



Hydro One Networks Inc.

**Application for electricity transmission and distribution
rates and other charges for the period from January 1,
2023 to December 31, 2027**

**DECISION ON BLUE PAGE UPDATE, CONFIDENTIALITY REQUEST AND REPLY
ON EXPERT EVIDENCE AND PROCEDURAL ORDER NO. 2**

October 25, 2021

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 it 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, the OEB provided for submissions on the following matters: (i) the need for a “blue page update”; (ii) the confidential treatment of the Confidential Labour Relations Strategy Appendix¹ (the Appendix) and Hydro One’s proposed conditions for accessing the Appendix; and (iii) Hydro One’s request that the OEB provide for reply evidence to expert evidence filed by OEB staff and intervenors.

Submissions were filed by OEB staff, intervenors² and Hydro One.

Blue Page Update

On August 12, 2021, OEB staff held a stakeholder conference with intervenors and Hydro One to consider the hearing schedule for this proceeding, with a view to meeting the OEB’s performance standard of 355 calendar days from issuing an application completeness letter to issuing a decision. At the stakeholder conference, Hydro One indicated that, if required, it would be able to provide a blue page update to the pre-filed evidence, reflecting 2021 audited financial information, in mid-April 2022.

¹ Exhibit E / Tab 6 / Schedule 1 / Attachment 5.

² Intervenor submissions were filed by: the Association of Major Power Consumers in Ontario (AMPCO), Canadian Manufacturers & Exporters (CME), Consumers Council of Canada (CCC), London Property Management Association (LPMA), Ontario Federation of Agriculture (OFA), Pollution Probe, Power Workers’ Union (PWU), Richard Gruchala, School Energy Coalition (SEC), Society of United Professionals (SUP), and Vulnerable Energy Consumers Coalition (VECC).

AMPCO, CCC, CME, LPMA, Pollution Probe, SEC, and VECC all expressed support for a blue page update. Submissions filed by these intervenors noted how an update would provide parties with access to the most recent information; assist in reviewing Hydro One's past performance and actual spending; assist in establishing an appropriate opening rate base for 2023; and allow for the disposition of an additional year of deferral and variance account balances. AMPCO, CME, LPMA, and VECC further noted the importance of a blue page update given the impacts and associated uncertainty arising from the COVID-19 pandemic.

OEB staff also noted the benefit of having the most recent financial information, but stated that the proceeding should progress under the assumption of no blue page update at this time. OEB staff submitted that Hydro One should provide updated financial information through interrogatory responses and undertakings and should plan to provide any material updates for 2021 year-end results in advance of the settlement conference. In the event that the settlement conference results in an incomplete settlement, or no settlement, OEB staff submitted that the OEB could then consider the value and scheduling implications associated with Hydro One filing an update.³ OFA provided a similar submission in which it recognized that the OEB can consider the need for (and allow intervenors to request) updated information during the proceeding.

In its submission, Hydro One concluded that, for purposes of regulatory efficiency, it should provide a blue page update and proposed to file this update on April 18, 2022. Hydro One disagreed with the OEB staff submission, stating that providing a 2021 update after the release of the 2021 audited financials, and not through the interrogatory process, would: (i) provide a singular point of reference once audited financials are released; and (ii) be of assistance to Hydro One in meeting its public securities reporting obligations with respect to providing updated forward-looking information.⁴

VECC submitted that if the OEB were to allow for a blue page update, it was unclear as to the urgency for completing initial procedural steps if such an update would ultimately cause the proceeding to be placed in abeyance. As such, VECC stated that parties would be better served by having the dates for interrogatories and responses, the technical conference, and other procedural steps extended.⁵

Hydro One disagreed with VECC and submitted that the timing for interrogatories should not be amended. Hydro One argued that the provision of an update, either as part of interrogatories or in a blue page update, is independent of the timing set aside

³ OEB Staff Submission / September 28, 2021 / p. 2.

⁴ Hydro One Submission / October 5, 2021 / pp. 2-3.

⁵ VECC Submission / September 28, 2021 / pp. 1-2.

for interrogatories under Procedural Order No. 1 given that the interrogatory process is in respect of the entirety of the application, and not just an update for a single bridge year.

VECC also noted that there had been no allowance made for discovery on the blue page update in the hearing schedules attached to Procedural Order No. 1. To allow for discovery, VECC submitted that the OEB could consider: (i) a technical conference being held in the week before the settlement conference to allow parties to better understand the update; or (ii) provide more time at the beginning of the settlement conference to allow for clarifications on the update. Hydro One disagreed with VECC's proposals, submitting that the OEB "...should not prejudge the nature or extent of [the blue page update] at this stage and that it should reserve any consideration of the need for additional discovery until the update is filed and the OEB can effectively balance the merit of such a process against the ability of parties to clarify the record as needed as part of the subsequent steps within the proceeding."⁶

Findings

The OEB finds that this proceeding shall not be delayed or paused waiting for the blue page update. The blue page update, reflecting fiscal 2021 audited financial information, is expected to be available in mid-April 2022. A number of steps, scheduled to occur before April 2022 will likely produce updated financial information in any event. These steps include, but are not limited to, the following:

- Responses to interrogatories, scheduled for the end of November 2021
- Responses to Technical Conference undertakings, scheduled for early January 2022

The OEB does not agree with Hydro One that this approach would potentially represent updating the 2021 financial forecasts three times. The information contained in the interrogatory responses and Technical Conference undertakings would be solicited by the parties regardless of the blue page update decision and should be more up-to-date than the currently available information.

Based on the above, the OEB finds that it will proceed assuming that a blue page update is not needed at this time (Illustrative Hearing Schedule D in Procedural Order No. 1). The OEB's expectations are that Hydro One will provide the most up-to-date

⁶ Hydro One Submission / October 5, 2021 / p. 3.

financial information at each step of the process. Hydro One will also file the blue page update in April 2022 in case it becomes necessary.

Confidentiality Request

Confidential Treatment of the Appendix

In response to the OEB's direction⁷ for Hydro One to provide forward-looking plans to achieve market levels of compensation, the Appendix was included in the pre-filed evidence. Hydro One sought confidential treatment of the Appendix, in its entirety, as it characterized the information as being labour-sensitive and containing: (i) an overview of Hydro One's objectives in upcoming rounds of collective bargaining; (ii) details on specific areas of focus in negotiations; and (iii) views and assumptions with respect to certain negotiating approaches.⁸ Hydro One stated that disclosure of such information would prejudice its position in upcoming rounds of collective bargaining with the PWU, SUP and any other unions with which it negotiates.

OEB staff, CCC, and SEC provided submissions that directly addressed Hydro One's request for the confidential treatment of the Appendix. CCC supported Hydro One's request, and SEC did not object to the request.

OEB staff questioned the need for the Appendix to be treated as confidential in its entirety. OEB staff acknowledged that the Appendix contained labour-sensitive information, but submitted that the Appendix's introduction⁹ did not require confidential treatment. OEB staff stated that the nature and detail of information in the introduction was provided at a level that if placed on the public record, would not prejudice Hydro One in upcoming rounds of collective bargaining. For the remaining sections¹⁰ of the Appendix, OEB staff supported confidential treatment by noting that such sections addressed the specific goals, negotiating approaches, and strategy for upcoming rounds of collective bargaining.

Hydro One responded to the OEB staff submission by maintaining that the OEB should grant confidential treatment to the entire Appendix, but agreed with making an exception for the first paragraph. Hydro One stated that, after further review, it would have no issue with the first paragraph¹¹ being made public as it is an initial paragraph that

⁷ EB-2019-0082 / Decision and Order / April 23, 2020 / p. 143.

⁸ Hydro One Request for Confidential Treatment of Certain Information in Pre-Filed Evidence / August 5, 2021 / p. 2.

⁹ Exhibit E / Tab 6 / Schedule 1 / Attachment 5 / p. 1 and p. 2 (Lines 1-14).

¹⁰ Exhibit E / Tab 6 / Schedule 1 / Attachment 5 / p. 2 (Lines 16-27) and pp. 3-8.

¹¹ Exhibit E / Tab 6 / Schedule 1 / Attachment 5 / p. 1 (Lines 3-7).

describes, in a generic manner, the topics that are addressed in the rest of the Appendix.¹²

For the remaining sections of the Appendix, Hydro One maintained its original position for the confidential treatment of the information¹³, but also provided further context and reasoning. Hydro One submitted that, when compared to the types of labour sensitive information the OEB has treated as confidential in past proceedings, the information in the Appendix is "...of even a more confidential and sensitive nature ... since the Appendix directly sets out Hydro One's go-forward labour negotiation strategy."¹⁴

SUP filed a submission related to the Appendix. However, the submission pertained to the treatment of any subsequent decisions and directives that the OEB may issue with respect to Hydro One's labour relations strategy. SUP submitted that the OEB is now directing Hydro One's labour negotiations through its decisions by requiring Hydro One to achieve P50 market median compensation. As a result, SUP stated that:

"...it would only be appropriate that as a minimum any decisions and / or direction that the OEB provides on "the Appendix" be put on the public record, along with some of the Appendix information if appropriate, and not be redacted at all. SUP submits that this will inform SUP in an unbiased manner for future contract negotiations as to what the OEB has indeed directed [Hydro One] to attain regarding P50 market median compensation as well as how, rather than having to rely on [Hydro One's] hired consultants at the contract bargaining table to provide an unbiased and complete view of the direction that the OEB has given on this matter."¹⁵

In addition, SUP further requested that the full details of the OEB's decision on Hydro One's confidentiality request be provided on the public record in its entirety and not be redacted so that the OEB's decision rationale can be considered in public.

In its response, Hydro One stated its understanding of SUP's submission to be a request that any future decisions or directions issued by the OEB, regarding the subject matter of the Appendix, be on the public record. Hydro One submitted that SUP's request was not a submission regarding the confidential treatment of the Appendix. As such, it is a matter that does not need to be considered at this stage of the proceeding. Hydro One also clarified its assumption that the OEB's subsequent decision on the application will be made public and that any decision or direction will not contain reference to confidential information.¹⁶

¹² Hydro One Submission / October 5, 2021 / p. 6.

¹³ Hydro One Submission / October 5, 2021 / pp. 4-5.

¹⁴ Hydro One Submission / October 5, 2021 / p. 5.

¹⁵ SUP Submission / September 28, 2021 / p. 1.

¹⁶ Hydro One Submission / October 5, 2021 / p. 7.

Access to the Appendix

Hydro One proposed conditions for parties to access the Appendix along with its request for the confidential treatment of the Appendix.¹⁷ Hydro One requested that access only be provided to individuals who execute and file the OEB's Declaration and Undertaking and that, with regard to the PWU, SUP and any other unions, that only external counsel and external consultants representing the unions in this proceeding be permitted to have access to the Appendix if they execute and file:

1. The OEB's Declaration and Undertaking
2. An affidavit or sworn declaration confirming that the individual 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 and PWU were the only parties that filed submissions addressing Hydro One's proposed conditions. PWU submitted that it did not object to the execution and filing of the OEB's Declaration and Undertaking. However, for the additional condition of filing an affidavit, PWU consented to the request as it relates to its external consultants, Econalysis, but opposed the request as it relates to its external counsel.¹⁸

In opposing the request, PWU referenced a submission it filed in the Ontario Power Generation Inc. (OPG) 2022-2026 payment amounts proceeding¹⁹ (2022-2026 OPG Payment Amounts Proceeding) regarding a similar request – as that made by Hydro One in this proceeding – for accessing information contained in a report²⁰ regarding post-employment benefit plans. In the 2022-2026 OPG Payment Amounts Proceeding, PWU submitted that: (i) the execution of the OEB's Declaration and Undertaking was sufficient as it is common for solicitors to “compartmentalize” information; (ii) in the case of lawyers, the breach of a Declaration and Undertaking is an act of professional misconduct; and (iii) the OEB had determined in a previous Toronto Hydro-Electric System Limited (Toronto Hydro) proceeding²¹ that the execution and filing of an affidavit, in addition to a Declaration and Undertaking, was not required.²²

¹⁷ Hydro One Request for Confidential Treatment of Certain Information in Pre-Filed Evidence / August 5, 2021 / pp. 2-3.

¹⁸ PWU Submission / September 28, 2021 / p. 1.

¹⁹ EB-2020-0290.

²⁰ The Report on the Estimated Accounting Cost for Post-Employment Benefit Plans for Fiscal Years 2021 to 2026 (Aon Report).

²¹ EB-2018-0165 / Decision on Confidentiality / December 14, 2018.

²² EB-2020-0290 / PWU Letter of Correspondence / March 10, 2021 / pp. 2-3.

PWU submitted that it adopted and relied on the submissions it made in the 2022-2026 OPG Payment Amounts Proceeding and clarified that its external counsel²³ has not typically been engaged in respect of collective bargaining matters. However, it was noted that neither the PWU, nor its counsel, should be required to predict and limit the scope of future engagements.²⁴ PWU also highlighted the OEB's decision in the 2022-2026 OPG Payment Amounts Proceeding where external counsel to the PWU and SUP were not required to file affidavits. The OEB determined that a Declaration and Undertaking was sufficient and that as members of the Law Society of Ontario, external counsel may be subject to the discipline of that body for any breach of the Declaration and Undertaking.²⁵

OEB staff also referenced the 2022-2026 OPG Payment Amounts Proceeding and submitted that external consultants to the PWU, SUP and any other unions should be required to file the OEB's Declaration and Undertaking and affidavit to access the Appendix. However, for external counsel, OEB staff submitted that, given the highly sensitive nature of the labour relations-related material in the Appendix, that the request for an affidavit from counsel was reasonable. OEB staff also submitted that, at a minimum, external counsel to the PWU, SUP and any other unions could 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 covered by Hydro One's application.²⁶

OEB staff reasoned 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 if they are then acting for the unions in labour negotiations. As a result, OEB staff considered Hydro One's request for an affidavit from counsel to be a reasonable request, and referenced OPG's 2017-2021 payment amounts proceeding²⁷ in which external counsel was required to file an affidavit. OEB staff also noted that in OPG's 2014-2015 payment amounts proceeding²⁸, external counsel to the PWU affirmed on the record, during the oral hearing phase of the proceeding, that he would not be involved in collective bargaining negotiations.

In response, Hydro One submitted that previous OEB decisions recognize the differing degrees of confidentiality and sensitivity of information and the requirement for differing degrees of protection.²⁹ Hydro One stated that given the highly confidential and labour-

²³ Mr. Richard Stephenson and Mr. Daniel Rosenbluth.

²⁴ PWU Submission / September 28, 2021 / pp. 2-3.

²⁵ EB-2020-0290 / Decision on Confidentiality – Pre-Filed Evidence / April 13, 2021 / pp. 6-7.

²⁶ OEB Staff Submission / September 28, 2021 / pp. 5-7.

²⁷ EB-2016-0152 / OEB Response to PWU's Objections Regarding Filing of Affidavit / January 31, 2017.

²⁸ EB-2013-0321.

²⁹ Hydro One Submission / October 5, 2021 / p. 8.

sensitive nature of the information contained in the Appendix, a heightened level of protection is warranted.

Hydro One raised questions as to the relevance of the proceedings referenced by PWU in its submission in this proceeding. Hydro One stated that the information in the Toronto Hydro and 2022-2026 OPG Payment Amounts Proceedings was of a much less confidential and sensitive nature than the information contained in the Appendix. As a result, there was much less risk of prejudice and harm to the utility if external counsel to the PWU was involved in collective bargaining. Given the highly sensitive nature of the information in the Appendix, Hydro One stated that the additional protection of requiring the affidavit was necessary.³⁰

In support of its argument, Hydro One referenced three proceedings where the OEB required, in addition to the filing of a Declaration and Undertaking, an affidavit, or confirmation on the record, that external counsel representing the union would not be involved in collective bargaining negotiations. The proceedings consisted of the two OPG proceedings³¹ that were noted by OEB staff in its submission, and the Alectra Utilities Corporation and Guelph Hydro Electric Systems Inc. amalgamation proceeding³² (Alectra-Guelph Proceeding). In the Alectra-Guelph Proceeding, the OEB required external counsel to file a Declaration and Undertaking as well as an affidavit affirming that they were external to, and at arms-length from the unions, and were not and would not be involved in any collective bargaining related activities on their behalf.

In response to Hydro One's submission regarding the proposed conditions for accessing the Appendix, OEB staff filed a letter, dated October 7, 2021, expressing concern about a comment made from Hydro One that stated:

In respect of protocols to ensure protection of the confidentiality of the Appendix, Hydro One has requested that: (i) in respect of OEB Staff and intervenors other than the unions – individuals be required to execute and file the OEB's standard Declaration and Undertaking in order to obtain access to the Appendix...³³

OEB staff noted that it does not execute and file the OEB's Declaration and Undertaking to obtain access to confidential materials in proceedings. As such, OEB staff submitted that it is neither necessary nor appropriate that it be required to do so in order to access the Appendix, or any other material that is filed in confidence in this proceeding.³⁴

³⁰ Hydro One Submission / October 5, 2021 / pp. 12-15.

³¹ OPG's 2014-2015 (EB-2013-0321) and 2017-2021 (EB-2016-0152) payment amounts proceedings.

³² EB-2018-0014 / Supplementary Decision on Confidentiality and Procedural Order No. 3 / August 7, 2018.

³³ Hydro One Submission / October 5, 2021 / p. 7.

³⁴ OEB Staff Letter of Correspondence / October 7, 2021 / p. 3.

Hydro One responded to OEB staff's letter and submitted that it wanted to ensure that the appropriate protections and protocols are in place so only appropriate individuals have access to the Appendix. Hydro One noted such protocols could consist of the execution of the OEB's Declaration and Undertaking or other alternative protocols.³⁵ Further, Hydro One submitted that any OEB staff who are members of the SUP union should not have access to the Appendix.

By letter dated October 20, 2021, OEB staff addressed Hydro One's response. OEB staff reiterated that Hydro One's request was neither necessary nor appropriate, but further submitted that OEB staff is subject to the confidentiality requirements set out under Ontario Regulation 381/07 – *Conflict of Interest Rules for Public Servants (Ministry) and Former Public Servants (Ministry)*, made under the *Public Service of Ontario Act, 2006* – compliance with which is a condition of employment. OEB staff also noted that the Appendix would be placed in a secure area of the OEB's network, with access limited to OEB Commissioners and staff who require access for the purpose of this proceeding.³⁶

Findings

The OEB finds that the Appendix, other than the introduction, contains specific labour relations strategy and objectives associated with upcoming negotiations with the unions. Disclosure of such information could prejudice Hydro One's position in these negotiations.

Regarding the introduction of the Appendix, the OEB agrees with Hydro One that other than the first paragraph (Lines 3 to 7), the rest of the introduction includes sensitive information about Hydro One's strategy.

The OEB, therefore finds that, other than the first paragraph of the introduction (Lines 3 to 7), the remainder of the Appendix shall be treated as confidential. The first paragraph in the introduction shall be placed on the public record.

Access to the entire Appendix shall be provided to individuals who sign the OEB's Declaration and Undertaking. Further, in respect of parties representing the PWU, SUP and any other unions, the OEB finds the following:

- Only external counsel and external consultants representing the unions in this proceeding shall be permitted to have access to the Appendix

³⁵ Hydro One Letter of Correspondence / October 7, 2021 / p. 2.

³⁶ OEB Staff Letter of Correspondence / October 20, 2021 / pp. 1-2.

- Each external consultant representing a union shall be required to execute and file an affidavit or sworn declaration confirming that the individual 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 (up to 2027)
- Each external counsel representing a union shall be required to execute and file an affidavit or sworn declaration confirming that the individual 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 (up to 2027). The OEB does not agree with PWU counsel that signing the Declaration and Undertaking is sufficient. In the OEB's view, the Declaration and Undertaking does not explicitly address the potential dual role of counsel in representing a union in both this proceeding and in labour negotiations. The objective of this additional requirement is to provide ratepayers and applicants with a high degree of confidence in the OEB's processes, and not to question the integrity of a union's legal counsel. Further, the OEB does not believe that imposing this requirement on union counsel would, in any way, limit their ability to effectively participate in this proceeding.

Regarding OEB staff access to the Appendix, the OEB finds that, given the measures that the OEB has put in place to protect confidential information, there is no need to impose additional restrictions or to exclude certain groups of OEB employees from having access to confidential information if that access is deemed to be necessary. These measures include provisions in the Practice Direction on Confidential Filings³⁷; limiting access to staff who require that access; and staff being subject to provincial conflict of interest rules as a condition of employment. Those provisions have worked effectively in the past and there is no reason to believe that this will not continue to be the case.

The OEB will not require OEB staff to sign the Declaration and Undertaking to get access to the Appendix or any other confidential information in this proceeding. Similarly, the OEB will not exclude any groups of OEB staff from having access to confidential information if that access is deemed to be necessary.

³⁷ Section 2.

Reply Evidence to Evidence Filed by OEB Staff and Intervenors

At the August 12, 2021 stakeholder conference regarding the hearing schedule for this proceeding, Hydro One requested it be provided the opportunity to reply to expert evidence filed by OEB staff and intervenors. Hydro One also filed a letter with the OEB, dated September 16, 2021, requesting that, as a matter of procedural fairness, it be allowed to file reply evidence to evidence filed by OEB staff and intervenors.³⁸ The letter was filed in response to OEB staff indicating its intent to deliver an expert report developed by its consultant, Pacific Economics Group (PEG). The PEG report would respond to evidence from Hydro One's consultant, Clearspring Energy Advisors (Clearspring).

Both Richard Gruchala and OFA supported Hydro One's request. Richard Gruchala supported the request as a matter of procedural fairness³⁹ while OFA submitted that having Hydro One provide written responses on the record early in the proceeding would allow parties the opportunity to prepare cross-examination of witnesses.⁴⁰ Likewise, SUP also submitted that allowing Hydro One earlier access to evidence filed by OEB staff and intervenors, and allowing the preparation of a written reply response, would contribute to the efficacy of the proceeding as well as procedural fairness.

CCC and SEC did not object to Hydro One's request, subject to certain conditions. CCC submitted that it did not object, subject to there being a procedural step allowing for parties to file interrogatories on Hydro One's reply evidence.⁴¹ SEC did not object to Hydro One's request, subject to: (i) reply evidence being limited to replying to new issues raised in OEB staff and intervenor evidence; (ii) depending on the content of any reply evidence filed, the provision for interrogatories; and (iii) the filing of reply evidence, and any associated process, not coming at the expense of the time available in the proceeding's hearing schedule. SEC noted that the third condition could be addressed by treating the process associated with reply evidence as an abeyance period.⁴²

Hydro One agreed with SEC's first condition in that any reply evidence would be limited to a response to new points or issues. However, for the second and third conditions, Hydro One submitted that the various hearing schedules for this proceeding should provide sufficient time for delivery of a reply report and that there would be no need to place the proceeding in abeyance to accommodate such process.⁴³

³⁸ Hydro One Letter of Correspondence / September 16, 2021 / p. 2.

³⁹ Richard Gruchala Submission / September 23, 2021 / p. 1.

⁴⁰ OFA Submission / September 29, 2021.

⁴¹ CCC Submission / September 28, 2021 / pp. 1-2.

⁴² SEC Submission / September 28, 2021 / pp. 1-2.

⁴³ Hydro One Submission / October 5, 2021 / p. 22.

VECC differed in its submission as it did not support Hydro One's request to file reply evidence by noting that a reply to evidence is "...simply an attempt to find another forum for the positions taken by..." Hydro One.⁴⁴ VECC submitted that such a process is essentially argument, and should be addressed as part of the argument process at the end of the proceeding, and not "piecemeal" within the proceeding. Hydro One disagreed with the submissions of VECC on the grounds that it denies Hydro One natural justice and procedural fairness.⁴⁵

Although VECC did not support Hydro One filing reply evidence, it did note that it is within the OEB's discretion to decide what it finds helpful. As such, if the OEB determined that it would grant Hydro One's request for reply evidence, VECC submitted that, in the interest of procedural fairness, the OEB should seek submissions of parties as to: (i) allowing for discovery on the reply; and (ii) allowing for submissions on the reply.⁴⁶

OEB staff submitted that it is not necessary to provide for reply evidence for the OEB to effectively and completely adjudicate this proceeding. Instead, the OEB could give consideration to Rule 13A.04 of the OEB's *Rules of Practice and Procedure* which contemplates evidence from more than one expert and provides a mechanism for experts to comment on each other's work without additional rounds of reply evidence.⁴⁷ OEB staff noted that this approach of "hot tubbing" was used by the OEB in the Canadian Distribution Antenna System Coalition proceeding.⁴⁸

Hydro One disagreed with OEB staff's submission. Hydro One stated that the processes outlined under Rule 13A.04 of the *Rules of Practice and Procedure* are not substitutes for the right to deliver any necessary reply evidence.⁴⁹ Hydro One also stated that such potential processes contemplated by Rule 13A.04 would only potentially make sense or be used after any reply on evidence. Further, Hydro One submitted that there is no need at this stage of the proceeding to decide whether it may or may not ultimately be useful to have the experts confer or testify as a joint expert panel. Instead, this matter could be considered later in the proceeding, such as leading up to the oral hearing.⁵⁰

OEB staff also addressed the process that should be established in the instance that the OEB decided to grant Hydro One's request to file reply evidence. OEB staff

⁴⁴ VECC Submission / September 28, 2021 / p. 2.

⁴⁵ Hydro One Submission / October 5, 2021 / p. 21.

⁴⁶ VECC Submission / September 28, 2021 / p. 3.

⁴⁷ OEB Staff Submission / September 28, 2021 / p. 8.

⁴⁸ EB-2011-0120 / Decision and Procedural Order No. 6 / December 6, 2011.

⁴⁹ Hydro One Submission / October 5, 2021 / p. 16.

⁵⁰ Hydro One Submission / October 5, 2021 / pp. 16-19.

submitted that the OEB would need to provide for surreply evidence in respect of any reply evidence, or at a minimum, for interrogatories on any reply filed, with corresponding adjustments to the proceeding's hearing schedule.⁵¹

Hydro One did not object to the provision for interrogatories on any reply evidence, but disagreed with OEB staff's submission regarding the provision for surreply. Hydro One stated that it is only in rare instances where surreply evidence can ever become necessary or appropriate. Further, surreply can only be required and proper in the unlikely event that the reply report itself raises new points or issues that were not previously raised and that could not have been reasonably anticipated and addressed. Hydro One noted that if such an instance were to occur, OEB staff and intervenors could raise the request for the need of surreply at that time.⁵²

In its letter, dated October 7, 2021, addressing Hydro One's comment about OEB staff being required to file a Declaration and Undertaking to access the Appendix, OEB staff also addressed an additional comment made by Hydro One in its submission. The comment pertained to Hydro One implying that working papers related to the Clearspring evidence had been provided to parties.⁵³

OEB staff noted that the working papers from Clearspring were yet to be provided to parties. As a result, OEB staff requested that the OEB direct Hydro One to make the working papers⁵⁴ available to all parties at its earliest convenience. OEB staff noted that provision of the working papers has been normal practice by applicants in previous proceedings⁵⁵ and that OEB staff had no objection to maintaining the working papers in confidence and that its consultant, PEG, agreed to protect any data released by Clearspring in a manner consistent with agreements Clearspring may have had with data vendors.

Hydro One responded to the OEB staff letter indicating that it did not mean to suggest that the working papers had already been provided. Instead, Hydro One clarified that it was trying to indicate that by the time PEG delivers its responding report, it would have had a chance to consider Clearspring's report and its accompanying working papers. As

⁵¹ OEB Staff Submission / September 28, 2021 / p. 8.

⁵² Hydro One Submission / October 5, 2021 / p. 23.

⁵³ Hydro One Submission / October 5, 2021 / p. 18.

⁵⁴ OEB staff specifically requested that Hydro One provide the working papers related to the Clearspring evidence: (i) all data in Excel format; (ii) calculations in Excel format or program code to show the derivation of the results from publicly available data; (iii) identification of variable names and company identification numbers; and (iv) any other information needed for an experienced consultant to be able to replicate the work.

⁵⁵ EB-2017-0049 and EB-2019-0082.

a result, PEG would have had an opportunity to address the working papers in preparing its responding report.

In its response, Hydro One also stated that it had no objection to accommodating OEB staff's request for early access to the Clearspring working papers, provided the subsequent exchange of information and reports is handled fairly and efficiently for both sides. Hydro One also assumed that PEG will execute the OEB's Declaration and Undertaking and that the working papers will consist of the same types of documents that have previously been produced in prior proceedings. However, Hydro One also stated that it asked OEB staff to provide the PEG working papers at the time it delivers PEG's responding report, so that Clearspring will have a fair and timely opportunity to review and consider its response to them.⁵⁶

Findings

The OEB does not find it necessary to provide for additional steps to allow for reply expert evidence by Hydro One at this time, for the following reasons:

- The current schedule already allows for a discovery process by all parties on filed expert evidence
- The OEB's Rules of Practice and Procedure contemplate evidence from more than one expert and provides a mechanism for experts to comment on each other's work without additional rounds of reply evidence (Rule 13A.04)

The OEB will not make provision for reply expert evidence from Hydro One at this time. The OEB may revisit this decision prior to the oral hearing if outstanding issues have not been addressed through the interrogatory process and the utilization of Rule 13A.04.

Hydro One's October 7, 2021 letter to the OEB clarified that "Hydro One has no objection to accommodating OEB staff's request for early access to the Clearspring working papers at this stage of the process, provided the subsequent exchange of information and reports between the experts is also handled fairly and efficiently for both sides".

The OEB directs Hydro One to provide Clearspring's working papers to the parties in this proceeding no later than October 27, 2021. The OEB's expectation is that any party

⁵⁶ Hydro One Letter of Correspondence / October 7, 2021 / p. 1.

filing expert evidence in this proceeding shall file the corresponding working papers at the same time as the subject report which has been OEB's practice in the past. The OEB further finds that the working papers filed by any party shall be treated as confidential and only provided to parties who sign the OEB's Declaration and Undertaking.

THE ONTARIO ENERGY BOARD THEREFORE ORDERS THAT:

1. All sections in the Appendix, with the exception of the first paragraph (Lines 3 to 7), shall be treated as confidential.
2. Access to the entire Appendix shall be provided to individuals who sign the OEB's Declaration and Undertaking. In respect of parties representing the PWU, SUP and any other unions:
 - i. Only external counsel and external consultants representing the unions in this proceeding shall be permitted to have access to the Appendix.
 - ii. Each external consultant representing a union shall be required to execute and file an affidavit or sworn declaration confirming that the individual 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 (up to 2027)
 - iii. Each external counsel representing a union shall be required to execute and file an affidavit or sworn declaration confirming that the individual 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 (up to 2027).
3. OEB staff will not be required to sign the Declaration and Undertaking in order to access the Appendix or any other confidential information in this proceeding. The OEB will not exclude any groups of OEB staff from having access to confidential information if that access is deemed to be necessary.
4. Hydro One shall provide Clearspring's working papers to the parties in this proceeding no later **October 27, 2021**.
5. OEB staff and intervenors shall file interrogatories on the Clearspring evidence by **November 10, 2021**. Interrogatories by OEB staff and intervenors on the rest of the application shall be filed by **October 26, 2021**.

6. Hydro One shall provide responses to the interrogatories on the Clearspring evidence by **November 29, 2021**.

Parties are responsible for ensuring that any documents they file with the OEB, such as applicant and intervenor evidence, interrogatories and responses to interrogatories or any other type of document, **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's [Rules of Practice and Procedure](#).

Please quote file number, **EB-2021-0110** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the [OEB's online filing portal](#).

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address
- Please use the document naming conventions and document submission standards outlined in the [Regulatory Electronic Submission System \(RESS\) Document Guidelines](#) found at the [Filing Systems page](#) on the OEB's website
- Parties are encouraged to use RESS. Those who have not yet [set up an account](#), or require assistance using the online filing portal can contact registrar@oeb.ca for assistance

All communications should be directed to the attention of the Registrar at the address below and be received by end of business, 4:45 p.m., on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Martin Davies at Martin.Davies@oeb.ca and Tracy Garner at Tracy.Garner@oeb.ca and OEB Counsel, James Sidlofsky at James.Sidlofsky@oeb.ca.

DATED at Toronto, October 25, 2021

ONTARIO ENERGY BOARD

Original signed by

Christine E. Long
Registrar