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BY EMAIL

September 28, 2021

Ms. Christine E. Long  
Registrar  
Ontario Energy Board  
2300 Yonge Street, 27<sup>th</sup> Floor  
Toronto, ON M4P 1E4  
[Registrar@oeb.ca](mailto:Registrar@oeb.ca)

Dear Ms. Long:

**Re: Ontario Energy Board (OEB) Staff Submission – Confidential Filing  
Hydro One Networks Inc.  
2023-2027 Joint Transmission and Distribution Rate Application  
OEB File Number: EB-2021-0110**

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Please find attached OEB staff's submission in the above referenced proceeding, pursuant to Procedural Order No. 1.

Yours truly,

*Original Signed By*

Martin Davies  
Project Advisor, Electricity Distribution: Major Rate Applications & Consolidations

Encl.

cc: All parties in EB-2021-0110



# **ONTARIO ENERGY BOARD**

## **OEB Staff Submission – Confidentiality and Other Matters set out in Procedural Order No. 1**

**Hydro One Networks Inc.**

**2023-2027 Joint Transmission and Distribution Rate Application**

**EB-2021-0110**

**September 28, 2021**

## Introduction

Hydro One Networks Inc. (Hydro One) filed an application dated August 5, 2021 with the Ontario Energy Board (OEB) under section 78 of the *Ontario Energy Board Act, 1998*, seeking approval for changes to the rates that Hydro One charges for electricity transmission and distribution, beginning January 1, 2023 and for each following year through to December 31, 2027.

In Procedural Order No. 1, issued September 17, 2021 (PO #1), the OEB provided for submissions on the confidential treatment of the Confidential Labour Relations Strategy Appendix<sup>1</sup> (the Appendix) and Hydro One's proposed conditions to access the Appendix. The OEB also requested submissions on the need for a "blue page update" and on a request by Hydro One that the OEB provide for reply evidence to evidence filed by OEB staff and / or intervenors.

OEB staff's submissions on these matters are set out below.

## OEB Staff Submission

### Blue Page Update

On August 12, 2021, OEB staff held a stakeholder conference to seek input on how best to plan for an efficient and effective proceeding – with a view to meeting the OEB's performance standard of 355 calendar days.<sup>2</sup> During the stakeholder session, Hydro One indicated that it would be able to provide a blue page update to the pre-filed evidence, reflecting 2021 audited financial information, in mid-April 2022. In PO #1, the OEB provided hearing schedules reflecting scenarios where a blue page update was, and was not, filed. In addition, PO #1 requested parties to provide submissions on the need for a blue page update in this proceeding.

OEB staff is of the view that having evidence that is as up to date as possible is beneficial, particularly in this proceeding, as Hydro One is seeking approval of transmission and distribution rates for a five-year term beginning in January of 2023, and the application was filed in early August of 2021 using 2020 audited financial information and a forecast for 2021. However, OEB staff notes that it is likely that parties will seek updated financial information throughout the course of the proceeding

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<sup>1</sup> Exhibit E / Tab 6 / Schedule 1 / Attachment 5.

<sup>2</sup> This is the performance standard applicable to cost-based rate applications for approval of revenue requirements greater than \$500 million. The 355 calendar days is measured from the issuance of the completeness letter, in respect of the application, to the issuance of the OEB's decision.

(e.g., through interrogatories and undertakings), regardless of whether a blue page update is provided for in the schedule.

Given that updated financial information is likely to be requested by parties during the proceeding, OEB staff submits that, at this time, the hearing should progress under the assumption that there will be no blue page update. However, Hydro One should be prepared to provide updated financial information through interrogatory responses and undertakings, and in particular, should plan to provide any material updates for 2021 year-end results in advance of the settlement conference scheduled to commence on February 7, 2022. OEB staff invites Hydro One to comment on the need, if any, for confidential treatment of those results, and notes that the OEB's *Practice Direction on Confidential Filings* identifies "forward looking" financial information that has not been publicly disclosed and that Ontario securities law therefore requires be treated as confidential.<sup>3</sup>

In the instance that the settlement conference results in an incomplete, or no settlement, OEB staff submits that the OEB could consider at that time the value and scheduling implications of requiring Hydro One to file a blue page update. OEB staff submits that progressing in this manner would acknowledge the need for updated financial information throughout the proceeding, would not unnecessarily pause the proceeding to wait for financial information that may not be necessary for the purposes of settlement discussions, and yet still allow parties to have access to Hydro One's 2021 audited financial information if this proceeding were to require an oral hearing.

## **Confidential Treatment and Access to the Appendix**

### Confidential Treatment of the Appendix

Hydro One requests confidential treatment of the Appendix, in its entirety, as it characterizes the information as being labour-sensitive. The information contained in the Appendix provides an overview of Hydro One's objectives in upcoming rounds of collective bargaining, areas of focus, and views / assumptions with respect to certain negotiating approaches. Hydro One submits that its disclosure would prejudice its position in upcoming rounds of collective bargaining with the Power Workers' Union (PWU), Society of United Professionals (Society), and any other unions with which Hydro One negotiates. Hydro One further states that the OEB has previously granted confidential treatment for similar types of labour-sensitive information, but notes that it is unaware of other utilities previously sharing labour relations strategy information to the extent of that contained in the Appendix.

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<sup>3</sup> OEB *Practice Direction on Confidential Filings* / Appendix B / p. 3.

The Appendix was filed in this proceeding as a response to the OEB's direction that Hydro One "...include a plan with its next rebasing application to bring its compensation levels in line with market median."<sup>4</sup> OEB staff agrees that there is information in the Appendix that is labour-sensitive, but questions the need for the Appendix to be treated as confidential in its entirety. OEB staff submits that the introduction section<sup>5</sup> of the Appendix should not be granted confidential treatment.

The information detailed in the introduction provides an overview of Hydro One's objectives for the rate period. OEB staff is of the view that the nature and detail of Hydro One's objectives is at a level that, if placed on the public record, should not prejudice Hydro One in future collective bargaining negotiations. The overarching themes of the objectives appear to be similar in nature to some of the non-confidential information provided in Hydro One's pre-filed evidence and outlined on its website.

For the remaining sections of the Appendix<sup>6</sup>, OEB staff submits that the information should be granted confidential treatment. The information should be treated as confidential as it details the specific goals Hydro One has for its labour relations; provides an in-depth discussion of the viability of Hydro One's negotiating approach; and outlines Hydro One's specific strategy for upcoming rounds of collective bargaining. OEB staff submits that if such information is not granted confidential treatment, it could prejudice Hydro One's position in future collective bargaining negotiations with the PWU, Society and any other unions.

#### Access to the Appendix

Hydro One requests that access to the Appendix only be provided to individuals who execute and file the OEB's Declaration and Undertaking. However, with respect to the PWU, Society and any other unions, Hydro One requests that only external counsel and / or external consultants representing the unions in this proceeding be permitted to have access to the Appendix, and then only if they file and execute: (i) the OEB's Declaration and Undertaking; and (ii) an affidavit or sworn declaration confirming that he / she is at arms-length from the union and is not (and will not be) involved in any way in collective bargaining on behalf of the union through to the end of the rate period covered by the application.

OEB staff suggests that the approach taken by the OEB in Ontario Power Generation

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<sup>4</sup> EB-2019-0082 / Decision and Order / April 23, 2020 / p. 143.

<sup>5</sup> Exhibit E / Tab 6 / Schedule 1 / Attachment 5 / p. 1 and p. 2 (Lines 1-14).

<sup>6</sup> Exhibit E / Tab 6 / Schedule 1 / Attachment 5 / p. 2 (Lines 16-27) and pp. 3-8.

Inc.'s (OPG) 2022-2026 payment amounts proceeding can be applied to Hydro One's request in this proceeding as it relates to external union consultants' access to the Appendix, but that additional requirements should be placed on external counsel to the PWU, Society and any other unions who wish to access the Appendix in this proceeding.<sup>7</sup> In its 2022-2026 payment amounts proceeding, OPG requested confidential treatment of certain information in the Report on the Estimated Accounting Cost for Post-Employment Benefit Plans for Fiscal Years 2021 to 2026 (Aon Report). Like Hydro One's request for confidential treatment of information in the Appendix, OPG argued that the Aon Report contained assumptions that underpinned cost estimates that were labour-relations sensitive. OPG also argued that disclosure of such information could prejudice its position in upcoming rounds of collective bargaining negotiations with the PWU and Society.<sup>8</sup> To avoid prejudice to its position, OPG requested that:

"...access to [the Aon] report only be provided to those individuals who have filed a Declaration and Undertaking and, in the case of intervenor representatives of the Power Workers' Union ("PWU") and Society of United Professionals ("Society"), that they also file an affidavit with the OEB affirming that they are external to and at arms-length from the PWU and Society, as applicable, and that they are not and will not be involved in any collective bargaining-related activities on their behalf."<sup>9</sup> [Emphasis added]

In response to OPG's request, the PWU filed an argument objecting to the proposed conditions. In its argument, the PWU referenced a previous submission it had filed in a Toronto Hydro-Electric System Limited (Toronto Hydro) proceeding<sup>10</sup> where a similar issue regarding access to confidential information was addressed. The PWU outlined how, in the Toronto Hydro proceeding, it had argued that: (i) the execution of a Declaration and Undertaking was sufficient as it is common for solicitors to be required to "compartmentalize" information; (ii) in the case of lawyers, the breach of a Declaration and Undertaking is an act of professional misconduct; and (iii) that the OEB determined that the PWU's external counsel was only required to execute a Declaration and Undertaking, as the execution and filing of an additional affidavit was unnecessary.<sup>11</sup> OEB staff notes that the OEB's December 14, 2018 confidentiality decision in the Toronto Hydro proceeding specifically addressed the obligations and consequences that external counsel to a union have with regard to disclosure of confidential information by stating that:

"The OEB will permit disclosure specifically to Richard Stevenson [*sic*], counsel for PWU. No staff or other representatives from PWU are granted access. As all parties are aware, there are

<sup>7</sup> EB-2020-0290 / Decision on Confidentiality – Pre-Filed Evidence / April 13, 2021 / pp. 4-7.

<sup>8</sup> EB-2020-0290 / Request for Confidential Treatment of Information / December 31, 2020 / p. 10.

<sup>9</sup> EB-2020-0290 / Request to Limit Access to Labour-Sensitive Information / March 5, 2021 / p. 1.

<sup>10</sup> EB-2018-0165.

<sup>11</sup> EB-2020-0290 / PWU Letter of Correspondence / March 10, 2021 / pp. 2-3.

significant consequences for breaches of the OEB's Undertaking. In addition to sanctions that the OEB can take, Mr. Stevenson [sic] as a lawyer has additional obligations to the Law Society of Ontario (LSO), and in particular to the LSO's *Rules of Professional Conduct*, to which he is bound. The OEB is satisfied that the significant consequences of a breach of the [Declaration and Undertaking] are such that the risk of disclosure is minimized."<sup>12</sup>

In the April 13, 2021 confidentiality decision in OPG's 2022-2026 payment amounts proceeding, the OEB established conditions for how external counsel and external consultants to the PWU and Society would be able to access the Aon Report. The conditions applicable to external consultants representing unions differed from those for external counsel representing unions. In its decision, the OEB noted that consultants do not have the same professional obligations as lawyers. As a result, the OEB determined that it was "...appropriate to require any external consultants to the PWU or the Society...to sign the affidavit requested by OPG in addition to the Declaration and Undertaking."<sup>13</sup>

OEB staff is of the view that similar conditions can be applied to external consultants (other than counsel) to the PWU, Society and any other unions who wish to access the Appendix in this proceeding.

For external counsel to the PWU, Society and any other unions to access information in the Appendix, OEB staff submits that there is no question that the OEB should require the execution and filing of a Declaration and Undertaking. With respect to the requested affidavit, OEB staff is aware that in its April 13, 2021 confidentiality decision in OPG's 2022-2026 payment amounts proceeding, the OEB determined that:

"...the Declaration and Undertaking is sufficient...for any other external counsel to the PWU or the Society, without an additional affidavit, as undertaking #1 states:

1. I will use Confidential Information exclusively for duties performed in respect of this proceeding.

In so deciding, the OEB finds that the words "exclusively for duties performed in respect of this proceeding" are sufficient protection against the disclosure or use of this information by the unions' legal counsel in future labour negotiations. In particular, Mr. Stephenson will be giving his undertaking as a member of the Law Society of Ontario and may be subject to the discipline of that body for any breach of the same. Any subsequent legal assistance that he may render to PWU with respect to labour negotiations involving OPG or in this proceeding will be governed by the terms of the undertaking.<sup>14</sup> The OEB relies on the provisions of the required undertaking, as well as the potential personal liability that might result from its breach to ensure compliance.<sup>15</sup>

<sup>12</sup> EB-2018-0165 / Decision on Confidentiality / December 14, 2018 / p. 3.

<sup>13</sup> EB-2020-0290 / Decision on Confidentiality – Pre-Filed Evidence / April 13, 2021 / p. 7.

<sup>14</sup> EB-2018-0165 / Decision on Confidentiality / December 14, 2018 / p. 3.

<sup>15</sup> EB-2020-0290 / Decision on Confidentiality – Pre-Filed Evidence / April 13, 2021 / pp. 6-7.

[Emphasis added]

However, with regard to the requested affidavit, OEB staff submits that in the circumstances of the current proceeding, and with regard to the highly sensitive nature of the labour-relations related material in the Appendix, external counsel to the PWU, Society and any other unions should also, at a minimum, confirm on the record of this proceeding that they will not be involved in labour negotiations for any of the unions during the rate period (2023-2027). OEB staff suggests that the statement be included by external legal counsel in their cover letter accompanying the signed Declaration and Undertaking.

According to Hydro One's counsel:

The Appendix outlines the key elements of Hydro One's labour relations strategy for upcoming rounds of collective bargaining. It highlights various considerations, factors that impact Hydro One's negotiating power, and other points which inform Hydro One's labour relations strategy going forward. The Appendix includes discussion of Hydro One's: objectives in upcoming rounds of bargaining; specific points of focus (including compensation-related changes intended to be pursued); and views or assumptions in respect of certain negotiating approaches. This information is confidential and would be highly prejudicial to Hydro One if disclosed to union representatives -- the information could be used against Hydro One during negotiations and influence collective bargaining outcomes to Hydro One's (and ratepayers') detriment.<sup>16</sup>

OEB staff suggests that it would be impossible for counsel acting for one of the unions in this proceeding to ignore Hydro One's entire collective bargaining strategy when they are then acting for the unions in labour negotiations. OEB staff considers the request for an affidavit from counsel to be reasonable. A similar matter was dealt with by the OEB in a previous (2016) OPG case<sup>17</sup>. The OEB did not excuse counsel to the PWU from the requirement to file an affidavit of the kind requested here. The OEB acknowledged that in a 2013 OPG proceeding<sup>18</sup>, counsel to the PWU had affirmed on the record that he would not be involved in collective bargaining negotiations, but in the 2013 case, the issue, and the affirmation, arose in the oral hearing phase of the proceeding. In the 2016 case, the matter arose prior to the oral hearing phase, and the OEB required the affidavit. OEB staff believes that an affidavit confirming that counsel is at arms-length from the union and is not (and will not be) involved in any way in collective bargaining on behalf of the union through to the end of the rate period covered by Hydro One's application would be the appropriate approach here, but that an affirmation on the record could also be acceptable.

<sup>16</sup> Request for Confidential Treatment of Certain Information in Pre-Filed Evidence / August 5, 2021 / p. 2.

<sup>17</sup> EB-2016-0152 / OEB Response to PWU's Objections Regarding Filing of Affidavit / January 31, 2017.

<sup>18</sup> EB-2013-0321 / Motion Hearing Transcript / May 9, 2014 / pp. 6-8.



For external consultants to the PWU, Society and any other unions to access information in the Appendix, OEB staff submits that the OEB should require the execution and filing of a Declaration and Undertaking as well as the affidavit confirming that the consultant is at arms-length from the union and is not (and will not be) involved in any way in collective bargaining on behalf of the union through to the end of the rate period covered by Hydro One's application.

OEB staff submits that establishing these conditions would ensure that the labour-sensitive information in the Appendix would be accessed in an appropriate manner to avoid prejudice to Hydro One's position in future collective bargaining negotiations.

### **Reply Evidence to Evidence Filed by OEB Staff and / or Intervenors**

By letter dated September 16, 2021, Hydro One requested the opportunity to file reply evidence in response to any evidence filed by OEB staff and / or intervenors in this proceeding. Hydro One characterized this request as a matter of basic procedural fairness. OEB staff understands Hydro One's request to be referring to the expert evidence that OEB staff has now indicated that it intends to file.<sup>19</sup>

The OEB has the power to determine its own procedures and practices. It may make orders with respect to the procedures and practices that apply in any particular proceeding, and it may make rules governing the practice and procedure before it.<sup>20</sup>

The OEB's *Rules of Practice and Procedure* (the Rules), of which Rule 13A deals with Expert Evidence, do not provide for reply expert evidence, although the Rules do provide that where procedures are not provided for in the Rules, the OEB may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.<sup>21</sup> However, OEB staff submits that it is not necessary to provide for reply evidence in this proceeding in order for the OEB to effectively and completely adjudicate this proceeding. The Rules contemplate evidence from more than one expert and provide a mechanism for experts to comment on each other's work without additional rounds of reply evidence.

Rule 13A.04 provides:

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<sup>19</sup> By letter dated September 24, 2021, OEB staff advised the OEB that Pacific Economics Group Research LLC (PEG) will provide one or more reports presenting PEG's review of the evidence prepared by Clearspring Energy Advisors LLC (Clearspring) on total cost benchmarking and Total Factor Productivity for Hydro One's Transmission Custom Plan and total cost benchmarking of Hydro One's Distribution Custom Plan.

<sup>20</sup> *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, ss. 25.0.1 and 25.1.

<sup>21</sup> *OEB Rules of Practice and Procedure* / Rule 2.02.

In a proceeding where two or more parties have engaged experts, the OEB may require two or more of the experts to:

- (a) In advance of the hearing, confer with each other for the purposes of, among others, narrowing issues, identifying the points on which their views differ and are in agreement, and preparing a joint written statement to be admissible as evidence at the hearing; and
- (b) at the hearing, appear together as a concurrent expert panel for the purposes of, among others, answering questions from the OEB and others as permitted by the OEB, and providing comments on the views of another expert on the same panel.<sup>22</sup> [Emphasis added]

OEB staff submits that, in the event that the matters in respect of which the expert reports are filed cannot be settled, the pre-hearing process identified in Rule 13A.04(a) and the presentation of a concurrent expert panel for the purposes set out in Rule 13A.04(b) provide for an effective, efficient and fair process that will allow each of the experts to defend their own work and comment on the views of their counterparts. OEB staff notes that this “hot tubbing” approach is not new to the OEB. The OEB previously provided for a process involving multiple experts in the Canadian Distributed Antenna System Coalition proceeding.<sup>23</sup>

Should the OEB permit Hydro One to file a reply to OEB staff’s and any intervenor expert evidence, OEB staff submits that the OEB would need to provide for surreply evidence in respect of the Clearspring reply evidence, or at a minimum, for interrogatories on any reply filed by Clearspring, with corresponding adjustments to the schedule for the proceeding.

~All of which is respectfully submitted~

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<sup>22</sup> OEB *Rules of Practice and Procedure* / Rule 13A.04.

<sup>23</sup> EB-2011-0120 / Decision and Procedural Order No. 6 / December 6, 2011.