Based on the Board's Renewed Regulatory Framework for Electricity (RRFE), a Cost of Service application is meant to determine the "Going In" rates or the rebasing upon which benchmarking is applied for the following four years. The RRFE emphasizes that while actual costs are decoupled from prices during the IR term, that link is restored at the cost of service review. This cannot happen if the cost of service rates are set based on a formulaic basis, starting from prior approved budgets. That approach means that rates are forever decoupled from costs. Under that approach, the determination and approval of actual costs never happens.
23. NOTL Hydro submits that the OEB's Decision on the 2019 OM&A budget is contrary to the evidence filed, and is contrary to policy and previous decisions of the OEB determining OM&A budgets. No explanation is provided as to what, if any, items in the detailed OM&A budget are unreasonable. No explanation is provided as to why it is reasonable for the approved budget to be \$168,000 lower than NOTL Hydro's actual OM&A expenditures for 2018.
24. These errors are material, and they render the Decision incorrect.
 - (ii) *Failure to include the impact of growth in NOTL Hydro's kWh delivered and system peak capacity*
25. NOTL Hydro's Additional Evidence and argument explain that if the OEB decides to confirm NOTL Hydro's 2019 OM&A budget by reference to the 2014 Board-approved budget, then it is appropriate to adjust the prior budget by several factors, including inflation, customer

growth, stretch factor, load growth and system peak load growth. This is consistent with the approach used by the OEB's expert PEG, which applies five factors to calculate the impact of growth on costs.³ These factors are customer growth, load growth, system peak growth, increase in distribution lines and acceleration in customer growth. In its Additional Evidence and argument NOTL Hydro used the first three of these items in evaluating the impact of growth on OM&A costs - the latter two items were not used because NOTL Hydro has seen no noticeable change in either the amount of distribution lines or the rate of customer growth.

26. In its determination of the 2019 OM&A budget, the Decision declined to follow the approach proposed by NOTL Hydro. The Decision states "NOTL Hydro also suggested additional load and peak factors as escalators to the 2014 OEB-approved OM&A. However, there is no indication that any increases caused by these factors would not be captured in whole or in part by the customer growth factor."
27. This determination is incorrect. The evidence that increases in load (kWh delivered) and peak load contribute incrementally to a distributor's costs is clear from the reports from PEG, the Board's own expert. While the PEG report found that the number of customers was the dominant cost driver, four other cost drivers were identified as being statistically significant: peak demand, kWh deliveries, circuit km of line and share of customers added over the last 10 years.
28. As explained in the PEG report of November 2013, "PEG developed an econometric model to benchmark distributors' total cost performance. PEG's recommended model finds that there is a statistically significant relationship between a distributor's total costs and five business condition variables: 1) the number of customers served; 2) kWh deliveries; 3) system peak capacity; 4) the average km of distribution over the sample period; and 5) the percent of customers added in the last 10 years."⁴ As each of these items is statistically significant, it cannot be said that they are all captured by the customer growth factor.
29. By using only the one variable, the Decision has systematically understated the impact of growth on NOTL Hydro's OM&A. The variables used by PEG are drivers of both OM&A and

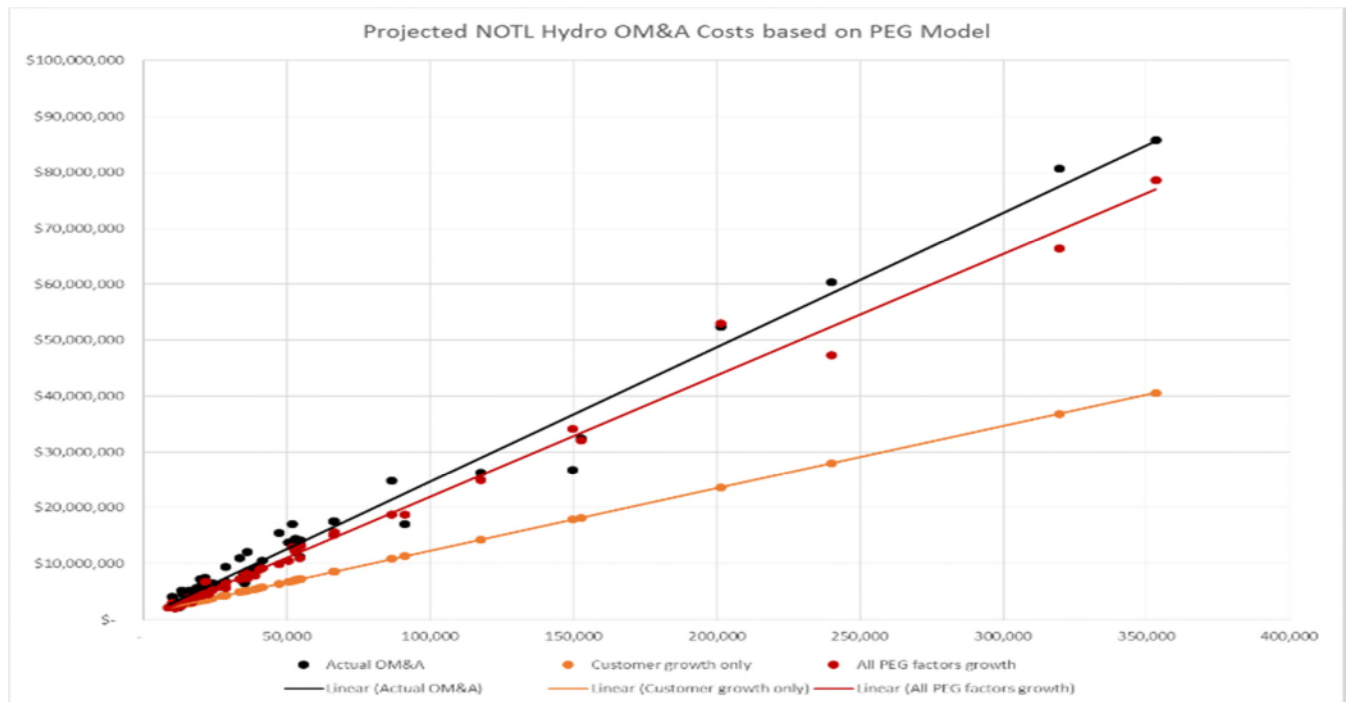
³EB-2010-0379, Report of the Board titled "Rate Setting Parameters and Benchmarking under the Renewed Regulatory Framework for Ontario's Electricity Distributors", December 4, 2013, page 23.

⁴ Pacific Economics Group Research, LLC, Productivity and Benchmarking Research In Support Of Incentive Rate Setting in Ontario: Final Report to the Ontario Energy Board, November 2013, at page 10.

capital costs. Factors like system peak growth and load growth increase a utility's operating costs, particularly in the case of a distributor like NOTL Hydro, which has significant transmission assets.

30. The fact that considering only customer growth understates OM&A impacts can be seen by comparing NOTL Hydro to other distributors. In the graph below, NOTL Hydro has extrapolated its OEB-approved 2014 OM&A to calculate what the 2014 OM&A would have been based on the customer counts of the larger Ontario distributors using the PEG model. If the observation in the Decision that only customer growth impacts OM&A expenditures is correct, then NOTL Hydro's extrapolated OM&A should be close to the actual OM&A of the other distributors. However, the results are that, on average, if only the customer count (customer growth factor) is used then NOTL Hydro's extrapolated OM&A is only 55% of the actual OM&A of the other distributors. On the other hand, if the full PEG model (with the five growth factors) is used then NOTL Hydro's extrapolated OM&A is 85% of the actual average OM&A.
31. This analysis is illustrated in the graph below. The black dots and the black trend line are the actual OM&A costs of all larger Ontario distributors sorted by customer count.⁵ The orange trend line and orange dots represent what NOTL Hydro's OM&A would be using the customer count of all the other larger Ontario distributors using the PEG formula in the Decision. The red trend line and dots represent what NOTL Hydro's OM&A would be using the PEG formula with all five statistically significant variables. As can be seen, using all five PEG factors leads to an extrapolated NOTL Hydro OM&A amount that is much closer to the actual costs of other distributors, confirming that using all five factors is a much more accurate estimation formula.

⁵ All data used was taken from the OEB's 2014 Yearbook of Electricity Distributors (July 31, 2015). Hydro One and Toronto Hydro have been removed as their size has the visual impact of moving all other distributors into the lower left section. Their removal has no impact on the analysis.



32. The difference in NOTL Hydro's 2019 OM&A budget between calculating the needed growth in OM&A using only customer count and using all the statistically significant PEG factors is \$129,524. This can be seen in the table below.

	Board Approved 2014	Actual					Projected	
		2014	2015	2016	2017	2018	2019	
Base OM&A Expense	2,155,262	2,208,203	2,243,119	2,292,101	2,355,575	2,384,019	2,441,167	
Escalator Rates								
Inflation (OEB)		0.00%	1.60%	2.10%	1.90%	1.20%	1.70%	
Base Productivity		0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	
Stretch Factor (PEG Group 3)		0.00%	0.30%	0.30%	0.30%	0.30%	0.30%	
Sub-Total		0.00%	1.30%	1.80%	1.60%	0.90%	1.40%	
Customer Growth (Growth x PEG Elasticity of 0.4485)		0.28%	1.51%	1.40%	0.91%	0.70%	0.87%	
		0.28%	2.81%	3.20%	2.51%	1.60%	2.27%	
Base OM&A Expense adjusted for Inflation + Customer growth		2,161,224	2,221,889	2,293,029	2,350,478	2,388,019	2,442,148	
kWh Growth (Growth x PEG Elasticity of 0.1083)		0.08%	0.26%	0.48%	(0.29%)	0.34%	1.04%	
System Peak (Growth x PEG Elasticity of 0.1623)		(1.58%)	1.34%	1.41%	(2.06%)	4.05%	0.41%	
		(1.50%)	1.59%	1.89%	(2.35%)	4.40%	1.45%	
Additional Base OM&A from kWh and System Peak escalators		(32,290)	698	42,714	(11,115)	91,605	129,524	
Base OM&A Expense adjusted for inflation/customer growth/load/peak		2,128,934	2,222,588	2,335,743	2,339,363	2,479,624	2,571,673	
2014 IFRS Impact - adjusted for escalators	130,784	129,187	134,870	141,736	141,956	150,467	156,053	
2014 Board Approved OM&A expenses adjusted for escalators and IFRS impacts		2,258,120	2,357,457	2,477,479	2,481,319	2,630,091	2,727,725	

(iii) *Failure to include relevant new and increased costs*

33. The Decision appropriately acknowledges simply applying escalation factors to NOTL Hydro's 2014 base OM&A budget will not accommodate the costs of new requirements that must be met by the utility and that have arisen since 2014. NOTL Hydro's evidence and argument explained a range of new and increased services whose costs will not be accommodated in an OM&A budget that is increased only by inflation and growth.

34. The Decision recognized some but not all of NOTL Hydro's filed costs for new and increased services. These are provided in the table below:

New / Increased Service	Description	Application	Decision	Variance
IT & Cyber security	This includes the cost of the new IESO service, future audits and consulting on the new framework. The disallowed amount of these costs (\$37,394) are the incremental costs with NOTL Hydro's service provider, Skycomp, in order to implement the new IT controls to meet the increased cyber security risks.	\$67,394	\$30,000	(\$37,394)
Utilismart	This is a new service NOTL Hydro began implementing in 2018 which will improve the handling of MicroFIT and other renewable generation customers, provide better data to GS>50 customers and assist the new monthly IESO settlement process. GS>50 customers want this data for their own energy use analysis. This cost, as relates to the MicroFIT customers, is being covered by the increase in the MicroFIT charge to \$10 a month which is included in Other Revenue and was approved in the Decision. Customers are getting the benefit of the revenue offset from this charge, but NOTL Hydro is not recovering the associated cost because it is not included in the approved OM&A budget.	\$56,844	-	(\$56,844)
Regulatory costs and survey	These items include the increased cost of this application as compared to the 2014 cost of service case (note that the actual costs of his application will be higher than claimed here), the cost of the annual new surveys (customer satisfaction and safety) and the increased cost of charges by the OEB allocated to distributors. All of these are new since 2014.	\$36,528	\$13,988	(\$22,540)

Locates	Increased costs arising from Province-wide initiatives to promote the need for customers to request locates.	\$36,566	\$36,566	-
Health & Safety Consultant	Safety is the top priority at NOTL Hydro. This cost is for a new, part-time position created in 2015 to ensure safety is maintained at the highest standard at NOTL Hydro and that NOTL Hydro is prepared to meet all ESA and Minister of Labour requirements.	\$31,367	-	(\$31,367)
Pole rentals	Increased costs resulting from higher pole rental charges from Bell Canada.	\$8,341	\$8,341	-
Total		\$237,040	\$98,435	(\$138,605)

35. The Decision provides no explanation as to why some of these costs were accepted and others were not. The evidence in this case establishes that the costs for each of the claimed items relates to a new requirement that has arisen since 2014 which must be met by the utility. By the OEB's own reasoning, each of these costs should be included in NOTL Hydro's 2019 OM&A budget. The Decision provides no information or determination supporting any different outcome.

(iv) Failure to include previously capitalized costs in base OM&A costs

36. While the Decision properly determined that NOTL Hydro should be permitted to include in the Test Year budget certain previously capitalized OM&A costs (these costs have been moved to OM&A because of an accounting rules change), it declined to include those costs in the base 2014 OM&A budget that was adjusted to arrive at the 2019 Test Year budget.

37. The Decision on this item is in error. These previously capitalized costs are not new costs. They represent labour costs that were part of the 2014 budget, but were included in capital costs at that time. If the goal of the Decision's budget-setting exercise for 2019 is to inflate the 2014 budget by inflation, growth and stretch factor, then it is proper to use an "apples to apples" comparison, and include all preexisting costs in the 2014 base. The Decision provides no explanation for why a different approach is appropriate. The evidence does not support the Decision on this point.

38. If the Decision had applied the appropriate inflation, growth and stretch factors to the 2014 capitalized labour cost of \$130,704, the resulting 2019 OM&A budget would have been increased by \$25,269.

The errors are material

39. Each of the errors described above have a material impact on NOTL Hydro's 2019 OM&A budget. This is especially the case when one takes account of the fact that NOTL Hydro's 2019 OM&A budget is the base for each of the next five years, meaning that the impact of the errors will be experienced five times over.
40. The Decision does not specifically deny or question any of NOTL Hydro's OM&A cost forecasts filed in this case. NOTL Hydro submits that had the Decision examined the actual costs and cost forecasts filed, then the requested OM&A budget would have been approved.
41. The table below explains the impact of the other errors in the Decision (taken together these items represent the difference between NOTL Hydro's filing and the OM&A budget approved):

Use of all relevant grown factors in the PEG model	\$129,524
Accounting change	25,269
New or increased services	138,605
Total	\$293,398

42. It is respectfully requested that the Decision be adjusted accordingly, to approve a 2019 Test Year OM&A budget of \$2,964,765.

NOTL Hydro satisfies the threshold test

43. Rule 43.01 of the Board's *Rules of Practice and Procedures* states that "In respect of a motion brought under Rule 40.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits."
44. Each of the four errors highlighted in this Notice of Motion raises material questions about the correctness of the Decision. Correcting these errors will materially impact the Decision. As such, NOTL Hydro satisfies the Board's threshold test and the Board should proceed to hear the motion on its merits.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The EB-2018-0056 Decision and Order dated April 11, 2019 (updated April 23, 2019).

2. The record of this EB-2018-0056 proceeding, including prefiled evidence, interrogatories and argument.
3. OEB reports and decisions, including the RRFE and the Productivity and Benchmarking Research Reports prepared by PEG for the OEB.
4. Written submissions, to be filed.
5. Such further and other documentary evidence as NOTL Hydro may provide and the Board approves.

April 29, 2019

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
Suite 1800, Box 754
181 Bay Street
Toronto, ON M5J 2T9

David Stevens
Tel (416) 863-1500
Fax (416) 863-1515

dstevens@airdberlis.com

TO: ONTARIO ENERGY BOARD
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto ON M4P 1E4
Tel: (416) 481-1967
Fax (416) 440-7636

AND TO:

ALL INTERVENORS IN EB-2018-0056