



DECISION AND ORDER

EB-2019-0143

NIAGARA-ON-THE-LAKE HYDRO INC.

MOTION TO REVIEW AND VARY THE ONTARIO ENERGY BOARD'S DECISION AND ORDER DATED APRIL 23, 2019 RE NIAGARA-ON-THE-LAKE HYDRO INC.'S 2019 DISTRIBUTION RATE APPLICATION (EB-2018-0056)

BEFORE: Susan Frank
Presiding Member

Michael Janigan
Member

Robert Dodds
Member

September 12, 2019



TABLE OF CONTENTS

1	INTRODUCTION AND SUMMARY.....	1
2	THE PROCESS	3
3	THE THRESHOLD TEST.....	4
4	ORDER	14

1 INTRODUCTION AND SUMMARY

This is a motion brought by Niagara-on-the-Lake Hydro Inc. (NOTL Hydro) to review and vary portions of the Decision and Order in EB-2018-0056 of the Ontario Energy Board (OEB) dated April 23, 2019 (the Decision) in which the OEB determined NOTL Hydro's Operating, Maintenance and Administration (OM&A) budget for the 2019 (Test Year OM&A).

NOTL Hydro asserts that there are several material errors in the Decision on the Test Year OM&A budget, namely:

1. Failure to consider NOTL Hydro's evidence about forecast and actual costs
2. Failure to include the impact of growth in NOTL Hydro's kWh delivered and system peak capacity
3. Failure to include relevant new and increased costs
4. Failure to include previously capitalized costs in base OM&A costs

NOTL Hydro claims that the impact of the errors in the Decision represents the difference between NOTL Hydro's as-filed and as-approved OM&A budget for 2019.

NOTL Hydro further states that each of the four errors highlighted in this Motion raises material questions about the correctness of the Decision. Correcting these errors will materially impact the Decision. As such, NOTL Hydro satisfies the OEB's threshold test and the OEB should proceed to hear the motion on its merits.

NOTL Hydro asserts in its submission that the OEB failed to consider the context of NOTL Hydro's requests because:

1. NOTL Hydro has maintained low rates and only added costs where necessary
2. The OEB's failure to take account of actual OM&A expenditures will have negative impacts on customer service

The OEB's *Rules of Practice and Procedure* provide that the OEB may, in respect of a motion filed, determine a threshold question of whether the matter should be reviewed before conducting any review on the merits of the motion. The OEB made provision for submissions on the threshold question.

The OEB has determined that the motion to review fails the threshold test. The OEB finds that the errors alleged by NOTL Hydro in arriving at the approved OM&A are

based on NOTL Hydro's preference for its own estimation of the appropriate amount rather than an actual mistake in the OEB's approach or calculations. The OEB finds that the methodology to determine OM&A was reasonable and it was applied correctly in the Decision as intended.

2 THE PROCESS

NOTL Hydro's 2019 Cost of Service rate application was partially settled under the terms of the Settlement Proposal dated January 10, 2019. The Settlement Proposal indicated that there are six "Unsettled Items", including the OM&A cost forecast for the 2019 test year. NOTL Hydro filed the additional evidence on the OM&A and other unsettled items along with the interrogatory responses on the additional evidence.

On February 8, 2019, the OEB issued its decision on the partial Settlement Agreement accepting the Settlement Proposal and the rates that result subject to the adjustments arising from the OEB's decision on the unsettled issues. The OEB issued the Decision and Order on April 11, 2019 (with a correction later being issued on April 23, 2019) in which it approved NOTL Hydro's 2019 OM&A budget of \$2,671,367.

On April 29, 2019, NOTL Hydro filed a Notice of Motion to review and vary the Decision. The Notice of Hearing and Procedural Order No. 1 relating to the motion was issued on June 6, 2019. The OEB adopted all parties to NOTL Hydro's 2019 Cost of Service proceeding as parties to the motion proceeding.

Procedural Order No. 1 made provision for written submissions by the parties on the threshold question and the merits of the motion. School Energy Coalition (SEC), Vulnerable Energy Consumer Coalition (VECC), and OEB staff filed written submissions on the threshold question and merits of the motion on July 11, 2019. NOTL Hydro filed a reply submission on July 25, 2019.

3 THE THRESHOLD TEST

The OEB threshold test associated with motions for review and variance requires that the motion applicant assert errors that raise material questions as to the correctness of the decision. NOTL Hydro alleges four errors that raise such questions:

I. The Decision failed to take account of NOTL Hydro’s detailed evidence about its forecast OM&A costs and the actual costs required to run a utility

NOTL Hydro claims that the use of an envelope formulaic approach to fashion the OM&A ignored the detailed evidence concerning its actual and future costs that it is required to file as per the OEB’s filing requirements¹ and this evidence cannot be ignored when setting the OM&A budget. If actual and forecast costs are determined by formula, then the going in rates for the Incentive Rate Mechanism framework may not match the particular circumstances of the utility. The Decision does not take issue with any particular OM&A expense and does not recognize NOTL Hydro’s achievements in terms of lowering its rates in terms of the provincial averages.

In its submission, SEC referenced the OEB’s decision in Hydro One Networks Inc. distribution application as to the appropriateness of the envelope approach:

In the past, the Board has used different techniques to determine the allowed OM&A. In some cases a detailed line by line examination has resulted in an equally detailed funding prescription from the Board. In other cases the Board has provided the applicant with an overall envelope of funding. ... leaves to the applicant the freedom to apply that spending according to its own prioritization.²

SEC referred to this Hydro One decision to support the Decision’s statement that “an envelope approach to the budget 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”.³ An envelope approach assesses the reasonableness of the overall request.

SEC submitted that the envelope approach is “a true outcomes-based approach, consistent with the Renewed Regulatory Framework, and reflective of how the market normally works. The whole concept of a market proxy is that the competitive markets

¹ The OEB’s Filing Requirements for Electricity Distribution Rate Application for 2019 Rates

² Decision and Order (EB-2009-0096), Hydro One Networks Inc., April 9 2010, p.10

³ Decision and Order (EB-2009-0096), Hydro One Networks Inc., April 9 2010, p.12

set external limits on the prices charged by companies, and those external limits are expressly not tied to the costs actually incurred by those companies”.⁴

SEC was also critical of NOTL Hydro’s claim that 2018 actuals are the best evidence of the cost to run NOTL Hydro’s business. SEC submitted that 2018 is not a reasonable starting point for 2019 as it was 11.2 % more than 2017. SEC noted that NOTL Hydro management’s decision to spend to that high level in 2018 does not mean those costs are reasonable or prudent.

OEB staff in their submission provided OEB decisions that took an envelope approach: Hydro One Networks’ 2010 and 2011 cost of service decision⁵ and Kingston Hydro Corporation’s 2011 cost of service decision.⁶ OEB staff provided two other cases that took a similar envelope approach to setting OM&A rejecting the use of the most recent OM&A actual expenditures as the starting point:

- The OEB finds that Canadian Niagara Power Inc. (CNPI)’s budget should remain, at most, close to the level of inflation reduced by the stretch factor of 45 basis points and should account for customer growth. This should be applied against actual OM&A spends in 2013.⁷
- The OEB used the same approach in its analysis of Innpower Corporation’s OM&A budget in that 2017 cost of service decision. For the calculation of the expected OM&A increase in 2017 test year, the OEB started with the 2013 OM&A budget.⁸

OEB staff concluded with the following:

The jurisprudence on administrative tribunal decision-making has established that it is not necessary for a tribunal to include explicit findings “on each constituent element leading to its final conclusion” or to address all of the evidence or arguments, especially if they are not part of the path to its decision.⁹

VECC noted the supplementary submissions of NOTL Hydro are largely re-argument of evidence already put forward and considered. VECC questioned the use of 2018 costs as the basis of 2019 costs noting that it would be a simple matter for any utility to inflate

⁴ SEC’s submission, July 11, 2019, page 6

⁵ Hydro One Networks Inc., Decision and Order EB-2009-0096

⁶ Kingston Hydro Decision and Order EB-2010-0136

⁷ Canadian Niagara Power Inc. Decision and Order EB-2016-0061, pages 5-6

⁸ Innpower Corporation Decision and Order EB-2016-0085, page 23

⁹ *S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.*, 1973, [1973] S.C.J. No. 148 at para 11. See also *N.I.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011, [2011] S.C.J. No. 62 at para 16 and *Clifford v. Ontario (Attorney General)*, 2009, [2009] ONCA 670, [2009] O.J. NO.3900 at paras37-44

its actual operating costs in the year before its rebasing to embed a higher ongoing cost.

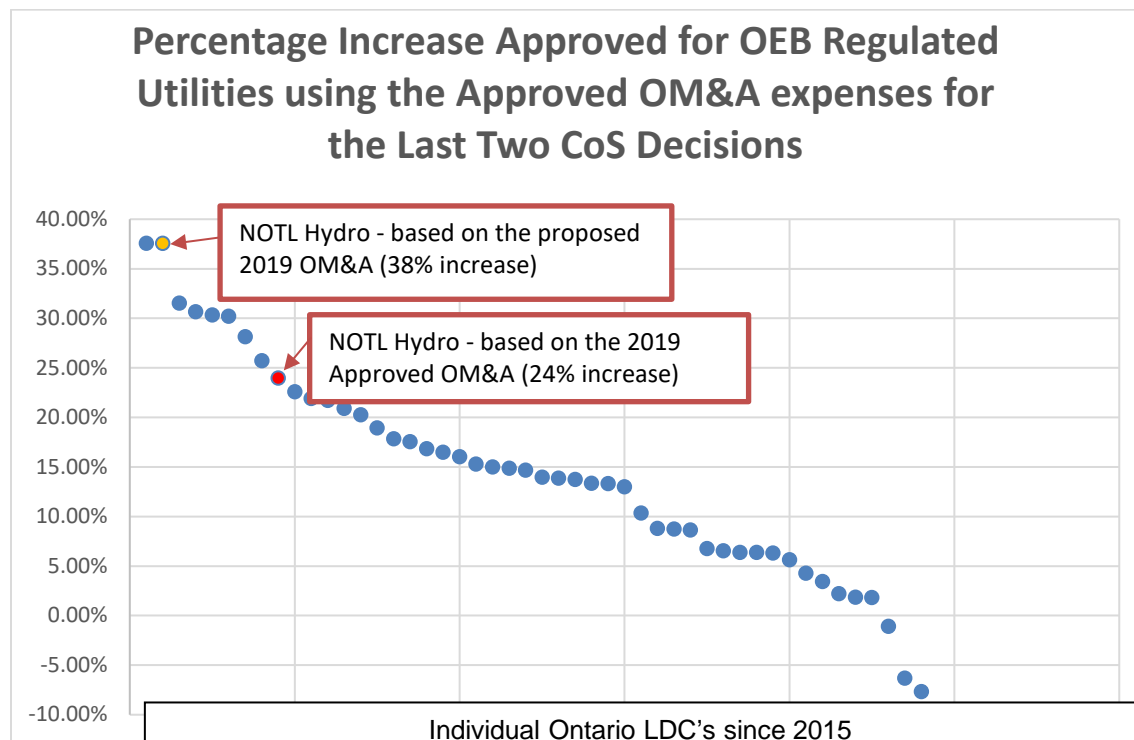
Findings

The Decision noted that the approval of an OM&A budget is both intended to recognize prudent proposed expenditures and to encourage continuous improvement. To do so involves not just an exercise of examining individual aspects of the OM&A budget, but also the size of the OM&A increase that is being sought. While individual proposed expenses may be found to be prudent, the OEB also must consider whether the overall budget is reasonable. Comparisons between previous years or industry standards may be used to assist in making such determinations. While individual expenditures may have a reason for their incurrence, the wisdom of their inclusion may also be questioned given the size of the OM&A increase sought.

NOTL Hydro applied its own envelope approach in its supplementary evidence. NOTL Hydro used as its main cost drivers in the OM&A budget increase inflation, growth, accounting standards, and certain new or increased services. Having presented an envelope approach in its supplementary evidence, NOTL Hydro nevertheless did not agree with the parameters used by the OEB or the use of an envelope in the Decision.

In support of its disagreement with the Decision, NOTL Hydro introduced in its motion argument a table based on the 2014 OEB Yearbook of Electricity Distributors. This table was to support NOTL Hydro's position that the use of the Decision's envelope approach would underestimate costs for a sample of large distribution utilities and, presumably, failed to approve reasonable OM&A costs for NOTL Hydro.

To act as a check on the reasonableness of the outcome of the Decision's approach and to review more recent applicable publicly available OEB data, the OM&A approved by the OEB over the last five years was examined. The accompanying chart below setting out the percentage increase of OM&A budgets for OEB approved OM&A budgets since 2015 rebuts any inference that the methodology used to approve OM&A was unreasonable in its outcome.



Note: the approved OM&A expenses were adjusted for the Modified International Financial Reporting Standard impact as applicable.

Using the OM&A increase of 38% requested by NOTL Hydro, NOTL Hydro is the second highest out of 47 utilities in the province in terms of the percentage increase in OM&A expenses using the last two cost of service applications. Using the 24% OM&A increase awarded in the Decision results in NOTL Hydro as the ninth highest out of 47 in terms of the percentage increase in OM&A expenses using the last two cost of service applications.

The Decision, in fact, provided an OM&A increase that was higher than typical for other Ontario electrical distribution utilities. Rather than make specific program cost-cutting decisions to achieve a more reasonable budget, the OEB used both accepted metrics and judgment to allow NOTL Hydro to make programming decisions.

Finally, NOTL Hydro’s complaint that the Decision took an exclusively formulaic approach to setting OM&A without reference to NOTL Hydro’s evidence is belied by the fact that the formula only accounted for slightly more than half the approved OM&A increase. The budget suggested by the formula was augmented by expenditures identified in NOTL Hydro’s evidence that amounted to over 44% of the increase of 24% over 2014 OEB approved.

The setting of an OM&A envelope for NOTL Hydro was a reasonable approach.

II. The Decision failed to include the impact of growth in NOTL Hydro's kWh and system peak capacity

NOTL Hydro submits that the Pacific Economics Group (PEG) model recognizes five growth factors as significant drivers of utility costs and that three of those factors - customer count, kWh growth and system peak capacity have an impact on OM&A costs. NOTL Hydro states that the Decision's use of only customer growth as a cost escalator and not the other two factors underestimates cost pressures. According to the PEG model customer growth increases utility costs by a factor .4485, kWh growth by a factor of .1083, and system peak by a factor of .1623. The utility submits that all three factors must be applied to NOTL Hydro's 2014 OEB approved OM&A to arrive at a fair result.

SEC submitted that "while load and system peak growth do impact costs, there is no evidence that they materially impact the OM&A, as opposed to the capital portion of total costs. In fact, the evidence before the Board showed that, with respect to NOTL Hydro, they did not. When asked in an interrogatory to point to actual OM&A costs that have increased due to kWh and system peak growth, NOTL was unable to do so".¹⁰ SEC further noted that if load and system peak growth were the drivers in NOTL Hydro's OM&A costs, then the operations and maintenance categories would be the logical program with increasing costs. However, since 2014, the cost increase occurred primarily in the administrative and general category which would be more closely impacted by increased customer growth.

Findings

NOTL Hydro is correct that all three growth factors contribute to total utility costs. However, the PEG model includes both OM&A and Capital costs in the calculation of the impact of each of these three factors. NOTL Hydro has not pointed to any evidence that demonstrates that NOTL Hydro's proposed OM&A cost increase was impacted by load and system peak capacity growth.

The OEB's Decision to only include customer growth in the formula to adjust the 2014 OM&A costs was reasonable in the circumstances in this case.

¹⁰ SEC's submission, July 11, 2019, pages 7-8

III Failure to include previously capitalized costs in base OM&A Costs

NOTL Hydro submits that labour costs of \$130,784 that were included in the capital costs presented with its 2014 budget are not correct. Because the Decision takes the 2014 budget and inflates it using a number of factors, these 2014 costs should have been included in the base amount and inflated as well. NOTL Hydro maintains that the labour costs should not be treated as a new expenditure. The amount in issue is \$25,269.

In its submission on this motion, OEB staff repeated its position in NOTL Hydro's 2019 cost of service application that, as of July 2012, all distributors were required to change their capitalization and depreciation policies to be consistent with the OEB's regulatory accounting policies. OEB staff submitted that NOTL Hydro's failure to follow the accounting direction should have resulted in no recovery of the labour costs.

SEC observed that the escalation amount does not meet the requirement of being material. SEC submitted that "even using NOTL's proposed approach (including load and system peak) the amount of \$25,269 is below NOTL's materiality threshold of \$50,000".¹¹ NOTL Hydro agreed that the escalation amount would not be material on its own.

Findings

The labour costs in issue were not in the 2014 OEB-approved OM&A budget that was used as the baseline for the development of the OM&A envelope. NOTL Hydro failed to record the amount in 2014 OM&A contrary to OEB regulatory accounting policies established in 2012. While the cost was in fact recognized in the Decision, NOTL Hydro wants to have the benefit of applied yearly increases and growth made as if NOTL Hydro had not made the mistake in 2014. The OEB has allowed the costs but, in effect, disallowed an escalation of this amount in response to concerns raised by OEB staff. The OEB did not err in failing to increase these costs by yearly increases and growth.

IV Failure to include relevant new and increased costs

NOTL Hydro submits that the Decision recognized some, but not all, of the costs of its new and increased services. It asserts that the Decision provided no explanation for why some of these costs were accepted and others were not. NOTL Hydro submits that

¹¹ SEC's submission, July 11, 2019, page 10

its evidence as to the costs of new requirements that has arisen since 2014 must be included in the 2019 OM&A “by the OEB’s own reasoning”.¹²

SEC submitted that the criteria used to evaluate the costs was evident from the new or increased costs allowed. SEC noted that:

The Board provided full funding for the pole rentals (external regulatory costs imposed by Bell), and locates (caused by the Province-wide required program), which are entirely caused by new requirements. It also provided a portion of the requested IT and cyber security costs and regulatory and survey costs, reflecting that some of those costs are based on new requirements, and some are changes driven by managerial and operational decisions. It rightly determined that the additional amounts for the Health and Safety Consultant and Utilismart costs are not caused by a new requirement, and should be accommodated within the envelope budget.¹³

OEB staff noted that, in its 2017 decision and order in CNPI’s cost of service application the OEB used the same escalators as the Decision while disallowing costs arising from additional programs for the reason that they should be offset by some savings from efficiency.¹⁴

Findings

The Decision provided as follows:

This envelope must then be adjusted to recognize expenditures that are not simply improvements, updates, or changes to operations driven by management operational decisions or directions. It is expected that the escalation factors noted above should accommodate the costs of such changes. However, there are expenditures in NOTL Hydro’s 2019 budget that recognize new requirements that must be met by the utility that have arisen since 2014.¹⁵

This passage from the Decision provides the criteria that were used to decide what was a new requirement that would be recognized in rates. There was thus no error in the Decision that arose as a result of a failure to provide an explanation for the determination of what new requirements would be included in the 2019 OM&A Budget. In general terms, the Decision allowed recovery for the cost increases that were

¹² NOTL Hydro Notice of Motion, April 29, 2019, p.11

¹³ SEC’s submission, July 11, 2019, page 9

¹⁴ EB-2016-0061, pages 5-6

¹⁵ Niagara-on-the-Lake Hydro 2019 Decision and Order EB-2018-0056, pages 11-12

externally driven. There was also no error associated with a failure of the OEB to apply its own reasoning as alleged. While not specifically addressed in the Decision, the panel had before it the evidence provided by NOTL Hydro on these costs so as to be able to apply the criteria. These costs included:

	Category	\$	Reference to Evidence
1	Cyber Security	30,000	Sum of Cell E21 and Cell F21 on the Appendix 2-JB OM&A cost driver shows that Cyber Security increases relate to the OEB's Cyber Security initiatives.
2	OEB Charges	9,540	Exhibit 4, OM&A Additional Evidence, Page 12, Table 12 described the increase to the annual charge to NOTL Hydro to cover the OEB costs
3	Survey	13,988	Exhibit 4, OM&A Additional Evidence, Page 12, Table 12 highlights the new requirement for the use of a third party
4	Locates	36,566	Exhibit 4, OM&A Additional Evidence, Page 11, Table 11 refers to "public initiatives such as Ontario One Call" as driving the increase in locate requests.
5	Pole Rental	8,341	Exhibit 4, OM&A Additional Evidence, Page 11, Table 11
	Sub-total	98,435	

NOTL Hydro's Exhibit 4 on the new or increased services also provides evidence concerning the OM&A costs claimed by NOTL Hydro that were disallowed. The OEB finds that there was no error in the disallowance of these costs on the basis of non-compliance with the OEB's reasoning as submitted by NOTL Hydro. These disallowed costs could reasonably be considered improvements, updates, or changes to operations driven by management operational decisions or directions and within management discretion.

NOTL Hydro's Submission on Additional Errors

NOTL Hydro submitted there were two additional errors in the Decision, in that the OEB failed to consider the context of NOTL Hydro's requests. These are:

- NOTL Hydro has maintained low rates and only added costs where necessary

- The OEB's failure to take account of actual OM&A expense will have negative impacts on customer service

In OEB staff's submission, the issue associated with NOTL Hydro's recent performance was canvassed and considered by the OEB including evidence of a historical improvement but a more recent decline in performance. The OEB decided not to incorporate either view in the approval of an OM&A budget.

SEC submitted that NOTL Hydro's supplementary written submissions were simply a second opportunity for NOTL Hydro to argue its case. SEC stated that "the 'contextual items' have nothing to do with the alleged errors before the Board, but are simply a further chance to make the same submissions NOTL made before the original panel".¹⁶

Findings

These two additional considerations introduced by NOTL Hydro were not part of the motion. The 38% increase requested for OM&A suggests that NOTL Hydro had the opportunity to lower its rate increase if a more modest OM&A growth would have been proposed. The suggestion that customer service will be negatively impacted is not supported with facts.

The OEB does not find these additional assertions as errors in the Decision compelling and are not accepted as such.

Conclusion and Threshold Test

In accordance with Rule 43.01¹⁷, the OEB must determine a threshold question as to whether the grounds raised by the motion applicant raise a question as the correctness of the decision.

The purpose of the threshold test was articulated by the OEB in its decision on a Motion to Review the Natural Gas Electricity Interface Review Decision (NGEIR Review Decision).¹⁸ In the NGEIR Review Decision, the OEB stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision. In order to proceed

¹⁶ SEC's submission, July 11, 2019, page 10

¹⁷ OEB's *Rules of Practice and Procedure*, October 28, 2016

¹⁸ NGEIR Review Decision, page 18

with a review on the merits of a motion to review, the OEB had to determine that there was enough substance to the issues raised such that a review based on those issues could result in the OEB varying, cancelling or suspending the decision.

In the NGEIR Review Decision the OEB stated:

In demonstrating that there is an error, the applicant 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.¹⁹

The OEB finds that the errors alleged by NOTL Hydro in arriving at the approved OM&A are based on NOTL Hydro's preference for its own estimation of the appropriate amount rather than any mistake in the OEB's approach or calculations. The OEB finds that the methodology to determine OM&A was reasonable and it was applied correctly in the Decision as intended.

As confirmed by the Divisional Court in *Tribute Resources Inc. v. Ontario Energy Board*²⁰ reasonableness is the standard for review of decisions by specialized administrative tribunals such as the OEB. In citing *Gale v. College of Physicians and Surgeons of Ontario*²¹, the judgement noted:

Reasonableness is a deferential standard, animated by the principle that certain questions that come before tribunals do not lend themselves to one particular result. It is concerned with whether the outcome falls within a range of possible acceptable outcomes.

The NOTL Hydro motion fails to meet the threshold test. The OEB dismisses NOTL Hydro's motion to review and vary portions of the OEB's Decision and Order in EB-2018-0056 dated April 23, 2019.

¹⁹ Natural Gas Electricity Interface Review Decision with Reasons, EB-2006-0322/0338/0340 (May 22, 2007) (NGEIR Review Decision), page 18

²⁰ *Tribute Resources Inc. v. Ontario Energy Board*, 2018 ONSC 265 (Divisional Court) at page 4 / para 20

²¹ *Gale v. College of Physicians and Surgeons of Ontario*, 2015 ONSC 1981 at para 8; *New Brunswick (Board of Management) v. Dunsmuir*, [2008] S.C.J. No. 9 (S.C.C.) at para. 47; *Ryan v. Law Society (New Brunswick)*, [2003] S.C.J. No. 17 (S.C.C.) at paras. 48-56)

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Niagara-on-the-Lake Hydro's motion to review and vary the OEB Decision and Order in EB-2018-0056 is denied.
2. Intervenors eligible for cost awards shall file with the OEB and forward to Niagara-on-the-Lake Hydro their respective cost claims by September 19, 2019.
3. Niagara-on-the-Lake Hydro shall file with the OEB and forward to intervenors any objections to the claimed costs by September 26, 2019.
4. Intervenors shall file with the OEB and forward to Niagara-on-the-Lake Hydro any responses to any objections for costs claimed by October 3, 2019.
5. Niagara-on-the-Lake Hydro shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

All filings to the OEB must quote the file number, **EB-2019-0143**, be made in searchable / unrestricted PDF format electronically through the OEB's web portal at <https://pes.ontarioenergyboard.ca/eservice/>. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <http://www.oeb.ca/Industry>. If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a USB flash drive in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary
E-mail: boardsec@oeb.ca
Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

DATED at Toronto September 12, 2019

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary