

Hydro One Networks Inc.

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LAW

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June 3, 2021

Ms. Christine Long
Registrar
Ontario Energy Board
P. O. Box 2319, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Long:

Re: EB-2021-0154 - Proposed Amendments to Rules 40-43 of the *Rules of Practice and Procedure* Regarding Motions to Review: Invitation to Comment

Hydro One Networks Inc. appreciates the Ontario Energy Board's invitation to comment on Proposed Amendments to Rules 40-43 of the *Rules of Practice and Procedure* Regarding Motions to Review.

An electronic copy of this letter has been filed through the OEB's Regulatory Electronic Submission System.

Yours very truly,


Michael Engelberg

IN THE MATTER OF THE *ONTARIO ENERGY BOARD ACT, 1998*

**AND IN THE MATTER OF PROPOSED AMENDMENTS TO RULES 40-43
OF THE RULES OF PRACTICE AND PROCEDURE REGARDING MOTIONS TO REVIEW**

**AND IN THE MATTER OF THE ONTARIO ENERGY BOARD'S
MAY 13, 2021, INVITATION TO COMMENT ON THE PROPOSED AMENDMENTS**

COMMENTS OF HYDRO ONE NETWORKS INC.

Hydro One Networks Inc. ("Hydro One") appreciates the opportunity to provide comments on the Board's proposed amendments to Rules 40-43 of the Rules of Practice and Procedure.

The proposed rules 42 and 43 are much longer than the previous rules 42 and 43. The Board's cover letter dated May 13, 2021, uses the word "clarify" a number of times to explain that the proposed changes are to "clarify" the old rules.

Hydro One submits that the existing rules are not confusing and do not need clarification.

Rather than clarify, the proposed new rules appear to ensure that there will be fewer motions to review and to ensure that even when such motions are brought, few of them will have a chance of success.

In that regard, Hydro One notes that the word "material" is used throughout the proposed new rules:

1. In 42.01(a)(i), the error of fact, law or jurisdiction must be "material."
2. In 42.01(a)(ii), the new facts would need to be reasonably expected to have resulted in a "material" change to the decision.
3. In 42.01(c), the moving party's interests must be "materially" harmed by the decision.
4. In 43.01(d), even for the threshold test, the errors or new facts would need to be reasonably expected to result in a "material" change to the decision.
5. In 43.01(e), even for the threshold test, the moving party's interests must be "materially" harmed by the decision.

6. In 43.03, even if the moving party has met all the other new hurdles, the Board still will not need to vary its decision unless it would be necessary to make a “material” change to the decision, based on the grounds in 42.01(a).

“Material” and “materially” are extremely objective words whose use throughout the new rules would greatly increase the Board’s discretion on such motions, and the increase would be to an unreasonable extent, well beyond what is normal, customary and necessary for such a process. Additionally problematic are item numbers 3 and 5 above, where the size and financial strength of a moving party would become relevant to the disposition of the motion, thereby resulting in not only unfairness but also inconsistency in the treatment of differently sized moving parties. Even more uncertainty would be the result.

Further to the comment above regarding the result of ensuring fewer motions and lower chances of success on a motion, the new rules create a new test that would prevent a moving party from relying on an error in the “weight” that the Board placed on a particular item when the Board made its decision, even though the incorrect or erroneous weight may well have altered the Board’s decision:

7. In 42.01(a)(i), disagreement as to the “weight” that the Board places on any particular facts would not amount to an error of fact.
8. In 43.01(a), even for the threshold test, disagreement regarding the “weight” applied by the Board to particular facts cannot be relied upon by the moving party when seeking a review.

Another example of the new rules’ additional wording that would ensure fewer motions and lower chances of success is the elimination of a moving party’s reliance on how the Board exercised its discretion [see 42.01(a)(ii) and 43.01(a)].

Additionally, Hydro One submits that the proposed new rule 43.01(f), which applies to the threshold test, is unclear. It is unclear whether the intent is to allow the Board to find that the threshold test for review by the Board cannot be met if the moving party has a right to go to the Divisional Court. The situation now is that moving parties apply to both the Board and to the Court where the matter of jurisdiction is unclear. The proposed new rule may intend to clarify which body has jurisdiction, but the wording does not accomplish the clarification.

Finally, in proposed new rules 42.01(d) and 43.01(c), the Board is proposing to deny the possibility of revisions to a decision if the new facts regarding a change in circumstances were within the control of the moving party. Not only is it unclear what such “control”

would mean, but also there may well be circumstances where the fact that there was such “control” would result in an unfair denial of the motion to review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

A handwritten signature in cursive script that reads "Michael Engelberg". The signature is written in dark ink and is positioned above a horizontal line.

Michael Engelberg

Counsel to Hydro One Networks Inc.