FILE NO: EB-2022-0140

ONTARIO ENERGY BOARD

IN THE MATTER OF An Application made by Hydro One Networks Inc. to the Ontario Energy Board pursuant to sections 92 and 97 of the *Ontario Energy Board Act*

AND IN THE MATTER OF Ontario Energy Board Proceeding EB 2022-0140 Procedural Order No. 4 dated September 27, 2022

REPLY ARGUMENT OF HYDRO ONE NETWORKS INC.

October 13, 2022

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AND TO: Interveners of Record

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I. INTRODUCTION

1. In accordance with Procedural Order No 4 dated September 27, 2022, Hydro One Networks Inc. ("**Hydro One**") provides reply argument to the submissions made by the following intervenors[1]:

    - Pollution Probe;
    - Haudenosaunee Development Institute;
    - The Ross Firm Group;
    - Three Fires Group Inc.; and
    - Environmental Defence

2. For the reasons that follow, Hydro One submits that no party has provided a reasonable basis to cause the Board to reject the relief Hydro One has sought in its application. The Project meets a defined need. The application and evidence in this proceeding demonstrate that the Project is appropriately designed to improve electricity transmission quality and service reliability in southwestern Ontario, while at the same time minimizing price impacts to customers over the long term. As such, Hydro One submits that the relief it seeks, including approvals being made subject to the Ontario Energy Board's (**"OEB" or "Board"**) standard terms and conditions for similar-type projects, is in the public interest and should be granted on an expedited basis.

II. REPLY SUBMISSIONS

Pollution Probe

3. At page 3 of its Argument, Pollution Probe suggests that Hydro One's application was in some way deficient; that Hydro One should have had the ability to know, in advance, the information that intervenors would request in addition to the information set out in its application.

4. Hydro One questions the validity of this criticism. Hydro One's application was filed to meet the Board's Filing Requirements. That is the metric which all applicants must meet. The written information request and response processes serve a valid purpose and address the fact that clairvoyance is not a skill which Hydro One possesses.

5. While Hydro One and Pollution Probe can agree on the value of expedited and fair regulatory processes, the facts are (i) Hydro One's application was determined to satisfy the Board's Filing Requirements, and because of this, (ii) the Board proceeded

[1] Hydro One acknowledges receipt and review of OEB Staff's submissions. As Staff have fully endorsed Hydro One's requested relief, no reply submissions are deemed appropriate.

in a fair and transparent manner to hear from parties through a written hearing process.

6. At page 4 of its Argument, Pollution Probe challenges Hydro One's decision not to include or "translate" information from its Environmental Study Report into specific mitigation measures or related cost estimates. At page 5, Pollution Probe argues that "it is not possible to validate that the mitigation costs are reasonable or in alignment with the environmental and socio-economic mitigation measures recommended in the Draft Environmental Report."

7. A so-called "validation" inquiry into the environmental mitigation measures carried out to fulfill environmental approval requirements is beyond the scope of this proceeding. Hydro One has provided parties with adequate information regarding the nature of the Project costs; how cost estimates have been developed, and the risks associated with actual incurrence levels. The information provided meets and exceeds the Board's Filing Requirements. Hydro One fails to see how the Board's detailed and in-depth consideration of a cost estimate sub-category totaling less than 1.5% of the overall cost estimate for this Project would materially improve the quality and outcome of this application. The rationale for this type of detailed oversight has not been explained by Pollution Probe.

8. At page 5 of its Argument, Pollution Probe next attempts to challenge the propriety of Hydro One's approach to estimating project costs. Results from a contractor competitive bid process and the consideration of actual costs experiences with a similar-sized project dating back to 2012 are the main reasons for this view. Pollution Probe further suggests that inflationary expectations should cause the Board to impose limits on ratepayer cost recovery due to Project overspending risks.

9. Hydro One does not disagree that current inflation expectations and factors causing inflationary pressures, such as supply chain issues, real estate costs, and labour market changes, are ones that potentially differentiate the level of costs Hydro One will incur for the Chatham to Lakeshore Project relative to comparator projects. That said, the purpose served by using similar projects is to better understand relationships between estimations and actual cost experience. Hydro One's cost estimates are informed by past experience as well as present market conditions.

10. If more recent greenfield 230kV transmission projects that were similarly sized and geographically situated linear infrastructure to the present Project had been constructed, Hydro One would readily consider this information in its analysis. However, that has not been Hydro One's experience. Pollution Probe seems to accept this point as it has not suggested better substitutes exist.

11. Pollution Probe's suggestion of limiting project cost overspending risks is not fully described. It seems, however, Pollution Probe seeks Hydro One to adopt a type of "not-to-exceed" price approach for rate-making purposes.

12. While this issue was not addressed in the interrogatory process, not-to-exceed cost estimates practices are uncommon with transmission line construction in Ontario. Hydro One would reasonably expect this practice to limit the availability of interested

contractors, which in turn could materially impact project construction and in-service timing. Not-to-exceed pricing would also reasonably cause contractors to demand significant price premiums in order to accept additional pricing risks. In an environment where inflationary expectations are significant, premiums required to address this risk would also be expected to be significant. Pollution Probe provides no rationale to justify why these sorts of price risks are ones that should be allocated to Hydro One or that why contractor competitive bid outcomes provide a less than satisfactory approach to a "price not-to-exceed" approach. Conjecture is not a reasonable basis to reject Hydro One's cost estimation approach. The Board should remain confident that Hydro One's estimate are reasonable in these circumstances.

13. At page 6 of its Argument, Pollution Probe raises concerns regarding Hydro One's reliance on its cost estimate being based upon the Class 3 AACE International Estimate Classification System and the difference in range of cost estimation used in that assessment as compared to the range of Project cost contingencies included in the Application.

14. In reply, Hydro One has explained the process used to develop its project contingency amounts.[2] The risk assessment process creates a factored contingency allowance based on the likelihood of the risks materializing in their unmitigated state. This risk assessment and contingency allowance seeks to identify and quantify the risks related to the central area of the standard distribution curve and represents the most likely risks which would impact the estimated cost at completion. It would be unreasonable for Hydro One to incorporate the most infrequent risk materialization outcomes at the outside edge of the distribution curve range (i.e. projects which overspend by 30%) by virtue of the standard distribution curve. Project outcomes at the edges of the range will be the extreme outliers.

15. At page 7 of its Argument, Pollution Probe casts doubt on how local generation would offset the demand needs identified in the application and/or if the Project would then be leveraged by gas fired generation stations that provide power for export. Hydro One submits that the issues of generation supply as raised by Pollution Probe are matters that fall outside the scope of this proceeding. Discussion of supply mix and the consideration of alternative approaches to those adopted by the Government of Ontario in its Orders in Council are matters which are best addressed by the IESO in its overall transmission system planning processes.

16. Also at pages 7-8 of its Argument, Pollution Probe asserts that Hydro One has not established that the Project will maintain or improve reliability. In so doing, Pollution Probe asserts that Hydro One did not provide "sufficient evidence to support its belief."

17. In reply, Hydro One refers to its Argument in Chief submissions (paragraphs 39-42). With respect, these submissions are a complete response to Pollution Probe's unfounded characterizations.

[2] See: Exhibit I, Tab 1, Schedule 7

18. Lastly, at page 8 of its Argument, Pollution Probe states its disagreement with, "Hydro One's suggestion that issues related to the Project route falls outside the scope of this proceeding."

19. In reply, Hydro One refers and relies on the views expressed by the Board in its Procedural Orders No. 2 and 3. Specifically, matters related to the cost and reliability impacts of the proposed route (i.e. the selected route between the two defined end points) can be reviewed in this proceeding even though the OEB notes that it does not intend to reproduce the Environmental Assessment Process.[3] The Board's emphasis here is purposeful; emphasis was placed on *the selected route* – as opposed to a more general inquiry. As a result, there is no legitimate basis for Pollution Probe's disagreement on this issue and should not in any way alter the relief sought by Hydro One in this proceeding.

Haudenosaunee Development Institute

20. The Haudenosaunee Development Institute ("**HDI**") has requested that the OEB deny this application. HDI asserts that the OEB has misinterpreted its jurisdiction as it relates to the duty to consult and that the Board's current process must be reconsidered in light of the federal *United Nations Declaration on the Right of Indigenous Peoples Act* (the "**Federal UNDRIP Act**"). HDI asserts that this legislation and the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**") requires the OEB and Hydro One to obtain the consent of the Haudenosaunee for the Project before any approval can be issued.

21. Hydro One is committed to meaningful consultation with Indigenous communities with the goal to achieving agreement and support. The Company has made significant efforts to engage Indigenous communities about the Project as part of the class environmental assessment. The adequacy of this consultation, which included HDI on behalf of the Haudenosaunee Confederacy Chiefs Council as well as Six Nations of the Grand River Elected Council, is being separately assessed by the Ministry of the Environment, Conservation and Parks. This issue is not before the Board.

22. The OEB has correctly determined its jurisdiction relating to the duty to consult. The Government of Canada's efforts to align federal laws with UNDRIP is an important and complex task but it does not impact the OEB's mandate as it relates to this application or the duty to consult. Contrary to HDI's submissions, the Federal UNDRIP Act only imposes obligations on the federal government and does not affect provincial laws or regulators or give immediate legal force and effect to UNDRIP in Canada. While UNDRIP can be used as an interpretive aid in statutory interpretation, it cannot override the plain meaning of a statute. The relevant provisions of the *Ontario Energy Board Act, 1998* ("**OEB Act**") are unambiguous and do not support the interpretation advanced by HDI.

[3] EB-2022-0140 Ontario Energy Board Procedural Order No. 3 dated August 30, 2022 at page 3

Federal UNDRIP Act Does Not Impact Provincial Laws or Decision-Making

23. In its submissions, HDI has asserted that the OEB is bound by UNDRIP as a result of the Federal UNDRIP Act and "must take all measures necessary to ensure the laws of Canada are consistent with the articles enumerated in UNDRIP".[4] This is incorrect for three reasons.

First, the federal government does not have the constitutional authority to enact legislation that changes validly enacted provincial laws relating to provincial undertakings, such as the *OEB Act*. Legislative implementation of international agreements is subject to the division of powers and "individual provinces will only be bound by the terms of such an agreement once their respective legislatures enact them into law".[5]

24. Second, consistent with the division of powers, the obligation to align the "laws of Canada" with UNDRIP over time in s. 5 of the Federal UNDRIP Act is limited to federal laws and does not include provincial laws. Section 5 explicitly limits this obligation to the Government of Canada which does not have the authority to change laws within the exclusive jurisdiction of the province:

> Consistency
>
> 5. The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration. (**Emphasis added**)

25. Third, there have been numerous statements by the federal government before and after the passage of the Federal UNDRIP Act confirming that the legislation was not intended to impact provincial laws and decision-making. At second reading of this legislation, the Honourable David Lametti, Attorney General of Canada, stated:

> Let me be clear: Bill C-15 would impose obligations on the federal government to align our laws with the declaration over time and to take actions within our areas of responsibility to implement the declaration, in consultation and co-operation with indigenous peoples. It would not impose obligations on other levels of government. However, we know that the declaration touches on many areas that go beyond federal jurisdiction. The preamble, therefore, recognizes that provincial, territorial, municipal and indigenous governments have and would continue to take actions within their own areas of authority that can contribute to the implementation of the declaration. Our goal is not to get in the way of good ideas and effective local action, but to look for opportunities to work collaboratively on shared priorities and in ways that are complementary.[6] (**Emphasis added**)

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4 Submissions of the Haudenosaunee Development Instituted, EB-2022-0140, October 6, 2022, paras. 52-54.

5 Reference re Pan-Canadian Securities Regulation, [2018] 3 SCR 189 at para. 66

6 House of Commons Debates (Hansard), 43-2, No. 60 (February 17, 2021) at 1805 & 1815 (Second Reading). The preamble of the Federal UNDRIP Act also recognizes that provincial government may take their own approaches to implementing UNDRIP within their areas of authority: "Whereas the Government of Canada acknowledges that provincial, territorial and municipal governments each have the ability to establish their own

26. While the federal government has welcomed efforts by provinces to implement UNDRIP within their respective jurisdictions, the federal Department of Justice has also publicly stated that the legislation does not require provinces to align their laws with UNDRIP: "Nothing in the federal legislation prevents provinces or territories from developing their own plans and approaches for implementation of the Declaration, or require them to do so."[7]

27. To date, the Province of Ontario has not enacted similar UNDRIP legislation. The 2019 provincial private member's bill referred to in HDI's submissions was not passed by the Legislature[8] and no such legislation is currently before the Ontario Legislature.[9]

UNDRIP Cannot Be Used to Change the OEB's Statutory Mandate

28. Even if the Federal UNDRIP Act could impact provincial laws, the legislation does not give immediate force and effect to UNDRIP. As such, UNDRIP can only be used as an interpretive tool similar to other international declarations and conventions.

29. The Federal UNDRIP Act has two stated purposes:

> 4 The purposes of this Act are to
>
> (a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and
>
> (b) provide a framework for the Government of Canada's implementation of the Declaration.

30. The first purpose is intended to confirm that courts can continue to use UNDRIP as an interpretive aid while the federal government takes steps to align its laws with UNDRIP, the parameters of which are further discussed below. It is not intended to give immediate legal force and effect to UNDRIP in Canada. This was confirmed by the Honourable David Lametti at second reading of the legislation:

> The preamble also specifically recognizes that international human rights instruments, such as the declaration, can be used as tools to interpret Canadian law. This means that the human rights standards they outline can provide relevant and persuasive guidance to officials and courts. While this does not mean that international instruments can be used to override Canadian laws, it does mean that we can look to the declaration to inform the process of developing or amending laws and as part of interpreting and applying them. This principle is further reflected in section 4, which affirms the Government of Canada's commitment to uphold the rights of indigenous

approaches to contributing to the implementation of the Declaration by taking various measures that fall within their authority".

7 Department of Justice, "Backgrounder: *United Nations Declaration on the Rights of Indigenous Peoples Act*", online: https://www.justice.gc.ca/eng/declaration/about-apropos.html

8 Bill 76, *United Nations Declaration on the Rights of Indigenous Peoples Act, 2019*, Status, online: https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-76/status

9 Legislative Assembly of Ontario, "Current bills", online: https://www.ola.org/en/legislative-business/bills/current

> peoples and the declaration as a universal human rights instrument with application in Canadian law. Together, the objective of these acknowledgements is to recognize existing legal principles and not give the declaration itself direct legal effect in Canada.
>
> The bill also includes specific obligations intended to provide a framework for implementing the declaration over time.[10] (**Emphasis added**)

31. The establishment of an implementation framework, which is the second purpose of the Act, clearly indicates that the intention is to implement the Declaration over time and not immediately, consistent with Minister Lametti's statement above. This process recognizes the complexity of the task and the need to consult Indigenous communities in the review of federal laws and policies. It involves the two-year development of an action plan to achieve the objectives of UNDRIP by June 2023 in consultation and cooperation with Indigenous peoples (s. 6) as well as annual reporting to Parliament on measures taken to align laws with UNDRIP and implement the action plan (s. 7). This framework would be unnecessary if the Federal UNDRIP Act was intended to give immediate legal force and effect to UNDRIP or create substantive rights under UNDRIP upon its passage.

32. Consistent with this, the Department of Justice has stated that the Federal UNDRIP Act does not change the duty to consult or Indigenous participation requirements in federal legislation:

> "The Act itself does not immediately change Canada's existing duty to consult Indigenous groups, or other consultation and participation requirements set out in legislation like the *Impact Assessment Act*."[11]

33. Courts have repeatedly held that the duty to consult does not provide a veto[12] and that it provides a right to a process and not a specific outcome.[13] Consent is only required in very limited circumstances which do not arise here, such as the use of established Aboriginal title lands. Hydro One's goal of achieving support and agreement of Indigenous communities in project engagement and commitment to support UNDRIP as set out in its *Indigenous Relations Strategy* does not alter the duty to consult or what the OEB is required to consider in this application.

34. Although it does not have legal force and effect in Canada, UNDRIP may be still used as an aid in interpreting domestic law. Domestic law is presumed to conform with international law and courts will strive to avoid constructions of domestic law that would violate international obligations, unless the wording of the statute clearly compels that result as the presumption of conformity is rebuttable.[14] The express words of the statute must be capable of supporting the interpretation and international law cannot

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10 House of Commons Debates (Hansard), 43-2, No. 60 (February 17, 2021) at 1810 (Second Reading).

11 Department of Justice, "Backgrounder: *United Nations Declaration on the Rights of Indigenous Peoples Act*", online: https://www.justice.gc.ca/eng/declaration/about-apropos.html

12 *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at para. 45; *Mikisew Cree First Nation v. Canada,* 2005 SCC 69; *Ktunaxa Nation v. British Columbia,* 2017 SCC 54 at para. 80

13 *Ktunaxa Nation v. British Columbia,* 2017 SCC 54 at para. 83.

14 *R. v. Hape,* 2007 SCC 26 at 53. See also *Nunatukavut Community Council Inc. v. Canada (Attorney General),* 2015 FC 981 at para. 103

be used to amend domestic law. As stated by Justice Stratas of the Federal Court of Appeal:

> "Once a court or administrative decision-maker arrives at a definitive legal interpretation of a provision—including, where proper, the content of international law—its job is to apply the provision's authentic meaning dispassionately and objectively to the facts of the case. To decide a case, a court or administrative decision-maker cannot reach out to other standards, such as those in international law, to supplement, modify or oust the authentic meaning of domestic law; international law is not a directly binding source of substantive law that supplements, modifies or ousts the authentic meaning of domestic law….. The meaning of domestic law is not to be amended by international law (citations omitted) (**Emphasis added**)[15]

35. In this case, the relevant provisions of the *OEB Act* are clear and do not support an interpretation that would allow the OEB to consider issues relating to "free, prior, and informed consent" under UNDRIP on an application under s. 92 of the OEB Act. Section 96(2) of the *OEB Act* explicitly limits what the OEB can consider on a s. 92 application to the "the interests of consumers with respect to prices and reliability and quality of electricity services". There is no ambiguity and a requirement to consider issues relating to UNDRIP would be effectively amending the Board's jurisdiction under the *OEB Act*, which is not permissible.

36. In the circumstances, the Federal UNDRIP Act and UNDRIP do not alter the Board's jurisdiction or what the Board must consider on this application.

OEB Is Not Responsible for Assessing the Adequacy of Consultation

37. The Board has correctly determined that it does not have jurisdiction to conduct consultation or assess the adequacy of Crown consultation on an application under s. 92 of the OEB Act, except to the extent it is relevant to issues of price and reliability and quality of electricity services.[16] This determination was not appealed by HDI and HDI had the opportunity to file evidence relevant to the issues within the Board's mandate.

38. There are several issues with the position advanced by HDI saying that the Board is required to consider the adequacy of consultation or consider issues relating to Indigenous rights or impacts of the project on Indigenous rights.

39. First, HDI's reliance on *Gitxaala Nation* is misplaced as the case is distinguishable. This case addressed the mandate of the Governor in Council (federal Cabinet) under the former *National Energy Board Act* upon receiving a recommendation report from the National Energy Board for an interprovincial pipeline project. The Governor in Council's mandate in ss. 53 and 54 of the *National Energy Board Act* was broad and

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[15] Canada v. Kattenburg, 2020 FCA 165 at para 31, leave to appeal to SCC ref'd. See also Nemeth v. Canada (Justice), 2010 SCC 56 at paras. 34-5;

[16] Ontario Energy Board, Procedural Order No. 1, EB-2022-0140, July 13, 2022; Ontario Energy Board, Procedural Order No. 2, EB-2022-0140, August 23, 2022; Ontario Energy Board, Determinations on the Filing of Evidence and Form of the Hearing, EB-2022-0140, August 5, 2022;

included environmental and other issues. It was described by the Federal Court of Appeal as being "based on the widest considerations of policy and public interest assessed on the basis of polycentric, subjective or indistinct criteria and shaped by its view of economics, cultural considerations, environmental consideration, and the broader public interest". It was not confined to prescribed factors that would preclude a consideration of the duty to consult.[17] The statutory provisions at issue were capable of multiple meanings and thus were interpreted in a way to include the duty to consult. This is distinguishable from the relevant provisions of the *OEB Act* which are not capable of multiple meanings. Section 96(2) of the *OEB Act* explicitly limits the issues that the OEB can consider for a s. 92 application and the wording does not enable an interpretation that would include assessing the adequacy of Indigenous consultation.

40. Second, it is not necessary to have explicit language in the *OEB Act* that removes the OEB's authority to consider the adequacy of the Indigenous consultation. The intention is clear by s. 96(2) which limits the issues that the Board is entitled to consider on a s. 92 application. It is a closed list and does not include the duty to consult or environmental issues or allow the consideration of issues of law beyond the factors set out in s. 96(2). It would be inconsistent to read-in factors that must be considered when the Legislature has established a closed list of factors or require the Legislature to explicitly set out factors that cannot be considered when it limits the jurisdiction of a regulator. This is particularly the case where there is a separate Crown process in which the duty to consult is considered. The fact that the Alberta government used different language in the *Responsible Energy Development Act* does not change the direction provided in s. 96(2) of the *OEB Act*. It is also distinguishable given this was intended to address decision-making authority across a broad range of applications under multiple statutes whereas s. 96(2) is dealing with what can be considered under an application under s. 92 of the *OEB Act*.

41. Third, HDI's suggestion that section 96 involves two separate lines of inquiry by the Board is also untenable. HDI has asserted that the first step involves the Board considering the application under section 90, 91, or 92 and this consideration "is not limited to any particular issue(s)". The second asserted step involves the Board considering whether the proposed work is in the public interest and HDI contends that it is only then that the OEB is limited to considering "the interests of consumers with respect to prices and the reliability and quality of electricity services".

42. The *OEB Act* does not support this interpretation. The purpose of section 92 is to set out a prohibition on the construction, expansion or reinforcement of an electricity transmission line or distribution line without first obtaining approval from the Board. It does not prescribe the Board's jurisdiction relating to the application or what the Board must consider in the application. This is addressed in s. 96:

> **Order allowing work to be carried out**
> 96 (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the

[17] Gitxaala, paras. 116, 118, 116, 154, and 166.

public interest, it shall make an order granting leave to carry out the work. 1998, c. 15, Sched. B, s. 96.

Applications under s. 92
(2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:

1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
2. Repealed: 2021, c. 25, Sched. 19, s. 2. (**Emphasis added**)

43. The interpretation advanced by HDI of s. 96(2) is untenable as it would enable the Board to do precisely what the Legislature has prohibited it from considering under s. 96(2). There would be no purpose to s. 96(2) if the OEB maintained the ability to consider any factor related to an application under s. 92.

44. Fourth, there is an environmental assessment process that is examining the potential impacts of this Project and route alternatives. Indigenous groups have had the opportunity to participate in this process and to raise concerns relating to impacts to rights from the Project. This process must be completed before Hydro One can proceed with the Project and the adequacy of Indigenous consultation will be assessed by the Ministry of Environment, Conservation and Parks. This is not a situation where there has been no Indigenous engagement or where the Crown is not assessing the adequacy of consultation. It is being assessed by a separate Crown entity and it is not the responsibility of the OEB to assess this issue.[18]

45. Any approval issued by the OEB will be subject to the standard condition that the applicant obtain all necessary approvals, permits, licenses, certificates, agreements and rights required to construct, operate and maintain the project, which would include the environmental assessment. As such, and consistent with Procedural Order No. 2, it is not necessary to impose any additional conditions relating to Indigenous consultation as suggested by HDI.

The Ross Firm Group

46. The Ross Firm Group ("**TRFG**") provides views regarding the fairness and scope of the Board's process and the quality of evidence which Hydro One has provided in support of the requested relief.

47. At Paragraphs 5-15, TRFG asserts that the Board's reasons for limiting the scope of this proceeding as it has, was somehow beyond its reach and jurisdiction. TRFG now suggests that the Board should start over and conduct an entirely different proceeding, allowing broader inquiry into a broader number of issues.

48. Hydro One submits that TRFG's argument is effectively a recast of the views it expressed in the lead up to Procedural Orders No. 2 and 3 and the submissions TRFG made in its Review and Variance Motion. Hydro One submits that TRFG's

[18] EB-2022-0140 Ontario Energy Board Procedural Order No. 1 dated July 13, 2022 at page 4.

submissions are not proper argument but rather are challenges to the reasons the Board has set out in these determinations as well as Procedural Order No. 4.

49. The Board has clearly explained its reasons for the process established for this application. Repeated attempts that challenge these determinations are not helpful nor an efficient use of the Board's time.

50. TRFG's alternative argument concerns the quality of Hydro One's evidence. Once again, TRFG takes a view that matters determined to be out of scope in this proceeding, such as route selection and routing alternatives, are ones which should cause the Board to deny the relief sought.

51. TRFG's position provides little assistance to the Board's consideration of the relief sought in this application. Routing selection and alternatives are not matters before the Board. While TRFG's claims they should be, this aspiration cannot overcome what has been determined.

52. It is reasonable for the Board to expect intervenor final arguments to address matters that are within the scope of a proceeding; and to avoid those that have expressly been determined to be out of scope. Hydro One submits that TRFG has not met this expectation and as such, no weight should be afforded to its argument.

53. At paragraph 19 of its Argument, TRFG challenges conductor technology and the form of tower design used in Hydro One's application. TRFG's submissions appear to take issue with the 230 kV line design itself; that a larger capacity system should be planned so that future demand and future growth requirements are met. The essence of TRFG's position concerns the subject of need. The Board has been very clear that need has been determined; Hydro One's transmission license was amended to accommodate a 230 kV transmission line to be located between Chatham and Lakeshore.

54. Hydro One has also explained why larger conductor sizing was not appropriate as this would not provide greater incremental capacity.[19] Hydro One's explanation also referred to California Energy Commission studies of ACCC conductors and the fact that these types of assets are approximately 3 times higher in cost compared to ACSR/TW conductors. Hydro One's evidence is that cost estimates received on other projects have confirmed this level of cost disparity remains today.[20] Hydro One explained that ACCC conductors are not standard to the Hydro One transmission system and that development of non-standard hardware would not comport with the current project schedule and priority nature of this project.[21] TRFG's perspectives on selection of ACCC conductors simply ignores this evidence and that the Project, as a priority project, is to proceed expeditiously.

55. Finally, TRFG provides views regarding tower design at paragraph 23 of its Argument. The premise underlying TRFG's views is that a monopole design of the Project is

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19 Exhibit I Tab 2 Schedule 5

20 Exhibit I, Tab 7 Schedule 4 Page 2 of 4.

21 Exhibit I, Tab 7 Schedule 4 Page 3 of 4

feasible as increased costs for this type of asset would be more than offset by lower real estate costs. There is no evidence to support TRFG's theory. Indeed, it is curious why TRFG asked no interrogatories in this regard and nor did it provide any description that this was the type of evidence it sought to elicit.

56. The evidence in this proceeding is that monopole towers are widely understood to be higher in cost per km than lattice towers.[22] They are commonly used in physically constrained areas such as urban environments or narrow corridors. These are not features associated with the location of the Chatham to Lakeshore Project. Lattice designs are consistent with the facilities comprising Ontario's transmission grid and have provided reliable transmission service. [23] No unique circumstances exist in the present circumstances that would cause Hydro One to deviate from this approach.

Three Fires Group Inc.

57. Hydro One responds to two elements of the Three Fires Group Inc. ("Three Fires") argument namely; (1) whether lower costs are appropriate to carry out Hydro One's Indigenous engagement consultation program; and (2) the addition of two approval conditions.

Hydro One's Consultation Costs Follow From its Delegated Responsibilities

58. Three Fires states that it is well positioned to assist Hydro One by acting as a "one window" Indigenous consultation coordination entity for the Project on all relevant issues. While Hydro One appreciates Three Fires interest in working collaboratively going forward and values the working relationship that has been established with the Three Fires. To date, Hydro One has not received direction from additional Indigenous governments included on the Crown Delegation list beyond the two noted that engagement with their respective governments is to be carried out via the Three Fires Group. Hydro One's approach to engagement is informed by the directions received from each Indigenous Community. By doing so, Hydro One intends to respect the cultures, traditions and rights unique to each Indigenous community.

59. Hydro One's approach to how it has conducted procedural aspects of Crown consultation are matters best determined by the Crown. It is for the Crown to decide if changes in how it delegates procedural aspects of Crown consultation, (i.e. to an affected Indigenous community and through a type of "sub-delegation") are appropriate. Until then, the position taken by Three Fires regarding Hydro One's consultation costs should not be given any weight. Three Fires has not demonstrated that Hydro One's consultation costs are unreasonable or in any way deficient. Rather, the evidence shows that consultation costs incurred have resulted in collaborative outcomes, reducing uncertainty and opposition to the Project.[24]

Additional Conditions Are Not Required

[22] Exhibit I, Tab 7 Schedule 4

[23] Exhibit I, Tab 7 Schedule 9

[24] Exhibit I, Tab 3, Schedule 5 updated September 30, 2022

60. Commencing at paragraphs 16-20 of the Three Fires Argument, two condition amendments are proposed.

61. The first concerns changes to the Board's standard condition #3. Three Fires seeks an amendment that would require Hydro One to advise the Board of all material changes in costs that exceed $250,000, including "additional matters triggering duty to consult and accommodate Indigenous peoples". Three Fires states that the detailed disclosure it seeks would clarify Hydro One's obligation to keep the Board advised of matters that impact Aboriginal or treaty rights or otherwise affect the traditional territory of Indigenous Communities.

62. In reply, Hydro One submits that characterizing whether a change in cost results in a "material change", or not, is best determined by the surrounding facts and circumstances involved in each Project. The Board's standardized conditions operate in this manner. Three Fires has not reasonably demonstrated why the facts and circumstances in the present application are so significant as to cause deviations of this sort to the Board's standard condition #3. Hydro One is also mindful of the fact that consultation costs amongst Indigenous Communities are dependent upon matters that include assessment and the potential for infringement resulting in non-standardized costs and accommodations. These negotiations can and usually are confidential and commercially sensitive. These attributes are appropriate and should not be impacted by Three Fires suggestion of more detailed public dissemination of consultation and accommodation costs.

63. The second proposed change concerns the addition of a condition requiring Hydro One to record and track costs associated with the Project in the Affiliate Transmission Projects ("ATP") Account. As documented in Exhibit I, Tab 1, Schedule 2, the station costs of the Project will be owned and operated by Hydro One thus these costs will form part of Hydro One's rate base and will not be recorded and tracked in the ATP Account. The line costs associated with the Project will be recorded and tracked in the ATP Account, consistent with the OEB's EB-2021-0169 Decision Hydro One can advise that costs that are recorded in the ATP Account are associated with specific capital project expenditures. There is therefore no need for the Board to impose this type of condition.

Environmental Defence

64. The premise to Environmental Defence's argument is that Hydro One's design of the applied-for transmission facilities is wrong because the transmission line loss assessment does not align with an IESO draft transmission losses guideline. The flaw with this argument is that IESO's draft transmission losses guideline is just that: a draft guideline. The finalization of this draft document is the subject-matter of an ongoing OEB-directed IESO-led engagement process. It is unclear why Environmental Defence omits or does not accept the work in progress nature of this document. It is also curious because Environmental Defence is aware of these circumstances as it is participating in this very process.

65. Environmental Defence's argument also challenges Hydro One's design of the Project, in particular, the conductor sizing. In so doing, Environmental Defence

provides the Board, in argument, new and untested evidence[25] regarding its perspectives on this issue, notwithstanding the evidence that Hydro One has presented and is on the record in this proceeding.

66. Importantly, Environmental Defence's intervention of June 17, 2022, expressly identified its issue of, "[w]hether Hydro One appropriately considered whether it would be cost-effective to upsize the wires to reduce transmission losses or enable greater capacity in a possible scenario where demand increases due to electrification."

67. Schedule A to Procedural Order No. 1 established the issues for this proceeding. The issues captured aspects associated with price (project cost and customer impact), quality and reliability of electricity service. If Environmental Defence had an alternate theory of project design, project cost, improvements to electricity service quality and reliability, the Issues List certainly provided ample opportunity for this type of inquiry.

68. On August 5, 2022, Procedural Order No. 2 addressed the requests of some interveners to file evidence in respect of the Issues List. Specifically, the Board stated:

> "If any intervenor wishes to file evidence that is directly and materially relevant to an issue on the issues list, it shall file a letter with the OEB by August 11, 2022 with a description of the proposed evidence (including an explanation of how the evidence relates to the issues in this proceeding), an estimate of the cost of the evidence (if the intervenor is eligible for an award of costs), and the proposed timing of the filing of the evidence.

69. While intent on exploring an issue with apparent evidentiary views, Environmental Defence chose not to provide those views as evidence and thus allowing parties to test and better understand those views. Given this, Environmental Defence cannot now use the argument process for the improper and unfair purpose of introducing new evidence.

70. In the interrogatory process, Environmental Defence asked questions regarding conductor sizing. It asked Hydro One about incremental capacity from possibly increasing the size of the conductor. Hydro One's response was clear: "Increasing the size of the conductor on the new line to 1780 kcmil conductor does not result in any increase in capacity on the corridor as the flow on the corridor is limited by the ratings of the smaller conductors on the existing lines between Chatham SS and Lakeshore TS. The incremental peak capacity using the 1780 kcmil is zero."[26]

71. With this information, Environmental Defence then participated in the second round of interrogatories. The only information requested was for Hydro One to file the draft IESO transmission losses guideline and calculation of the cost-effectiveness of using a larger conductor using an alternative approach. Hydro One's response was that there were no further updates to the response it had already provided.

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[25] Submissions of Environmental Defence, EB-2022-0140, October 6, 2022, pp. 2-3.

[26] Exhibit I, Tab 2 Schedule 5.

72. Given these circumstances, Hydro One submits that no regard can, or should, be given to the views that Environmental Defence has expressed regarding the design of the Project. Its views are inconsistent with the evidence placed on the record in this proceeding. Specifically, Environmental Defence's view that the OEB has no better option but to accept Hydro One's proposed conductor is irrefutably addressed by the sensitivity analysis that was conducted to support the design being put forward, all of which was included in Exhibit B, Tab 9, Schedule 1 of this Application. The best evidence is, and remains, that which Hydro One has included in its application and the responses provided to intervenors, including Environmental Defence.

73. Regarding Environmental Defence's views on transmission line losses, Hydro One submits that its calculations also remain as the best evidence of estimated transmission losses for the applied-for facilities. This evidence shows that transmission line losses are calculated consistent and compliant with Hydro One's existing standards. Hydro One submits designing transmission systems in accordance with existing and known standards is a prudent and appropriate approach. The adoption of changes to standards are aspects that can only be taken into account in transmission designs, when the standards are known, transparent and accepted by the Board. To do otherwise causes unnecessary regulatory uncertainty on the standards by which facilities should be designed to achieve.

III. CONCLUSION

74. Hydro One submits there is no compelling reason for the Board to delay or alter, let alone reject, the applied for relief in this Application. The Chatham to Lakeshore Project is in the public interest. The design and location of the Project comport with Hydro One's license amendments and will achieve the purposes set out in the Government of Ontario's Orders In Council. The application comports with the Board's legislative requirements. For these reasons, Hydro One submits that the Board can and should expeditiously approve the Project so that regulatory certainty is provided and ongoing efforts may continue and in-service timing requirements are achieved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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